No. _____

IN THE

Supreme Court of the United States

UNIVERSITY OF DALLAS; CATHOLIC DIOCESE OF BEAUMONT; CATHOLIC CHARITIES OF SOUTHEAST TEXAS, INC.; CATHOLIC CHARITIES, DIOCESE OF FORT WORTH, INC.,

Petitioners,

v.

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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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

Petitioners, who were the plaintiffs below, are the University of Dallas; Catholic Diocese of Beaumont; Catholic Charities of Southeast Texas, Inc.; and Catholic Charities, Diocese of Fort Worth, Inc. Petitioners do not have any parent corporations. No publicly held corporation owns any portion of Petitioners, and the Petitioners are not subsidiaries or affiliates 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.

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PETITION FOR WRIT OF CERTIORARI

This case involves a challenge under the Religious Freedom Restoration Act ("RFRA") to regulations that force Petitioners to violate their religious beliefs by offering health insurance to their students and employees through a company that will provide or procure coverage for abortifacients, contraceptives, and sterilization services. By holding that the regulations do not substantially burden Petitioners' religious exercise, the U.S. Court of Appeals for the Fifth Circuit directly contradicted binding precedent from this Court. The Government "substantially burdens" the "exercise of religion" whenever it forces plaintiffs to "engage in conduct that seriously violates their religious beliefs" on pain of "substantial" penalties. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775-76 (2014). The regulations at issue here, however, do just that: they threaten massive penalties unless Petitioners violate their religion by (1) submitting a "self-certification" or "notification" and (2) offering health plans through companies that will provide the objectionable coverage.

This Court has now granted certiorari in *Zubik v. Burwell* 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. Indeed, one of those petitions arises from the same consolidated Fifth Circuit opinion challenged in this case. *See East Texas Baptist University v. Burwell*, No. 15-35. 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

One of the district courts' opinions granting Petitioners' requests for preliminary injunctions (Pet. App. 1a) is reported at 2013 U.S. Dist. LEXIS 185410, another (Pet. App. 8a) is reported at 10 F. Supp. 3d 725, and the final opinion is unreported (Pet. App. 29a). The Fifth Circuit's opinion reversing the district courts (Pet. App. 31a) is reported at 793 F.3d 449. The Fifth Circuit's order denying Petitioners request for rehearing en banc (Pet. App. 60a) is reported at 2015 U.S. App. LEXIS 17281.

JURISDICTION

The judgment of the Fifth Circuit was entered on June 22, 2015. Pet. App. 31a. That court denied rehearing en banc on September 30, 2015. Pet. App. 60a. Jurisdiction is proper under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following provisions are reproduced in Appendix M (Pet.App. 121a): 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; 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, http://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.* 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]

[1] *See* 29 U.S.C. § 1002(16)(A) (limiting the definition of a plan administrator to "the person specifically so designated

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. Petitioners

Petitioners are nonprofit Catholic organizations that provide a range of spiritual, charitable, educational, and social services. Petitioners' religious beliefs forbid them from taking actions that would

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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 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. 51092, 51095 n.8 (August 27, 2014).

make them complicit in the delivery of coverage for abortifacients, contraception, or sterilization services, or that would create "scandal" by encouraging through words or deeds other persons to engage in wrongdoing. Petitioners sincerely believe that compliance with the regulations would violate these principles. Pet. App. 78a-120a.

Historically, Plaintiffs have exercised their religious beliefs by offering health coverage in a manner consistent with Catholic teaching. In particular, they have contracted with insurers and TPAs that would provide conscience-compliant health coverage to their plan beneficiaries, and would not provide or procure coverage for abortifacients, contraceptives, or sterilization. Pet. App. 81a-84a, 90a, 98a, 105a.

- Catholic Charities of Fort Worth offers healthcare coverage to its employees through a plan with CIGNA. Pet. App. 90a.
- The Diocese of Beaumont provides coverage through its Diocesan Employee Health Plan, a self-insured church plan administered by the Christian Brothers Employee Benefit Trust. Pet. App. 98a. The Diocese of Beaumont's Employee Health Plan also covers employees of Catholic Charities of Southeast Texas. Pet.App. 98a-99a,105a.
- University of Dallas, a member of a healthcare consortium, provides healthcare coverage to its employees through a partially self-insured benefits plan administered by Blue Cross/Blue Shield of Texas. Pet. App.81a-82a. It also provides healthcare

coverage for its students through a plan with Aetna. Pet. App. 83a.

Despite their avowedly religious missions, none of Petitioners except the Diocese of Beaumont qualifies as exempt "religious employers." Even the Diocese is not truly exempt because it offers its health plan to the employees of its non-exempt affiliates, such as Petitioner Catholic Charities of Southeast Texas, whose employees thus become eligible to receive the objectionable coverage through the Diocese's plan under the Nonprofit Mandate. Pet. App. 98a-102a.

C. Proceedings Below

Left with no alternative to avoid violating their beliefs, Petitioners University of Dallas and Catholic Charities Diocese of Fort Worth sought relief under RFRA in the Northern District of Texas. The district court granted two separate preliminary injunctions in their favor, which the Government appealed. Pet. App. 1a, 29a. In doing so, the court adopted "the thoughtful analysis set out by Judge Rosenthal" in *East Texas Baptist University v. Sebelius*, 988 F. Supp. 2d 743 (S.D. Tex. 2013), a similar case in the Southern District of Texas. Pet. App. 5a.

Meanwhile, the Diocese of Beaumont and Catholic Charities of Southeast Texas filed suit in the Eastern District of Texas. The district court entered final judgment in favor of plaintiffs on their RFRA claim and permanently enjoined the Government from applying or enforcing the Nonprofit Mandate against them. Pet. App. 6a, 8a. Citing Judge Rosenthal's opinion in *East Texas Baptist*, the court concluded that "[r]equiring the head of a religious organization to sign a putatively correct statement of religious

belief, which the Government has defined to authorize a third party to take an action that is contrary to those religious beliefs, imposes a substantial burden on the free exercise of religion." Pet. App. 10a. The court also held that the Government had "failed to establish" that the Accommodation is "the least restrictive means" to achieve a compelling interest. Pet. App. 26a-27a. Again, the Government appealed.

The U.S. Court of Appeals for the Fifth Circuit consolidated the Government's appeals in these two cases with the Government's separate appeal in *East Texas Baptist*. On June 22, 2015, a panel of that court reversed the rulings of the district courts, and held that Petitioners could not prevail on their RFRA claim. Pet. App. 31a. The panel did not deny that the regulations force Petitioners to submit the objectionable documentation and offer health insurance through a company that would provide or procure the objectionable coverage for Petitioners' plan beneficiaries. It concluded, however, that despite Petitioners' express protestations to the contrary, these acts "do not include providing or facilitating access to contraceptives." Pet. App. 49a. It further held that, in reality, "the acts that violate [Petitioners'] faith are those of third parties." Pet. App. 49a. On this basis, the court concluded that the Government had not imposed a substantial burden on Petitioners' religious exercise. Pet. App. 49a.[2]

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[2] Two parties, the Roman Catholic Diocese of Fort Worth and Our Lady of Victory Catholic School, who were plaintiffs below, were dismissed from the appeal due to a later change in their insurance plan that obviated their religious objections. Though the panel's opinion erroneously treats

Petitioners sought rehearing en banc, which was denied on September 30, 2015. Pet. App. 60a. Judge Jones, joined by Judges Clement and Owen, dissented from the denial of rehearing en banc. According to Judge Jones, "this case is not controlled by *Bowen* and the related cases cited by the panel," but rather by this Court's decision in *Hobby Lobby*. Pet. App. 70a, 72a. (finding Hobby Lobby "decisive"). In reaching this conclusion, Judge Jones rejected the panel's claim that contraceptive coverage would be provided separate and apart from any action of Petitioners: "[i]f the government's 'accommodation' forms are really 'independent' of the provision of free contraceptive insurance to religious institutions' employees, why does the government insist on requiring them?" Pet. App. 72a.

Petitioners subsequently requested a stay of the Fifth Circuit's mandate pending disposition of their forthcoming petition for certiorari. That request was granted on October 7, 2015. Pet. App. 73a.

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. Indeed, one of those petitions arises from the same consolidated Fifth Circuit opinion

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them as if they were still parties, Pet. App. 41a. they are not parties to this petition.

challenged in this case. *See East Texas Baptist University v. Burwell*, No. 15-35.

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, Petitioners respectfully request 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 485-86 (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 Fifth Circuit's conclusion that the Government's regulatory scheme is consistent with this statute cannot be reconciled with *Hobby Lobby* and related precedent.

Hobby Lobby squarely 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 Petitioners' religious exercise. Just as in *Hobby Lobby*, Petitioners believe that if they "comply 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—they "will be facilitating" wrongdoing in violation of their Catholic religious beliefs. *Id.* at 2759. And just as in *Hobby Lobby*, if Petitioners "do not comply, they will pay a very heavy price." *Id.* Thus, because the regulations "force[] [Petitioners] to pay an enormous sum of money . . . if they insist on providing insurance coverage in accordance with their religious beliefs,

the [Government has] clearly impose[d] a substantial burden" on Petitioners' religious exercise. *Id.* at 2779. Because the Government's regulatory regime is not the least restrictive means of furthering a compelling interest, Petitioners are entitled to relief under RFRA.

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, Petitioners 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. Indeed, a hold is particularly appropriate in the case at hand, as this Court will be ruling on the same consolidated Fifth Circuit opinion challenged in this case. *See East Texas Baptist University v. Burwell*, No. 15-35. 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 Fifth Circuit, and remand this case for further consideration in light of its decision.

Respectfully submitted,

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December 2015

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROMAN CATHOLIC DIOCESE OF FORT WORTH, et al.	§	
	§	
	§	CIVIL ACTION
VS.	§	NO. 4:12-CV-314-Y
	§	
KATHLEEN SEBELIUS, et al.	§	
	§	

ORDER GRANTING PRELIMINARY INJUNCTION

Before the Court is the motion for a preliminary injunction of plaintiff University of Dallas (doc. 70).[1] After review, the Court GRANTS the motion.

I. BACKGROUND

The University of Dallas ("the University") is a private, coeducational, liberal-arts school affiliated with the Catholic Church and located in Irving, Texas. The University provides health insurance to its benefits-eligible employees through a healthcare

[1] The remaining plaintiffs in this cause have also sought injunctive relief, but the University is the only plaintiff that will be immediately affected by the challenged provision of the Affordable Care Act. Accordingly, the Court addresses **only** the University's motion for injunctive relief and reserves its ruling on the remaining plaintiffs' motions for a later date.

consortium called Collegiate Association Resource of the Southwest ("CARES"). Consistent with Catholic doctrine, the CARES plan offered by the University does not cover contraceptives, abortion-inducing products, or sterilization.

Because the CARES plan year begins January 1, 2014, the University must be prepared to comply with the Patient Protection and Affordable Care Act ("the ACA"). Under the ACA, employer group health plans, such as the one offered by the University, must include insurance coverage for women's "preventative care and screenings." 42 U.S.C. § 300gg-13(a)(4). Congress did not define "preventative care"; instead, it delegated the duty for defining the term to the Department of Health and Human Services ("HHS"). HHS, in turn, tasked the Institute of Medicine ("IOM") with developing guidelines for preventative services for women. IOM recommended that women's preventative care include "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." HHS adopted the IOM's recommendations.

Under the adopted definition of preventative care, the ACA requires health plans to cover contraception, sterilization, and related counseling services ("the contraceptive mandate" or "the mandate"). Provision of these types of care are contrary to the teachings of the Catholic Church.

Although the ACA exempts certain "religious employers" from the contraceptive mandate, the exemption applies mainly to churches and would not

provide the University with any relief. The government has also created an "accommodation" for "eligible organizations" that object to the mandate on religious grounds but do not qualify for an exemption. Under this accommodation, a religious organization submits a form to its insurer, or if it is self-insured, to its third-party administrator ("TPA"), certifying that it is an eligible organization and that it objects to the contraceptive mandate on religious grounds. The insurer or TPA is then required to provide contraceptive coverage without charging the eligible organization any additional fees or premiums. Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39,870-01, 39,879-80. Accordingly, an objecting religious organization that self-certifies is relieved of its obligation "to contract, arrange, pay, or refer for contraceptive coverage." 78 Fed. Reg. at 39,874.

While the University would qualify for the accommodation, it contends that the self-certification process effectively requires it to facilitate the provision of products and services that are contrary to its sincerely held religious beliefs. Based on this contention, the University asserts claims for violations of the Religious Freedom Restoration Act ("RFRA"), the First Amendment, and the Administrative Procedure Act ("APA"). Because the University will be required to comply with the contraceptive mandate effective January 1, 2014, it seeks a preliminary injunction from this Court, exempting it from compliance with the contraceptive mandate.

II. LEGAL STANDARD

Before this Court may grant the University a preliminary injunction, the University must demonstrate:

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

Janvey v. Alguire, 647 F.3d 585, 595 (5th Cir. 2011). The Fifth Circuit has counseled that "a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has 'clearly carried the burden of persuasion' on all four requirements." *Bluefield Water Ass'n, Inc. v. City of Starkville,* 577 F.3d 250, 253 (5th Cir. 2009) (quoting *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 196 (5th Cir. 2003)).

III. ANALYSIS

Several federal courts have considered the issue of whether the contraceptive mandate offends the RFRA, even where the entity claiming a violation of its religious beliefs is eligible for the ACA's accommodation. Based on this Court's review of those decisions, there is no clear consensus. The Fifth Circuit has yet to address the issue.

The Court is persuaded by a recent decision handed down in the Southern District of Texas, which involved plaintiffs similarly situated to the University of Dallas. *E. Texas Baptist Univ. v. Sebelius*, No. H-12-3009, 2013 WL 6838893 (S.D. Tex.

Dec. 27, 2013). In that case, the Court granted injunctive relief based, in part, on its determination that "the accommodation's imposition on the plaintiffs of a required act—self-certification—that they find religiously offensive, coerced or pressured by exposure to punitive fines, meets the substantial burden test." *Id.* at *21.

This Court adopts the thoughtful analysis set out by Judge Rosenthal in her detailed and well-reasoned opinion. Accordingly, the University's motion for injunctive relief is GRANTED. The government is hereby ENJOINED from enforcing, as to the University of Dallas, the requirements set out in 42 U.S.C. § 300gg-13(a)(4), as well as any related fines and penalties, until further order of this Court.

SIGNED December 31, 2013.

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES
DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CATHOLIC DIOCESE OF BEAUMONT AND CATHOLIC CHARITIES OF SOUTHEAST TEXAS, INC.	CIVIL ACTION No: 1:13-cv-709
Plaintiffs,	JUDGE RON CLARK
v.	
KATHLEEN SEBELIUS, SECRETARY, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, ET AL.	
Defendants.	

ORDER

Before the court is Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction. [Doc. # 3]. Pursuant to Fed. R. Civ. P. Rule 65(a)(2), and with the agreement of the parties, the hearing on the preliminary injunction was consolidating with a hearing on permanent injunctive relief. For the reasons stated in the forthcoming Memorandum Opinion, the government is enjoined from applying or enforcing the regulations that require the Plaintiffs,

their health plans, TPAs, or issuers, to provide or execute the self-certification forms that enable or require the TPA or issuer to provide health insurance coverage for Plaintiff's employees for FDA-approved contraceptives, emergency contraceptives, products, or services under the requirements imposed in 42 U.S.C. § 300gg-13(a)(4), Pub. L. 11-148, § 1563(e)-(f), as well as the application of the penalties found in 26 U.S.C. §§ 4980D & 4980H, and 29 U.S.C. § 1132.

A final judgment consistent with this Order and the Memorandum Opinion will be forthcoming.

So **ORDERED** and **SIGNED** this **31** day of **December, 2013**.

/s/ Ron Clark
Ron Clark, United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CATHOLIC DIOCESE OF BEAUMONT AND CATHOLIC CHARITIES OF SOUTHEAST TEXAS, INC.	CIVIL ACTION No: 1:13-cv-709
Plaintiffs,	JUDGE RON CLARK
v.	
KATHLEEN SEBELIUS, SECRETARY, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, ET AL.	
Defendants.	

MEMORANDUM AND ORDER

Plaintiffs, the Catholic Diocese of Beaumont and Catholic Charities of Southeast Texas, Inc., filed suit against Defendants United States Departments of Health and Human Services, Labor, and Treasury, seeking an injunction against enforcement of a portion of the Patient Protection and Affordable Care Act that requires employers to provide their employees with a health plan that covers all FDA-approved contraceptive methods, sterilization

procedures, and patient education and counseling ("contraceptive services"). The Government asserts that Plaintiffs lack standing, and alternatively failed to show a violation of the Religious Freedom Restoration Act, a violation of their Free Exercise rights, or a violation of their Free Speech rights.

This case is one of many similar cases brought by religious organizations across the country. Some district courts have found for the plaintiffs,[1] while others have found for the Government.[2] As detailed

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[1] *See e.g., E. Tex. Baptist Univ. v. Sebelius*, No. 4-12-cv-3009, at *42-43 (S.D. Tex. Dec. 27, 2013); *Southern Nazarene University v. Sebelius*, No. 13-cv-1015-F (W.D. Okla. Dec. 23, 2013); *Geneva College v. Sebelius*, No. 12-cv-00207 (W.D. Pa. Dec. 23 2013); *Legatus v. Sebelius*, No. 12-cv-12061 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-cv- (D.D.C. Dec. 20, 2013) (enjoining mandate on "compelled silence" argument; but otherwise denying injunctive relief), emergency motion for expedited briefing for injunction filed Dec. 23 2013, No. 13-5371 (D.C. Cir.); *Reaching Souls Int'l v. Sebelius*, No. 13-cv-01092 (W.D. Okla. Dec. 20, 2013); *Reaching Souls Int'l, Inc. v. Sebelius*, No. 5:13-cv-1092 (W.D. Ok. Dec. 20, 2013); *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12-cv-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013) (holding that the accommodation violates RFRA and enjoining the mandate); *Persico v. Sebelius*, No. 13-cv-00303 (W.D. Pa. Nov. 21, 2013); *Zubik v. Sebelius*, No. 13-cv-01459 (W.D. Pa. Nov. 21, 2013).

[2] *See, e.g., Catholic Diocese of Nashville v. Sebelius*, No. 3:13-cv-1303 (M.D. Tenn. Dec. 26, 2013); *University of Notre Dame v. Sebelius*, No. 13-cv-01276 (N.D. Ind. Dec. 20. 2013), emergency motion for injunction filed Dec. 23, 2013, No 13-3853 (7th Cir.); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-cv-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013) (holding that the accommodation does not create a RFRA substantial burden), emergency motion for injunction filed Dec. 20, 2013, No. 13-5368 (D.C. Cir.).

below, this court's analysis and conclusions are in line with those of the Honorable Lee H. Rosenthal in in *E. Tex. Baptist Univ. v. Sebelius*, No. 4-12-cv-3009, at *42-43 (S.D. Tex. Dec. 27, 2013), the Honorable Brian M. Cogan in *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12-cv-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013) and the Honorable Arthur J. Schwab in *Zubik v. Sebelius*, No. 13-cv-01459 (W.D. Pa. Nov. 21, 2013).

Requiring the head of a religious organization to sign a putatively correct statement of religious belief, which the Government has defined to authorize a third party to take an action that is contrary to those religious beliefs, imposes a substantial burden on the free exercise of religion. That conclusion is not changed by the Government's argument that, at present, it does not have the power to compel the third party to act. The court finds that Plaintiffs have demonstrated that they have standing and have met their burden for issuance of a permanent injunction.

I. Background

Plaintiffs filed suit on December 10, 2013. Because of the January 1, 2014 deadline the court ordered early consultation by counsel on the issues. With input from counsel at the management conference, the court entered an expedited briefing schedule and set a hearing for December 30, 2013. Defendants moved for dismissal or in the alternative, for summary judgment. The Government filed the administrative record, and the court has reviewed those portions designated by counsel in the pleadings and papers on file. The parties have also filed

"Parties Stipulated Preliminary Findings." [Doc. # 26].

At the hearing Plaintiffs presented witnesses, live and by deposition, and the court heard argument of counsel. The parties agreed that the record had been fully developed and only questions of law existed. The parties also agreed at the hearing that they did not object to the court consolidating that hearing with a trial on the merits, and making a final determination as to matters raised by Defendants' motion to dismiss or alternatively for summary judgment and Plaintiffs' request for an injunction based on the record before the court. [Transcript of Hearing on December 30, 2013 (Tr.) pp. 75-77].[3] *See* Fed. R. Civ. P. 65(a)(2).

The court did not scour the administrative record in a search for facts that support either party, but it has considered the portions that have been specifically referenced by the parties in their motions and briefing. *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 463 (5th Cir. 1996) (citations omitted). The Government argues that the court should limit its review of the facts to the administrative record, and presumably the stipulated facts. Since Plaintiffs are alleging interference with important constitutional rights, the court will consider the evidence presented by Plaintiffs. *See McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 493-94, 111 S. Ct. 888, 896-97 (1991).

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[3] A final, certified transcript has not been prepared, so the page numbers in this Memorandum Order are those of a rough transcript. They may differ from those of any final transcript that is prepared.

The facts pertinent to this case are virtually uncontroverted, and very similar to the facts in all of the other opinions the court has seen so far. To save space the court will adopt the Parties Stipulated Preliminary Findings [Doc # 26] as findings of fact of the court. The court also finds that the statements concerning the religious beliefs of Catholics (including Plaintiffs) the teachings of the Catholic Church, and the role that Plaintiff Catholic Charities plays in the ministry of Plaintiff Roman Catholic Diocese of Beaumont, set out in the "Declaration of Bishop Curtis J Guillory, S.V.D., D.D." [Doc # 3-1] factually set out the sincere religious beliefs of Plaintiffs and their respective members. [Bishop Guillory, Tr. p. 4]. The court sustains the Government's objection to those statements that express Bishop Guillory's opinions as to the legal effect of, or proper legal interpretation of, the regulations and statutes in question, at paragraphs 15, 17, 19, 21, and the first sentence of 22, and will not consider those as facts.

A. *Findings of Fact as to Plaintiffs' Sincere Religious Beliefs*

In summary, Plaintiffs are both entities affiliated with the Roman Catholic Church. In their complaint and motion for preliminary injunction, they allege that the contraceptive mandate forces them to choose between violating central elements of their religious faith and paying substantial financial penalties. For nearly two thousand years the Catholic Church "has taught that life is sacred from conception to death and any – whether it's medicine or instruments that would prevent life, we consider morally wrong." [Bishop Guillory, Tr. pp. 5-6].

The Church also teaches that material cooperation with evil is also morally wrong. "Material cooperation with evil is like in this particular case, for instance, we for instance as co-payers with the insurance would be cooperating in what we think is morally wrong. In other words, it's cooperating in -- into something that we consider evil, or morally evil; and we are a part of that. We are a participant in that action or that program. And that's what we call material cooperation." [Bishop Guillory, Tr. p. 9]. Defendants do not challenge that Plaintiffs have a sincerely held religious belief that all forms of contraceptives and abortifacients are morally wrong.

B. *Findings of Fact as to Catholic Diocese of Beaumont*

The Catholic Diocese of Beaumont ("Diocese") is a non-profit organization that encompasses forty-four parishes and seven missions located in the greater Beaumont area. The Diocese employs over 950 people, approximately 370 of whom are currently eligible for health plan benefits offered through the Diocese. The Diocese carries out a tripartite mission of spiritual, educational, and social service. Its spiritual ministry is carried out through its parishes. Its educational ministry is conducted through its schools and religious education programs. The Diocese operates three parish schools and two diocesan schools which serve approximately 1,088 students.

Consistent with Church teachings on social justice, the Diocese provides a self-insured health plan to employees working at least thirty hours per week. The plan is offered through the Christian Brothers

Employee Benefit Trust. Consistent with Catholic teaching, the Trust health plan does not cover abortifacients, sterilization, or contraception. [4] Dropping coverage for Catholic Charities so the Bishop would not have to sign the self-certification form would violate the sincerely held religious belief that employee health care is a right, and should be provided.

C. *Findings of Fact as to Catholic Charities of Southeast Texas, Inc.*

Catholic Charities of Southeast Texas, Inc. ("Catholic Charities") is a faith-driven non-profit that provides services to approximately 6,000 individuals annually. Catholic Charities has ten full-time and seven part-time employees who are offered health insurance through the Diocese.

Catholic Charities participates in the Catholic charitable mission of aiding those in need, including feeding the poor, helping immigrants, and providing counseling. [Bishop Guillory, Tr. p. 11]. Bishop Guillory has the primary responsibility for determining whether programs administered by Catholic Charities comport with Catholic teachings and principles, and as such, it is an entity of the Catholic Diocese of Beaumont. [Bishop Guillory, Tr. pp. 11-12]. The Diocese contributes almost a third of the budget of Catholic Charities. The self-certification form at issue in this dispute would have to be signed either by Bishop Guillory or by another

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[4] Though generally not covered by the Trust plan, contraceptives may be covered when provided for medically necessary, non-contraceptive purposes that have been approved by the Trust.

person with his approval. [Bishop Guillory, Tr. p. 22]. If the form were not prepared or coverage for Catholic Charities were dropped, the resulting fines would impose a heavy financial burden on Plaintiffs. [Bishop Guillory, Tr. p. 20]; [Sherlock, Tr. pp. 33-34].

D. *The Statutory and Regulatory History*

The now familiar statutory and regulatory history is outlined in the "Parties Stipulated Preliminary Findings" and is set out in detail in *E. Tex. Baptist Univ. v. Sebelius*, No. 4-12-cv-3009, (S.D. Tex. Dec. 27, 2013), *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12-cv-2542, (E.D.N.Y. Dec. 16, 2013), and *Zubik v. Sebelius*, No. 13-cv-01459 (Pa. Nov. 21, 2013). In brief, Congress enacted the Patient Protection and Affordable Care Act (ACA) as well as the Health Care and Education Reconciliation Act in March 2010. This was followed by more than three years of rule making.

The ACA requires that group health insurance plans cover certain preventative medical services without cost-sharing, such as a copayment or a deductible. Pursuant to regulations subsequently issued, the preventative services that must be covered include contraception, sterilization, and related counseling (the "Mandate"). There was a good deal of concern over the impact of the law and regulations on the religious beliefs and practices of various faith groups and several proposals for some kind of religious exemption were published and amended. Some 600,000 comments were received during the process.

The Final Rules purport to accommodate religious objections to the Mandate in two ways. First, the

Final Rules revised the definition of "religious employers," who are entirely exempt from the Mandate. The Final Rules define "religious employer" as a non-profit referred to in § 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code, which in turn refers to churches, their integrated auxiliaries, associations of churches, and the exclusively religious activities of religious orders. 78 Fed. Reg. at 39,874. The Diocese meets this definition and is thus exempt from the contraceptive mandate. Catholic Charities is not exempt. This is true even though Catholic Charities participates in the Diocese's health plan, because non-exempt entities cannot avail themselves of the religious employer exemption unless they "independently meet the definition of religious employer." *Id*. at 39,886.

The Final Rules provide for an "accommodation" for "eligible organizations" that do not meet the definition of "religious employer." An "eligible organization" is one that satisfies the following criteria:

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

> self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. 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.

45 C.F.R. § 147.131(b).

There is no dispute that Catholic Charities would qualify for this accommodation if the self-certification form is signed. The Final Rules state that an eligible organization is not required to "contract, arrange, pay, or refer for contraceptive coverage" as to which it has religious objections. 78 Fed. Reg. at 39,874. Instead, the eligible organization must complete a self-certification form stating that it is an eligible organization, and provide a copy of that form to its issuer or, where an eligible organization self-insures, as do all plaintiffs here, to their TPA. The TPA is then required to provide or arrange for payments for contraceptive services, a requirement imposed through the Department of Labor's ERISA enforcement authority. *See id.* at 39,879-39,880. The self-certification "will be treated as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of ERISA." *Id.* at 39,879. The TPA is required to provide these services "without cost sharing premium, fee, or other charge to plan participants or

beneficiaries, or to the eligible organization or its plan." *Id.* at 39,879-80. The TPA may seek reimbursement for such payments through adjustments to its Federally-Facilitated Exchange ("FFE") user fees. *Id.* at 39,882.

II. Legal Standard for Injunctions

"It is well-established that the party seeking a permanent injunction must demonstrate: '(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.'" *Abraham v. Alpha Chi Omega*, 708 F.3d 614, 626-27 (5th Cir. 2013) (quoting *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 126 S. Ct. 1837, 1839 (2006)).

III. Analysis

A. *Article III Standing*

Defendants have argued that Plaintiffs lack Article III standing, asserting that the government has no ability to enforce the contraceptive mandate because the health plan in question is a church plan not governed by ERISA. As discussed in detail by Judges Rosenthal and Cogan, the injury to the religious organizations relates to the submission of the self-certification form, not to whether a TPA may or may not be penalized for not providing contraceptive coverage. *E. Tex. Baptist Univ. v. Sebelius*, No. 4-12-

cv-3009, at *23 (S.D. Tex. Dec. 27, 2013). Indeed, the existence of a regulatory loophole cannot obviate Plaintiffs' standing. *Id.* "This alleged spiritual complicity is independent of whether the scheme actually succeeds at providing contraceptive coverage." *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 1-12-cv-2542 (E.D.N.Y. Dec. 16, 2013).

Furthermore, the federal regulations governing Defendant Department of Labor, and those governing Defendant Department of the Treasury provide:

> (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 arrangement.

Compare 26 C.F.R. § 54.9815-2713A(b)(iii), relating to Department of Treasury, Internal Revenue Service, and the exact same language in 29 C.F.R. § 2590.715-2713A(b)(iii), relating to Department of Labor.

Mr. Sherlock, President of the Board of Plaintiff Catholic Charities, testified that he has already contacted insurers and plan providers to determine whether any would offer coverage if Plaintiffs did not provide a self-certification. [Mr. Sherlock, Tr. pp. 27-29]. What stronger way is there to influence a provider of goods and services than shopping your requirements to competitors? A rule that prevents plaintiffs from comparison shopping, and negotiating,

for an acceptable policy on favorable terms is a burden.

Plaintiffs' injury is sufficient for the requirements of Article III standing.

B. *First Amendment-Free Exercise of Religion*

Prior to 1990, First Amendment jurisprudence relied on a compelling-interest test. *See Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526 (1972); *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790 (1963). In 1990, the Supreme Court held that the "Free Exercise Clause of the First Amendment d[id] not prohibit governments from burdening religious practices through generally applicable laws." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 126 S. Ct. 1211, 1216 (2006) (describing *Emp't Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990)). In *Smith*, the Supreme Court also 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." *Gonzales*, 546 U.S. at 424, 126 S. Ct. at 1216 (citing *Smith*, 494 U.S. at 883-90, 110 S. Ct. at 1602-06).

In response to *Smith*, Congress sought to restore the compelling-interest test by the passages of the Religious Freedom Restoration Act of 1993 ("RFRA") in 1993. 42 U.S.C. § 2000bb, *et seq*. "[T]he Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability' unless the government can satisfy the compelling-interest test." O Centro, 546 U.S. at 424, 126 S. Ct. at 1216 (quoting § 2000bb-1(a)).

The threshold inquiry under RFRA is whether the Government's regulation substantially burdens the exercise of a sincerely held religious belief. *See Diaz v. Collins*, 114 F.3d 69, 71 (5th Cir. 1997). Defendants do not dispute Plaintiffs have a sincerely held religious belief that contraception and abortion is morally wrong; therefore, the only question that remains in this inquiry is whether the ACA substantially burdens that belief. If the court finds a substantial burden, the Government must then show that the burden "is in furtherance of a compelling governmental interest" and that it "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

1. *Substantial Burden*

As ably discussed at length by Judge Rosenthal, Fifth Circuit case law uses a subjective standard for determining the presence of a substantial burden. So long as Plaintiffs are compelled or pressured by punitive fines to act or refrain from action, and that action or inaction is religiously offensive to them, a substantial burden exists. *See E. Tex. Baptist Univ. v. Sebelius*, No. 4-12-cv-3009, at *26-40 (S.D. Tex. Dec. 27, 2013).

RFRA does not expressly define "substantial burden." *See Hicks v. Garner*, 69 F.3d 22, 26 n. 22 (5th Cir. 1995). The analysis of substantial burdens under RFRA is based on the pre-*Smith* cases *Yoder* and *Sherbert*.

In *Yoder*, the plaintiffs were Old Order Amish and Conservative Amish Mennonites who refused to enroll their fourteen- and fifteen-year-old children in public or private school, in violation of Wisconsin's

compulsory education requirements, arguing that school attendance endangered the children's salvation. *Yoder*, 406 U.S. at 207-209, 92 S. Ct. at 1529-30. The Supreme Court in *Yoder* held that the

> impact of the compulsory-attendance law on respondents' practice of the Amish religion [wa]s not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to *perform acts* undeniably at odds with fundamental tenets of their religious beliefs. . . . [The compulsory-attendance law] carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. . . . [It] carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.

Yoder, 406 U.S. at 218, 92 S. Ct. at 1534-35.

In *Sherbert*, the plaintiff was a Seventh-Day Adventist who refused to work on her Sabbath, Saturday, and was denied unemployment benefits because of that. *Sherbert*, 374 U.S. at 399-401, 83 S. Ct. at 1791-92. The Supreme Court held that

> not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the

> precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Sherbert, 374 U.S. at 404, 83 S. Ct. at 1794.

"Under RFRA, a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by threat of civil or criminal sanctions (*Yoder*)." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069, 1069-70 (9th Cir. 2008) (en banc). The Fifth Circuit has explained government action substantially burdens a religious belief when it "truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs," in the RLUIPA context. *Moussazadeh v. Tex. Dept. of Criminal Justice*, 703 F.3d 781, 793 (quoting *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004)). Even indirect compulsion that infringes upon free exercise can be substantial. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718, 101 S. Ct. 1425, 1432 (1981).

Defendants have argued that any burden the ACA places on Plaintiffs is *de minimis*. Plaintiffs aver that it is not. District courts are split on this matter, with authority supporting both positions. *Compare University of Notre Dame v. Sebelius*, No. 13-cv-01276 (N.D. Ind. Dec. 20. 2013) (holding de minimus burden) *with E. Tex. Baptist Univ. v. Sebelius*, No. 4-12-cv-

3009 (S.D. Tex. Dec. 27, 2013) (finding substantial burden exists).

So just what is being required of the Bishop in this case? According to the Government he need only sign EBSA Form 700, which contains a true statement of his, and the Church's, objection to contraceptive services. But, the regulations provide that "the self-certification **will be treated as a designation** of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits . . . ." 78 FR 39879 (emphasis added). The rule drafters have chosen to be their own lexicographers, and the Government is bound by that choice. Like Humpty Dumpty, politicians may ascribe varied nuances of meaning and intent to their statements. [5] Judicial interpretation of federal regulations requires a more consistent, plain meaning approach. *See U.S. v. Woods*, ___ U.S. ___, 134 S. Ct. 557, 566-67 (2013).

The Government responds: "we have no power to actually compel the third party administrator provide the coverage so there is no burden." If the IRS and the Department of Labor are truly helpless hothouse flowers in this dispute, then why did the Government not accept this court's invitation to agree to a limited extension of Plaintiffs' deadlines to avoid the necessity of preparing for, and presenting, this case during a holiday season. *See* Doc #5, p. 2, par. 3. Based on their docket sheets, there were, at the same time, cases around the country requiring the

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[5] "When I use a word" said Humpty Dumpty, in rather a scornful tone "it means just what I choose it to mean-neither more nor less." Lewis Carroll, Through the Looking-Glass, 1872.

immediate attention of counsel for the Government, Mr. Humphries. *See also Archdiocese of New York*, p 11-12 (belated assertion of powerlessness argument), *East Tex. Baptist University*, p. 24, n.4 (why must form be signed now if it is meaningless?)

More importantly, given the history behind the adoption the First Amendment, can the court accept either the Government's *de minimus* argument or its assertion of powerlessness? Nobody would argue today that requiring any person of faith to sign a Test Act oath would be a *de minimus* burden on the exercise of religious beliefs.[6] Would the result be different if such an oath was worded to comport with the signer's personal belief, but another statute or regulation provided that it would be "treated as" the opposite? After all, once the oath is signed the Government would have no way of knowing what the person truly believed.

Submitting the self-certification affidavit is not simply espousing a belief that Plaintiffs hold. It is defined as an authorization for the TPA to provide coverage. It enables the exact harm that Plaintiffs seek to avoid, harm that Plaintiffs find religiously forbidden. If Plaintiffs choose to follow the course

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[6] *See* An Act for Preventing Dangers Which May Happen from Popish Recusants, 1672, 25 Car. II, c. 2, § 7 (Eng.) (commonly referred to as the Test Act of 1673) (averment of disbelief in transubstantiation); N.C. Const. of 1776, art. XXXII ("That no person, who shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding any office or place of trust or profit in the civil department within this State.")

they believe their faith dictates, they face fines that all parties agree are onerous. The Diocese could dump Catholic Charities from its health plan, but this runs afoul of Church teachings on social justice and the rights of employees. This "Hobson's Choice" is a quintessential "substantial burden" on the free exercise of religious belief, prohibited by RFRA.

2. *Compelling Interest*

The RFRA states that "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb–1(b). "RFRA 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." *O Centro*, 546 U.S. at 431-32.

Defendants propose two compelling interests: the promotion of public health and provision of equal access for women to healthcare. As stated by Judge Cogan, the Government's position that Christian Brothers could not be "required" or "mandated" to provide coverage for contraceptive services "fatally undermines any claim that imposing the Mandate on these plaintiffs serves a compelling governmental interest. *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12-cv-2542, at *33 (E.D.N.Y. Dec. 16, 2013).

On the other hand, if the objectives are simply assumed to be compelling, Defendants have failed to

establish that this is the least restrictive means to achieve them. Indeed, several other district court opinions have provided a myriad of less restrictive alternatives. *See E. Tex. Baptist Univ. v. Sebelius*, No. 4-12-cv-3009, at *42-43 (S.D. Tex. Dec. 27, 2013) (discussing various less restrictive alternatives proposed by other courts). Defendants therefore fail to meet their burden.

C. *The APA*

Plaintiffs pled claims under the Administrative Procedures Act (APA). Plaintiff's proposed conclusions of law make no mention of the APA, and at the hearing, which Plaintiffs agreed could be consolidated with the trial, the issue was not raised. The Government's proposed conclusions of law included the somewhat circular analysis: "The regulations do not violate the Administrative Procedure Act because the regulations are in accordance with federal law." Nobody has asserted that the rulemaking process, or the procedures used for adopting the contested regulation violated the law, but the court has found that the regulations themselves violate Plaintiff's rights. That conclusion does not depend on an analysis of the APA. To make clear that the court is entering a final judgment, Plaintiff's APA claim is dismissed.

IV. Conclusion

Plaintiffs are entitled to a permanent injunction. To re-state the Order signed on December 31, 2013 [Doc. # 32], the Government is enjoined from applying or enforcing the regulations that require the Plaintiffs, their health plans, TPAs, or issuers, to provide or execute the self-certification forms that

enable or require the TPA or issuer to provide health insurance coverage for Plaintiff's employees for FDA-approved contraceptives, emergency contraceptives, products, or services under the requirements imposed in 42 U.S.C. § 300gg-13(a)(4), Pub. L. 11-148, § 1563(e)-(f), as well as the application of the penalties found in 26 U.S.C. §§ 4980D & 4980H, and 29 U.S.C. § 1132."

IT IS FURTHER ORDERED that all currently pending motions are DENIED as MOOT. A final judgment consistent with the Memorandum and Order shall be forthcoming.

So **ORDERED** and **SIGNED** this **2** day of **January, 2014**.

/s/ Ron Clark
Ron Clark, United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROMAN CATHOLIC DIOCESE OF FORT WORTH, et al.	§	
VS.	§	CIVIL ACTION NO. 4:12-CV-314-Y
KATHLEEN SEBELIUS, et al.	§	

ORDER GRANTING PRELIMINARY INJUNCTION

Before the Court is the motion for a preliminary injunction of Plaintiffs Roman Catholic Diocese of Fort Worth; Our Lady of Victory Catholic School; and Catholic Charities, Diocese of Fort Worth, Inc. (doc. 103). After review of the motion, response, and reply, the Court GRANTS the motion.

I. BACKGROUND

This case involves a challenge by several entities affiliated with the Catholic Church to the contraceptive mandate in the Affordable Care Act ("the ACA"). This Court previously granted injunctive relief to Plaintiff University of Dallas ("the University"). The University moved for injunctive relief separately from the other plaintiffs given that its plan year began January 1, 2014, and it would be

required to comply with the contraceptive mandate first. The remaining Plaintiffs, whose plan years begin this summer, now seek injunctive relief.

The government has filed an interlocutory appeal of this Court's order granting injunctive relief as to the University. The Fifth Circuit has consolidated the appeal from this case with two other, similar appeals from the Eastern and Southern Districts of Texas.[1] As of the date of this order, however, briefing has not been completed and the Fifth Circuit is not expected to rule in time for Plaintiffs to avoid injury. Furthermore, the Court is not persuaded that the remaining Plaintiffs are any less entitled to injunctive relief than the University.

Accordingly, the motion for injunctive relief of Plaintiffs Roman Catholic Diocese of Fort Worth; Our Lady of Victory Catholic School; and Catholic Charities, Diocese of Fort Worth, Inc., is GRANTED. The government is hereby ENJOINED from enforcing, as to the remaining plaintiffs, the requirements set out in 42 U.S.C. § 300gg-13(a)(4), as well as any related fines and penalties, until further order of this Court.

SIGNED June 5, 2014.

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES
DISTRICT JUDGE

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[1] *Catholic Diocese of Beaumont v. Kathleen Sebelius*, No. 1:13-CV-00709; *E. Tex. Baptist Univ. v. Sebelius*, No. 4:12-CV-03009

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-20112

United States Court of Appeals
Fifth Circuit
FILED
June 22, 2015
Lyle W. Cayce
Clerk

EAST TEXAS BAPTIST UNIVERSITY; HOUSTON BAPTIST UNIVERSITY,

Plaintiffs–Appellees,

WESTMINSTER THEOLOGICAL SEMINARY,

Intervenor Plaintiff–Appellee,

versus

SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services;

THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor;

JACOB J. LEW, in his official capacity as Secretary of the United States Department of Treasury;

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

UNITED STATES DEPARTMENT OF LABOR;

UNITED STATES DEPARTMENT OF TREASURY,

Defendants–Appellants.

Appeal from the United States District Court for the Southern District of Texas

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* * * * * * * * * * * * * * *

Nos. 14-20112, 14-10241, 14-40212, 14-10661

No. 14-10241

UNIVERSITY OF DALLAS,

Plaintiff–Appellee,

versus

SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services;

THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor;

JACOB J. LEW, in his official capacity as Secretary of the United States Department of Treasury;

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

UNITED STATES DEPARTMENT OF LABOR;

UNITED STATES DEPARTMENT OF TREASURY,

Defendants–Appellants.

Appeal from the United States District Court for the Northern District of Texas

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* * * * * * * * * * * * * * *

Nos. 14-20112, 14-10241, 14-40212, 14-10661

No. 14-40212

CATHOLIC DIOCESE OF BEAUMONT;

CATHOLIC CHARITIES OF SOUTHEAST TEXAS, INCORPORATED,

Plaintiffs–Appellees,

versus

SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services;

THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor;

JACOB J. LEW, in his official capacity as Secretary of the United States Department of Treasury;

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

UNITED STATES DEPARTMENT OF LABOR;

UNITED STATES DEPARTMENT OF TREASURY,

Defendants–Appellants.

Appeal from the United States District Court for the Eastern District of Texas

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* * * * * * * * * * * * * * *

No. 14-10661

Nos. 14-20112, 14-10241, 14-40212, 14-10661

CATHOLIC CHARITIES, DIOCESE OF FORT WORTH, INCORPORATED,

Plaintiff–Appellee,

versus

SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of the U.S. Department of Health and Human Services;

THOMAS PEREZ, in his official capacity as Secretary of the U.S. Department of Labor;

JACOB J. LEW, in his official capacity as Secretary, U.S. Department of Treasury;

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

UNITED STATES DEPARTMENT OF LABOR;
UNITED STATES DEPARTMENT OF TREASURY,
Defendants–Appellants.

Appeal from the United States District Court for the Northern District of Texas

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Before REAVLEY, SMITH, and GRAVES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

In these consolidated appeals, religious organizations challenge, under the Religious Freedom Restoration Act ("RFRA),[1] a requirement that they either offer their employees health insurance that covers certain contraceptive services or submit a form or notification declaring their religious opposition to that coverage. The district courts held that the requirement violates RFRA or, in one case, that the plaintiffs had demonstrated a substantial likelihood of establishing that it does, so they enjoined the government from enforcing it. Because the plaintiffs have not shown and are not likely to show that the requirement substantially burdens their religious exercise under established law, we reverse.

I.

A.

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[1] 42 U.S.C. §§ 2000bb to 2000bb-4, *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997).

Under the Affordable Care Act ("ACA"),[2] employers with fifty or more full-time employees generally must offer their employees a group health plan[3] that provides "minimum essential coverage." *See* 26 U.S.C. §§ 4980H(a), (c)(2), 5000A(f)(2). Plans typically must cover all FDA-approved contraceptive methods and sterilization procedures for women[4] without copayments or deductibles.[5] Two types of plans are automatically exempt from the so-called contraceptive mandate: grandfathered plans, meaning those that have not made certain specified changes since March 2010, *see* 42 U.S.C. § 18011(a), and plans offered by religious employers, defined by reference to the Tax Code to include mostly churches themselves, as distinguished from associated educational or charitable institutions.[6] An employer that does not comply with these requirements faces draconian penalties: $2,000 per full-time employee

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[2] Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

[3] The term "group health plan" includes both insured plans, in which an insurer writes a policy and bears the risk of claims, and self-insured plans, in which the employer bears the risk but may contract with a third-party administrator to perform administrative tasks such as processing claims.

[4] We refer to the contraceptive methods and sterilization procedures collectively as "contraceptives" unless otherwise indicated.

[5] *See* 42 U.S.C. § 300gg-13(a)(4); Group Health Plans and Health Insurance Insurers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725–26 (Feb. 15, 2012).

[6] *See* 45 C.F.R. § 147.131(a) (citing 26 U.S.C. § 6033(a)(3)(A)(i), (iii)).

per year for not offering a plan at all[7] and $100 per affected individual per day for offering a plan that provides insufficient coverage, 26 U.S.C. § 4980D(a), (b)(1).

An "accommodation" is available to religious entities that do not qualify as religious employers but seek exemption from the mandate. To avail itself of that option, (1) an organization must oppose, on religious grounds, providing coverage for some or all contraceptives; (2) it must be organized as a nonprofit; (3) it must hold itself out as religious; and (4) it must certify that it satisfies the foregoing criteria.[8] It can certify in two ways.

The first way is to complete EBSA[9] Form 700 and send it to its insurer or third-party administrator.[10] The person signing the form must certify that the organization meets the requirements and that the form is believed to be correct.[11] The form requires the name of the organization, the name and title of the person signing it, and contact information. DEP'T OF LABOR, supra note 11, at 1. The second

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[7] 26 U.S.C. § 4980H(a), (c)(1). The penalty applies if at least one employee enrolls in a subsidized plan through an exchange. *See id*. § 4980H(a)(2).

[8] 26 C.F.R. § 54.9815-2713A(a); 29 C.F.R. § 2590.715-2713A(a); 45 C.F.R. § 147.131(b).

[9] "EBSA" stands for "Employee Benefits Security Administration," which is part of the Department of Labor.

[10] 29 C.F.R. § 2590.715-2713A(b)(1)(ii), (c)(1); 45 C.F.R. § 147.131(c)(1).

[11] DEP'T OF LABOR, EBSA FORM 700 1 (2014), http://www.dol.gov/ebsa/-preventiveserviceseligibleorganizationcertificationform.doc.

way in which an organization can certify is to submit a notice to the Department of Health and Human Services ("HHS").[12] The notice need not take a particular form but must include the name of the organization; a statement that it opposes, on religious grounds, providing coverage for some or all contraceptives; the name and type of the plan; and the name and contact information of the plan's insurer or third-party administrator, if applicable.[13]

The effect of applying for the accommodation depends on the type of plan and method of certification. If an employer with an insured plan uses Form 700, the insurer must exclude the objectionable coverage from the plan and provide "separate payments" for contraceptives for plan participants.[14] The insurer may not impose any direct or indirect costs for contraceptives on the employer or participants.[15] In addition, it must send a notice to participants, separately from plan materials, explaining that the employer does not administer or fund contraceptives but that, instead, the insurer provides separate payments.[16] If an

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[12] 29 C.F.R. § 2590.715-2713A(b)(1)(ii), (c)(1); 45 C.F.R. § 147.131(c)(1).

[13] *See* 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii); 45 C.F.R. § 147.131(c)(1)(ii).

[14] 29 C.F.R. § 2590.715-2713A(c)(2)(i); 45 C.F.R. § 147.131(c)(2)(i).

[15] 26 C.F.R. § 54.9815-2713A(c)(2)(ii); 29 C.F.R. § 2590.715-2713A(c)(2)(ii); 45 C.F.R. § 147.131(c)(2)(ii).

[16] 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(d).

employer with an insured plan submits a notice to HHS, then HHS notifies the insurer of its obligations, which are the same as if the employer had used Form 700.[17]

The process for self-insured plans is somewhat different. If an employer with a self-insured plan uses Form 700, the third-party administrator, if there is one, must either provide separate payments (as an insurer would) or arrange for an insurer or other entity to do so. *See* 29 C.F.R. § 2590.715-2713A(b)(2). Third-party administrators and insurers that pay for contraceptives in this circumstance are eligible for government reimbursement of 115% of their expenses.[18] The prohibition on imposing costs and the notice requirement are the same as for insured plans.[19] Moreover, the form "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 [contraceptives], and shall supersede any earlier designation." *Id.* § 2510.3-16(b).

If an employer with a self-insured plan submits a notice to HHS, then HHS notifies the Department of Labor, which in turn notifies the third-party

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[17] *See* 29 C.F.R. § 2590.715-2713A(c)(1)(ii), (2)(i); 45 C.F.R. § 147.131(c)(1)(ii), (2)(i).

[18] 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50(d); Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13744, 13809 (Mar. 11, 2014).

[19] *See* 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(b)(2), (d).

administrator of its obligations. *See id.* § 2590.715-2713A(b)(1)(ii)(B). The result is the same as if the employer had used Form 700, *id.* § 2590.715-2713A(b)(1)(ii)(B), (2), except that it is the notice from the Department of Labor, instead of Form 700, that is treated as an instrument under which the plan is operated and as designation of the plan administrator, *id.* § 2510.3-16(b).

B.

The plaintiffs are religious organizations that oppose the use of some or all contraceptives. The sincerity of their beliefs is undisputed. The Dioceses of Fort Worth and Beaumont are automatically exempt from the mandate as religious employers, and the other plaintiffs are eligible for the accommodation.

The plaintiffs in *East Texas Baptist University* are East Texas Baptist University and Houston Baptist University, which have self-insured plans[20] for their employees, and Westminster Theological Seminary, which offers an insured plan to its employees. Houston Baptist University's plan is a church plan, which is exempt from ERISA. The plaintiffs oppose abortion and believe that emergency contraceptives and intrauterine devices, which are included in the contraceptive mandate, can cause abortions. They are unwilling to provide or facilitate access to those products. They sued in the Southern District of Texas, and the court entered partial final judgment[21] and a permanent injunction against the government.

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[20] All self-insured plans at issue in these appeals have third-party administrators.

[21] The court stayed other claims not at issue on appeal.

The plaintiffs in *University of Dallas*[22] are several Catholic organizations. The University of Dallas has a self-insured plan for its employees and an insured plan for its students. The Diocese of Fort Worth provides coverage to its employees through a church plan, and Our Lady of Victory Catholic School offers coverage to its employees through the diocese's plan.[23] Catholic Charities, Diocese of Fort Worth, has an insured plan for its employees. The plaintiffs oppose the use of any contraceptives to prevent pregnancy or induce abortion,[24] and providing or facilitating access to them for those purposes would violate their faith. They sued in the Northern District of Texas, and the court entered preliminary injunctions against the government.

The plaintiffs in *Diocese of Beaumont* are the Diocese of Beaumont, which provides coverage to its employees through a church plan, and Catholic Charities of Southeast Texas, which offers coverage to its employees through the diocese's plan.[25] Like

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[22] The *University of Dallas* and *Diocese of Fort Worth* appeals arise from the same district-court case. We refer to those appeals collectively as "*University of Dallas*."

[23] The diocese is automatically exempt from the mandate as a religious employer, but Our Lady of Victory is not. The diocese is a plaintiff because it alleges that the regulations will require it either to sponsor a plan that complies with the mandate or to remove Our Lady of Victory from its plan.

[24] The Catholic plaintiffs do not oppose the use of contraceptives to treat medical conditions so long as the purpose is not to prevent pregnancy or induce abortion.

[25] As with the Diocese of Fort Worth and Our Lady of Victory, the diocese is automatically exempt from the mandate as a religious employer, but Catholic Charities is not. The diocese is

the plaintiffs in *University of Dallas*, they oppose the use of any contraceptives to prevent pregnancy or induce abortion, and they object to providing or facilitating access to them for those purposes. They sued in the Eastern District of Texas, and the court entered final judgment and a permanent injunction against the government.

II.

We review a summary judgment *de novo*. *LaBarge Pipe & Steel Co. v. First Bank*, 550 F.3d 442, 449 (5th Cir. 2008). We review the grant of a preliminary or permanent injunction for abuse of discretion and the underlying legal conclusions *de novo*.[26]

III.

Under RFRA, the "[g]overnment 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." 42 U.S.C. § 2000bb-1(a) to (b). We begin and end our analysis

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a plaintiff because it alleges that the regulations will require it either to sponsor a plan that complies with the mandate or to remove Catholic Charities from its plan.

[26] *See Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 528 (5th Cir. 2013) (en banc) (permanent injunction), *cert. denied*, 134 S. Ct. 1491 (2014); *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 195 (5th Cir. 2003) (preliminary injunction).

with the substantial-burden prong.[27] The plaintiffs must show that the challenged regulations substantially burden their religious exercise,[28] but they have not done so or, in *University of Dallas*, have not established a substantial likelihood of doing so. Because their claims fail on the merits, we need not consider the other requirements for an injunction.[29]

A.

A preliminary question—at the heart of this case—is the extent to which the courts defer to a religious

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[27] Westminster claims that the government waived its argument on this issue by failing to present it to the district court. We disagree. The government explained at length why it believes that the regulations do not substantially burden the plaintiffs' religious exercise.

[28] *See City of Boerne*, 521 U.S. at 533–34 (noting that the burden is on the religious objector); *Diaz v. Collins*, 114 F.3d 69, 71–72 (5th Cir. 1997) (same).

[29] "To be entitled to a preliminary injunction, the applicant must show (1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) granting the preliminary injunction will not disserve the public interest." *Lake Charles Diesel*, 328 F.3d at 195–96. "[A] plaintiff seeking a permanent injunction must . . . demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

objector's view on whether there is a substantial burden. The inquiry has three components: (1) What is the adherent's religious exercise? (2) Does the challenged law pressure him to modify that exercise? (3) Is the penalty for noncompliance substantial? It is well established that the court accepts the objector's answer to the first question upon finding that his beliefs are sincerely held and religious.[30] It is also undeniable that the court evaluates the third question as one of law.[31] Although we have not directly addressed who decides the second question,[32] all of our sister circuits that have considered contraceptive-mandate cases have come to the same conclusion: The court makes that decision.[33] We agree.

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[30] *See*, *e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2777–79 (2014); *Thomas v. Review Bd.*, 450 U.S. 707, 713–16 (1981).

[31] *See*, *e.g.*, *Hobby Lobby*, 134 S. Ct. at 2775–77; *Sherbert v. Verner*, 374 U.S. 398, 403–06 (1963).

[32] East Texas Baptist University cites two Fifth Circuit cases applying the Texas version of RFRA, but those decisions merely confirmed that the court defers to the adherent's answer to the first question upon finding that his beliefs are sincerely held and religious. *See A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 263–66 (5th Cir. 2010); *Merced v. Kasson*, 577 F.3d 578, 590–91 (5th Cir. 2009).

[33] *See Univ. of Notre Dame v. Burwell*, No. 13-3853, 2015 WL 2374764, at *6 (7th Cir. May 19, 2015) ("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."); *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 435 (3d Cir.) ("Without testing the appellees' religious beliefs, we must nonetheless objectively assess whether the appellees'

Two free-exercise cases are especially instructive.[34] In *Bowen v. Roy*, 476 U.S. 693 (1986), parents challenged the government's use of a Social Security number for their daughter because they believed that

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compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive cover-age."), mandate recalled and stayed sub nom. *Zubik v. Burwell*, 135 S. Ct. 1544 (2015); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 247 (D.C. Cir. 2014) ("Accepting the sincerity of Plaintiffs' beliefs, however, does not relieve this Court of its responsibility to evaluate the substantiality of any burden on Plaintiffs' religious exercise, and to distinguish Plaintiffs' duties from obligations imposed, not on them, but on insurers and [third-party administrators]. Whether a law substantially burdens religious exercise under RFRA is a question of law for courts to decide, not a question of fact."). The Sixth Circuit used the same approach in a pre-*Hobby Lobby* case, but the Supreme Court has since vacated and remanded that decision for reconsideration in light of *Hobby Lobby*. *See Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 385 (6th Cir. 2014) ("[A]lthough we acknowledge that the appellants believe that the regulatory framework makes them complicit in the provision of contraception, we will independently determine what the regulatory provisions require and whether they impose a substantial burden on appellants' exercise of religion."), *cert. granted and judgment vacated sub nom. Mich. Catholic Conference v. Burwell*, 135 S. Ct. 1914 (2015).

[34] Congress passed RFRA in response to *Employment Division v. Smith*, 494 U.S. 872 (1990), and one of the statute's purposes is "to restore the compelling interest test as set forth in [*Sherbert*, 374 U.S. 398,] and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)[,] and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). Accordingly, pre-Smith caselaw is relevant in interpreting RFRA. *See*, *e.g.*, *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 *passim* (5th Cir. 2014); *Tagore v. United States*, 735 F.3d 324, 330 (5th Cir. 2013).

the use of the number would "rob her spirit." *Id.* at 695–97. The Court ruled for the government, reasoning that the parents were challenging the government's acts, not a burden on them, *id.* at 699–701, and that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens," *id.* at 699. The Court decided for itself whether the policy in question pressured the parents to modify their religious exercise, noting that, although

> Roy's religious views may not accept this distinction between individual and governmental conduct[,] [i]t is clear . . . 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. at 701 n.6 (citation omitted).

The Court used the same approach in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). The plaintiffs complained of the government's plan to construct a road and permit logging on federal land, which they had used for religious purposes. *Id.* at 441–42. Relying on *Roy*, the Court rejected their claim. *Id.* at 447–49. It accepted the plaintiffs' statement of their religious beliefs, *id.* at 449–51, but concluded that the project involved only the government's management of its own property, which did not implicate the plaintiffs' constitutional rights, *id.* at 453. The Court stressed that, "[w]hatever may be the exact line between

unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Id.* at 451.

In addition, one RFRA case from the District of Columbia Circuit illustrates that the court decides the second question. In *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), an inmate objected to a requirement that he participate in the collection of a tissue sample, which the FBI would use to create a DNA profile, because he opposed on religious grounds the extraction and storage of DNA information. *Id.* at 673–74. The court ruled for the government. *Id.* at 686. It "[a]ccept[ed] 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." *Id.* at 679. Applying that rule, it held that his religious exercise was not substantially burdened, because "[t]he extraction and storage of DNA information are entirely activities of the FBI, in which Kaemmerling plays no role and which occur after the BOP has taken his fluid or tissue sample (to which he does not object)." *Id.*

The Court did not address the issue in *Hobby Lobby*. There, closely held for-profit corporations challenged the contraceptive mandate based on their owners' religious opposition to some contraceptives. *Id.* at 2764–66. The corporations were neither automatically exempt from the mandate as religious employers nor eligible for the accommodation; they had to offer insurance that covered contraceptives or

face large penalties. *Id*. at 2775–76. The Court held that the mandate violated RFRA as applied to the corporations. *Id*. at 2785. The substantial-burden analysis addressed only the first and third questions. The Court rejected the government's theory "that the connection between what the objecting parties must do (provide health-insurance coverage for [contraceptives]) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated," *id*. at 2777, explaining that drawing the line between acceptable and unacceptable levels of involvement was the owners' prerogative, *id*. at 2778–79. In doing so, the Court reaffirmed that courts defer to the objector's description of his religious exercise upon finding that his beliefs are sincerely held and religious. And the Court analyzed the substantiality of the penalties for noncompliance itself, rather than automatically accepting the corporations' position. *Id*. at 2775–77.

But the Court said nothing about the second question. It had no reason to, because there was no doubt that imposing large penalties for not offering insurance that covered contraceptives pressured the corporations to facilitate the use of contraceptives.

In the absence of further guidance from the Supreme Court, we are bound to follow *Roy* and *Northwest Indian Cemetery* by deciding, as a question of law, whether the challenged law pressures the objector to modify his religious exercise. The other

circuits' decisions confirm the continued vitality of that approach.[35]

B.

Although the plaintiffs have identified several acts that offend their religious beliefs, the acts *they* are required to perform do not include providing or facilitating access to contraceptives. Instead, the acts that violate their faith are those of third parties. Because RFRA confers no right to challenge the independent conduct of third parties, we join our sister circuits in concluding that the plaintiffs have not shown a substantial burden on their religious exercise.[36]

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[35] *See Notre Dame*, 2015 WL 2374764, at *6; *Geneva*, 778 F.3d at 435; *Priests for Life*, 772 F.3d at 247; *Kaemmerling*, 553 F.3d at 679.

[36] *See Notre Dame*, 2015 WL 2374764, at *6 ("As far as we can determine from the very limited record, the only 'conduit' [for payments for contraceptives] is between the [insurer and the third-party administrator] and Notre Dame students and staff; the university has stepped aside."); *Geneva*, 778 F.3d at 438 ("By participating in the accommodation, the eligible organization has no role whatsoever in the provision of the objected-to contraceptive services."); *Priests for Life*, 772 F.3d at 256 ("It is as a result of the ACA, and not because of any actions Plaintiffs must take, that Plaintiffs' employees are entitled to contraceptive coverage provided by third parties and that their insurers or TPA must provide it; RFRA does not entitle Plaintiffs to control their employees' relationships with other entities willing to provide health insurance coverage to which the employees are legally entitled. A religious adherent's distaste for what the law requires of a third party is not, in itself, a substantial burden; that is true even if the third party's conduct towards others offends the religious adherent's sincere religious sensibilities."). The Sixth Circuit reached the same result in its now-vacated decision. *See Mich. Catholic*, 755 F.3d

First, the plaintiffs claim that their completion of Form 700 or submission of a notice to HHS will authorize or trigger payments for contraceptives. Not so. The ACA already requires contraceptive coverage: "A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for . . . with respect to women, such additional preventive care . . . as provided for in comprehensive guidelines" promulgated by HHS, 42 U.S.C. § 300gg-13(a)(4), which includes contraceptives.[37] That provision expressly requires insurers to offer coverage. And although it does not specifically mention third-party administrators, they administer "group health plan[s]," which must include coverage. Nothing suggests the insurers' or third-party administrators' obligations would be waived if the plaintiffs refused to apply for the accommodation. Accordingly, the plaintiffs' completion of Form 700 or submission of a notice to

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at 390 ("The appellants allege that providing, paying for, and/or facilitating access to contraceptive coverage burdens their exercise of religion. . . . [T]he exemption and accommodation framework does not require them to do any of these things. The framework does not permit them to prevent their insurance issuer or third-party administrator from providing contraceptive coverage to their employees pursuant to independent obligations under federal law. However, the inability to 'restrain the behavior of a third party that conflicts with the [appellants'] religious beliefs,' does not impose a burden on the appellants' exercise of religion." (alteration in original) (citation omitted) (quoting *Mich. Catholic Conference v. Sebelius*, 989 F. Supp. 2d 577, 587 (W.D. Mich. 2013))).

[37] Group Health Plans and Health Insurance Insurers, 77 Fed. Reg. at 8725–26.

HHS does not authorize or trigger payments for contraceptives, because the plaintiffs cannot authorize or trigger what others are already required by law to do.[38]

The plaintiffs offer two variations of that theory, but those are equally unconvincing. The plaintiffs assert that their listing the names and contact information of their insurers and third-party administrators will make it easier for the government to inform those entities of their obligations. It will, but that does not mean the plaintiffs' religious exercise is burdened. Without the accommodation, the plaintiffs would have to offer a plan that covered contraceptives,[39] so the effect of the government's communications with the insurers and third-party administrators is to shift the burden to those entities. Providing the names and contact information facilitates only the plaintiffs' exemption, not contraceptive coverage.

Separately, the self-insured plaintiffs contend that their completion of Form 700 or submission of a notice to HHS will make their third-party administrators eligible for the government's

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[38] *See Notre Dame*, 2015 WL 2374764, at *7–9 (concluding that federal law, not the completion of Form 700 or submission of a notice to HHS, triggers payments for contraceptives); *Geneva*, 778 F.3d at 435–42 (same); *Priests for Life*, 772 F.3d at 252–56 (same).

[39] *See* 26 U.S.C. §§ 4980H(a), (c)(2), 5000A(f)(2); 42 U.S.C. § 300gg-13(a)(4); Group Health Plans and Health Insurance Insurers, 77 Fed. Reg. at 8725–26.

reimbursement. Again, it will,[40] but that does not mean the plaintiffs' religious exercise is burdened.

For the insured plans, the insurers will not lose money by paying for contraceptives, because the savings on pregnancy care at least are expected to equal the costs of contraceptives.[41] There is a potential problem for the self-insured plans, though: The third-party administrators do not bear the risk of claims, so they will not realize any savings on pregnancy care. The regulations prohibit passing on the costs of contraceptives, 29 C.F.R. § 2590.715-2713A(b)(2), but in an efficient market, the third-party administrators would be unable to avoid doing so without additional revenue. The reimbursement is the government's attempt to solve the problem by giving the third-party administrators additional money to cover the costs of contraceptives. Assuming the amount is sufficient, the reimbursement is what will allow the self-insured plaintiffs to avoid paying for contraceptives.

Second, the plaintiffs urge that the accommodation uses their plans as vehicles for payments for contraceptives. But that is just what the regulations prohibit. Once the plaintiffs apply for the accommodation, the insurers may not include contraceptive coverage in the plans.[42] The insurers and third-party administrators may not impose any

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[40] *See* 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50(d).

[41] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39877 (July 2, 2013).

[42] 29 C.F.R. § 2590.715-2713A(c)(2)(i)(A); 45 C.F.R. § 147.131(c)(2)(i)(A).

direct or indirect costs for contraceptives on the plaintiffs[43]; they may not send materials about contraceptives together with plan materials[44]; in fact, they must send plan participants a notice explaining that the plaintiffs do not administer or fund contraceptives.[45] The payments for contraceptives are completely independent of the plans.[46]

Third, the plaintiffs theorize that the requirement that they offer their employees a group health plan pressures them to authorize or facilitate the use of contraceptives. They must contract with the insurers and third-party administrators to offer a plan, and those entities pay for contraceptives. In the plaintiffs' view, the insurers and third-party administrators would not do so absent the contracts, so the contracts facilitate the use of contraceptives.

The plaintiffs misunderstand the role of the contracts. Under the accommodation, the contracts are solely for services to which the plaintiffs do not object; the contracts do not provide for the insurers and third-party administrators to cover contraceptives, do not make it easier for those entities to pay for contraceptives, and do not imply

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[43] 26 C.F.R. § 54.9815-2713A(c)(2)(ii); 29 C.F.R. § 2590.715-2713A(b)(2), (c)(2)(ii); 45 C.F.R. § 147.131(c)(2)(ii).

[44] 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(d).

[45] 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(d).

[46] *See Notre Dame*, 2015 WL 2374764, at *5–7 (explaining that the accommodation does not use the plans as vehicles for payments for contraceptives); *Geneva*, 778 F.3d at 438, 441 (same); *Priests for Life*, 772 F.3d at 253–54 (same).

endorsement of contraceptives. *See supra* notes 42–46 and accompanying text. Instead, the plaintiffs are excluding contraceptive coverage from their plans and expressing their disapproval of it, but the government is requiring the insurers and third-party administrators to offer it—separately from the plans—despite the plaintiffs' opposition. The plaintiffs' religious beliefs forbid them from providing or facilitating access to contraceptives, but the requirement that they enter into the contracts does not force them to do so. The acts that violate their faith are the acts of the government, insurers, and third-party administrators, but RFRA does not entitle them to block third parties from engaging in conduct with which they disagree.[47]

A hypothetical illustrates the breadth of the plaintiffs' position. Suppose a person needs a passport for an upcoming trip. She fills out the application, but as she is about to mail it, she learns that the State Department will assign her a number when it approves her request. She opposes, on religious grounds, the use of a number to identify her, *see generally Roy*, 476 U.S. at 695–97, as well as any

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[47] *See Nw. Indian Cemetery*, 485 U.S. at 453 (holding that an adherent was not entitled to challenge a third party's actions that offended his beliefs); *Roy*, 476 U.S. at 701 (same); *Notre Dame*, 2015 WL 2374764, at *5–7 (concluding that the requirement to offer a plan does not impose a substantial burden, because the contracts with the insurers and third-party administrators do not facilitate the use of contraceptives); Geneva, 778 F.3d at 438 n.13 (same); Priests for Life, 772 F.3d at 253 (same); *Kaemmerling*, 553 F.3d at 679 (holding that an adherent was not entitled to challenge a third party's actions that offended his beliefs).

act that would facilitate the use of a number, so she sues under RFRA.

That case is indistinguishable from the one at bar. The objector does not oppose completing the application but only the State Department's assigning her a number in response even though she need not help the department do so. The idea that she could force the department to justify, under strict scrutiny, its application requirement or use of a number is unreasonable. Yet the plaintiffs here are making the same type of claim. Accepting such claims could subject a wide range of federal programs to strict scrutiny. Perhaps an applicant for Social Security disability benefits disapproves of working on Sundays and is unwilling to assist others in doing so. He could challenge a requirement that he use a form to apply because the Social Security Administration might process it on a Sunday.[48] Or maybe a pacifist refuses to complete a form to indicate his beliefs because that information would enable the Selective Service to locate eligible draftees more quickly.[49] The possibilities are endless, but we doubt Congress, in enacting RFRA, intended for them to be.

The Court did not resolve the issue in *Hobby Lobby* but, instead, rejected the government's notion that there was no substantial burden, because the intervening acts of third parties, such as employees' decisions to use contraceptives, made the connection

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[48] *See generally Geneva*, 778 F.3d at 439 n.14 (considering an analogous hypothetical). Case: 14-20112 Document: 00513087723 Page: 20 Date Filed: 06/22/2015

[49] *See generally Notre Dame*, 2015 WL 2374764, at *18 (discussing a similar hypothetical).

between the plaintiffs' providing contraceptive coverage and the destruction of an embryo too attenuated. 134 S. Ct. at 2777–79. The distinction between that case and the instant one is that the regulations compelled the *Hobby Lobby* plaintiffs to participate in providing contraceptives, albeit in an indirect way. What the regulations require of the plaintiffs here has nothing to do with providing contraceptives.

The difference is not just that there are more links in the causal chain here than in *Hobby Lobby*—a difference that would not change the outcome, given that we accept an adherent's judgment as to how much separation is enough.[50] It is also that the type of compelled act is quite different—the act at issue in this case is not one that authorizes or facilitates the use of contraceptives.

The *Hobby Lobby* Court did not consider this type of situation and actually suggested in dictum that the accommodation does not burden religious exercise: The majority noted that "HHS has effectively exempted certain religious nonprofit organizations" through the accommodation, *id.* at 2763, and the concurrence observed that "the accommodation equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs," *id.* at 2786 (Kennedy, J., concurring).[51] Thus, *Hobby Lobby* is of no help to the plaintiffs' position, and the

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[50] *See*, *e.g.*, *Hobby Lobby*, 134 S. Ct. at 2779; *Thomas*, 450 U.S. at 715.

[51] The Court cautioned that it did "not decide . . . whether [the accommodation] complies with RFRA for purposes of all religious claims." *Hobby Lobby*, 134 S. Ct. at 2782.

requirement to offer a group health plan does not burden their religious exercise.

Fourth, the self-insured plaintiffs postulate that they will be required to pay for contraceptives despite the regulations to the contrary. They say the government lacks the authority under ERISA to prohibit third-party administrators from passing on the costs, insurers are unlikely to work with the third-party administrators because of the small amounts involved (an insurer must seek reimbursement on behalf of a third-party administrator[52]), and the 115% reimbursement will not cover the costs.

This issue is not ripe, and we express no view on its merits. "A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical."[53] "The key considerations are 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" [54] "A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required."[55] "However, 'even where an issue presents purely legal questions, the

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[52] 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50(d).

[53] *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586 (5th Cir. 1987)).

[54] *Id.* (quoting *New Orleans*, 833 F.2d at 586).

[55] *Id.* (quoting *New Orleans*, 833 F.2d at 587).

plaintiff must show some hardship in order to establish ripeness.'"[56]

The plaintiffs' prediction that third-party administrators will attempt to charge them for contraceptives may not come to pass, so the matter is not fit for judicial decision. The administrative costs associated with payments for contraceptives may turn out to be low. If so, the insurers and third-party administrators will be eager to take advantage of the 115% reimbursement, [57] and the third-party administrators will profit from the arrangement and have no occasion to pass on the costs. The plaintiffs say that is unlikely because only a small number of their employees will use contraceptives. But their reasoning overlooks the economies of scale that the insurers and third-party administrators could establish by paying for contraceptives for the employees of many religious organizations.

On this record, there is no basis for assessing which outcome is most likely. And withholding court consideration would not harm the plaintiffs. There is no allegation that any third-party administrator has asked the plaintiffs to pay for contraceptives. If that happened, the plaintiffs could challenge the regulations then and would have had to pay nothing in the meantime. As a result, we decline to reach the issue.

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[56] *Id.* (quoting *Cent. & S. W. Servs., Inc. v. U.S. EPA*, 220 F.3d 683, 690 (5th Cir. 2000)).

[57] *See Notre Dame*, 2015 WL 2374764, at *7 (speculating as to why insurers and third-party administrators might want to participate in the scheme).

Fifth, the two dioceses, which are automatically exempt from the mandate as religious employers, submit that the regulations will require them either to sponsor a plan that complies with the contraceptive mandate or to remove from their plans affiliated entities that are not religious employers but are eligible for the accommodation. That is a misreading of the regulations, which allow those types of organizations to share a plan provided that the entity that does not qualify as a religious employer applies for the accommodation.[58] Because the accommodation does not burden the plaintiffs' religious exercise, neither does a requirement that the dioceses do nothing and the affiliated entities apply for the accommodation.[59]

In short, the acts the *plaintiffs* are required to perform do not involve providing or facilitating access to contraceptives, and the plaintiffs have no right under RFRA to challenge the independent conduct of third parties. Because the plaintiffs have not shown that the regulations substantially burden their religious exercise or, in *University of Dallas*, have not demonstrated a substantial likelihood of doing so, we need not reach the strict-scrutiny prong or the other requirements for an injunction.

REVERSED.

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[58] *See* Coverage of Certain Preventive Services, 78 Fed. Reg. at 39886.

[59] *See Geneva*, 778 F.3d at 443–44 (explaining that the different treatment of dioceses and affiliated organizations does not impose a substantial burden).

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-20112

EAST TEXAS BAPTIST UNIVERSITY;
HOUSTON BAPTIST UNIVERSITY,
Plaintiffs-Appellees,
WESTMINSTER THEOLOGICAL SEMINARY,
Intervenor Plaintiff-Appellee,
versus
SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services;
THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor;
JACOB J. LEW, in his official capacity as Secretary of the United States Department of Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR;
UNITED STATES DEPARTMENT OF TREASURY,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
No. 4:12-CV-3009

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No. 14-10241

UNIVERSITY OF DALLAS,
Plaintiff-Appellee,
versus
SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services;
THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor;
JACOB J. LEW, in his official capacity as Secretary of the United States Department of Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR;
UNITED STATES DEPARTMENT OF TREASURY,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
No. 4:12-CV-314

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No. 14-40212

CATHOLIC DIOCESE OF BEAUMONT;

CATHOLIC CHARITIES OF SOUTHEAST TEXAS, INCORPORATED,

Plaintiffs-Appellees,

versus

SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services;

THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor;

JACOB J. LEW, in his official capacity as Secretary of the United States Department of Treasury;

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

UNITED STATES DEPARTMENT OF LABOR;

UNITED STATES DEPARTMENT OF TREASURY,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas
No. 1:13-CV-709

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No. 14-10661

CATHOLIC CHARITIES , DIOCESE OF FORTH WORTH, INCORPORATED

Plaintiff-Appellee,

versus

SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of the U.S. Department of Health and Human Services;
THOMAS PEREZ, in his official capacity as Secretary of the U.S. Department of Labor;
JACOB J. LEW, in his official capacity as Secretary, U.S. Department of Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR;
UNITED STATES DEPARTMENT OF TREASURY,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
No. 4:12-CV-314

ON PETITION FOR REHEARING EN BANC
(Opinion June 22, 2015, 793 F.3d 449)

Before REAVLEY, SMITH, and GRAVES, Circuit Judges.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

In the en banc poll, 4 judges voted in favor of rehearing (Judges Jones, Clement, Owen, and Elrod),

and 11 judges voted against rehearing (Chief Judge Stewart and Judges Jolly, Davis, Smith, Dennis, Prado, Southwick, Haynes, Graves, Higginson, and Costa).

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

* * * * * * *

JONES, Circuit Judge, joined by CLEMENT and OWEN, Circuit Judges, dissenting from Denial of Rehearing En Banc,

This case goes to the heart of religious liberty protected by the Religious Freedom Restoration Act ("RFRA"). That the panel's decision, like those of other circuit courts, rejects these religious institutions' free exercise of their faith is ironic and tragic. How ironic that this most consequential claim of religious free exercise, with literally millions of dollars in fines and immortal souls on the line, should be denied when nearly every other individual religious freedom claim has been upheld by this court. How tragic to see the humiliation of sincere religious practitioners, which, coming from the federal government and its courts, implicitly denigrates the orthodoxy to which their lives bear testament. And both ironic and tragic is the harm to the Judeo-Christian heritage whose practitioners brought religious toleration to full fruition in this nation. Undermine this heritage, as our founders knew, and the props of morality and civic virtue will be

destroyed.[1] As an example to other courts, ours should have corrected the panel's grave error en banc.

Because much has been written about these particular issues in a clear Eighth Circuit opinion[2] and several elegant dissents,[3] we add only a few points.

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[1] George Washington, Farewell Address to the People of the United States (Sept. 19, 1796) ("Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man ought to respect and to cherish them."); Letter from John Adams to Zabdiel Adams (June 21, 1776), *in* 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 401 (Charles Francis Adams ed. Little, Brown & Co. 1854) ("[I]t is religion and morality alone, which can establish the principles upon which freedom can securely stand. The only foundation of a free constitution is pure virtue.").

[2] *Sharpe Holdings, Inc. v. U.S. Dep't. of Health & Human Servs.*, ___ F.3d ___, 2015 WL 5449491 (8th Cir. Sept. 17, 2015).

[3] *Grace Sch. v. Burwell*, ___ F.3d ___, 2015 WL 516784, at * 17 (7th Cir. Sept. 4, 2015) (Manion, J., dissenting); *Little Sisters of the Poor Home for the Aged v. Burwell*, ___ F.3d ___, 2015 WL 5166807, at *1 (10th Cir. Sept. 3, 2015) (Hartz, J., dissenting from denial of rehearing en banc) (joined by Kelly, Tymkovich, Gorsuch, and Holmes, J.J.); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, ___ F.3d ___, 2015 U.S.App. LEXIS 8326, at *15, *42 (D.C. Cir. May 20, 2015) (Brown, J. and Kavanaugh, J., dissenting from denial of rehearing en banc); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1208 (10th Cir. 2015) (Baldock, J. dissenting); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 626 (7th Cir. 2015) (Flaum, J., dissenting); *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*,756 F.3d 1339, 1340 (11th Cir. 2014) (Pryor, J., specially concurring).

The panel opinion denied religiously affiliated institutions' RFRA challenge to the "accommodation" provided by HHS in administering the Affordable Care Act ("ACA"). Under RFRA, the federal government may sustain a regulation against the claim that it substantially burdens a person's exercise of religion only if the government demonstrates a compelling interest and adopts the least restrictive means to further the interest. 42 U.S.C. § 2000bb-1(a), (b). The ACA requires covered employers to provide health care insurance that includes emergency contraceptive services.[4] Only last year, the Supreme Court applied RFRA to exempt a corporation owned by sincere religious believers who opposed the contraceptive mandate from complying with the requirement. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

The HHS "accommodation" offered in this case requires each religiously affiliated institution to fill out forms that effectuate contraceptive insurance coverage for their employees without direct payments by the institutions. These institutions assert, without dispute, that complying with the "accommodation" violates their sincerely held religious beliefs that they would become morally complicit in furnishing services that involve the destruction of human life at or shortly after

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[4] 42 U.S.C. § 300gg-13(a)(4); Group Health Plans and Health Insurance Insurers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725-26 (Feb. 15, 2012). Department of Health and Human Services regulations specifically exclude religious employers, such as churches and synagogues, from this mandate. 45 C.F.R. § 147.131.

conception. Also undisputed is that if they fail to comply with the "accommodation," they will incur millions of dollars in fines. The panel concluded, however, that the acts the institutions are required to perform "do not include providing or facilitating access to contraceptives." *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 459 (5th Cir. 2015). The panel simply disagreed with the institutions' view of what Christian theology demands. Finding no "substantial burden" on the institutions' religious exercise if they fill out the required forms, the panel never addressed the government's compelling interest or whether the "accommodation" is the least restrictive means to furnish insurance for emergency contraceptive services.

Based on this court's precedents, this should have been an easy case for upholding religious liberty. Within the past decade, this court has acknowledged that a substantial burden was placed on a person's religious exercise in nine claims under RFRA or related federal and state statutes;[5] this court denied only one claim that affected prison security, a compelling interest. The nine claims involved possession of eagle feathers for Native American worship; a Sikh's wearing a 3-inch kirpan (dagger); a Native American prisoner's possession of a lock of hair; a Muslim inmate's beard; long hair on a Native American high school student; Santeria practitioners' keeping and slaughtering four-legged animals; kosher food in prison; worship in a particular prison

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[5] *See* 42 U.S.C. § 2000cc-1(a)(1) (Religious Land Use and Institutionalized Persons Act); Tex. Civ. Prac. & Rem. Code § 110.003(a), (b) (Texas Religious Freedom Restoration Act).

setting; and possession of stones by Odinists in prison.[6] In none of the cases did this court find that

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[6] *See, e.g., McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014) (finding that a federal law prohibiting possession of bald eagle and golden eagle feathers substantially burdened the exercise of the Native American plaintiff's religious beliefs under RFRA); *Tagore v. United States*, 735 F.3d 324, 330 (5th Cir. 2013) (finding that an IRS employee who was prohibited from wearing a 3-inch kirpan blade in a federal building had the religious exercise of her Sikh faith substantially burdened under RFRA); *Chance v. Tex. Dep't of Criminal Justice*, 730 F.3d 404, 417 (5th Cir. 2013) (finding that preventing a Native American inmate from possessing a lock of hair from his deceased parents substantially burdened his exercise of religion under RLUIPA); *Garner v. Kennedy*, 713 F.3d 237, 244 (5th Cir. 2013) (assuming that Texas prison system's no-beard policy substantially burdened exercise of a prisoner's Muslim faith); *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 265-66 (5th Cir. 2010) (finding that a school district's requirement that a Native American student wear his long hair in a bun or tucked inside his shirt if braided was a substantial burden on the free exercise of his sincere religious belief in wearing his hair visibly long under the Texas Religious Freedom Restoration Act); *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 332-34 (5th Cir. 2009) (finding that, under RLUIPA, the Texas Department of Criminal Justice's ban on worship in a certain chapel substantially burdened a prisoner's religious exercise because alternative chapels did not contain Christian symbols or furnishings, such as an altar and cross); *Merced v. Kasson*, 577 F.3d 578, 591 (5th Cir. 2009) (finding that an ordinance prohibiting the keeping of animals for slaughter and the slaughtering of four-legged animals substantially burdened the religious exercise of adherents of the Santeria religion under the Texas Religious Freedom Restoration Act); *Mayfield v. Tex. Dep't of Criminal Justice*, 529 F.3d 599, 615 (5th Cir. 2009) (finding that the religious exercise of an adherent of the Odinist religion was substantially burdened by the Texas Department of Criminal Justice's policy preventing the unsupervised possession of

the secular regulation did not impose a "substantial" burden on the believers' free exercise of religion. Yet when these institutions' beliefs are predicated on a long history of Christian moral theology concerning complicity in immoral conduct, *Hobby Lobby*, 134 S.Ct. at 2778 & n.34, the panel here declared their concerns too "attenuated" to merit legal protection.

As a consequence of the panel's dismissal of the institutions' RFRA claim, three interrelated issues should have been addressed by this court en banc:

1. whether under RFRA, the courts decide the "substantiality" of a burden imposed by government regulations on sincerely held religious beliefs, or whether the believers' views are controlling;
2. whether the substantiality of a burden is measured by the degree of modification of the religious objector's behavior or by the severity of the penalty for noncompliance with the objectionable action;
3. whether under the "accommodation," the acts causing the provision of insurance coverage for services the institutions believe are immoral are truly "independent" of the institutions.

Had these issues been resolved favorably to the institutions, we would also have to rule on the compelling interest/least restrictive means aspects of

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runestones under RLUIPA); *Baranowski v. Hart*, 486 F.3d 112, 125 (5th Cir. 2007) (finding that the religious exercise of a Jewish prisoner was substantially burdened by the Texas Department of Criminal Justice's failure to provide kosher food under RLUIPA).

the RFRA claim. Because the three threshold issues have sparked lengthy debate and dissent in nearly every other circuit, we will not revisit the arguments here.

Nevertheless, it seems decisive that the Supreme Court rejected the government's contention in *Hobby Lobby* that the link between mandated emergency contraceptive coverage and the destruction of human embryos was "too attenuated." *Id.* at 2777. The Court explained:

> This argument 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). . . . [The plaintiffs'] 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 . . . in effect tell[s] the plaintiffs their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.

Id. at 2778. At the least, *Hobby Lobby* says the decision on whether a person's government-compelled

act is "attenuated" from the immorality that follows poses a religious and ethical question that courts may not second-guess. *Hobby Lobby* also says, contrary to implications in the panel's decision here, that the Court is not ruling on the constitutionality of the accommodation regulation itself. *Id*. at 2763 n.9, 2782.

Second, the district court granted an injunction against HHS's enforcement of the "accommodation" regulation for some of these plaintiffs. *E. Tex. Baptist Univ. v. Sebelius*, 988 F.Supp.2d 743 (S.D. Tex. 2013). The court found a clear connection between the acts that the plaintiffs here are required to perform and the consequences, *i.e.* the provision of emergency contraceptive services to the institutions' employees: "It is the insurance plan that the religious-organization employer put into place, the issuer or TPA the employer contracted with, and the self-certification form the employer completes and provides the issuer or TPA, that enable the employees to obtain the free access to the contraceptive devices that the plaintiffs find religiously offensive." *Id*. at 768-69. The court went on to find that the government demonstrated no compelling interest in requiring the institutions to comply with the "accommodation" regulation, nor did HHS employ the least restrictive means to achieve its goal. Curiously, the panel opinion never joins issue with the trial court's reasoning.

Third, recent opinions of the Eighth Circuit and a dissent in the Seventh Circuit explain in a detailed review of the regulations how the filing of the forms required of these institutions is the sine qua non, the but-for cause, the indisputable link to the provision of

contraceptive coverage to their employees. *Sharpe Holdings, Inc. v. U.S. Dep't. of Health & Human Servs.*, ___ F.3d ___, 2015 WL 5449491 (8th Cir. Sept. 17, 2015); *Grace Sch. v. Burwell*, ___ F.3d ___, 2015 WL 516784, at * 17 (7th Cir. Sept. 4, 2015) (Manion, J., dissenting).

Finally, this case is not controlled by *Bowen v. Roy*, 476 U.S. 693 (1986), and the related cases cited by the panel; in contradistinction to those cases, these plaintiffs are required to perform acts that put into motion the steps necessary to enable their employees to obtain contraceptive coverage they would not otherwise have received. The plaintiffs in the "government acts" cases cited by the panel performed no such acts that, to them, were morally abhorrent.

Conscience is the essence of a moral person's identity. Thomas More went to the scaffold rather than sign a little paper for the King. Liberty of conscience was the foundation for Madison's and Jefferson's and other Framers' views underlying the First Amendment's religion clauses. We end with two questions about the instant case. If the government's "accommodation" forms are really "independent" of the provision of free contraceptive insurance to religious institutions' employees, why does the government insist on requiring them? And if the forms are not "independent" but indeed inseparable from the "attenuated" consequences, how can HHS or the federal courts thrust them on religious believers under the false nomer of "accommodation"?

We dissent.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-20112

EAST TEXAS BAPTIST UNIVERSITY; HOUSTON BAPTIST UNIVERSITY,

Plaintiffs–Appellees,

WESTMINSTER THEOLOGICAL SEMINARY,

Intervenor Plaintiff–Appellee,

versus

SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services;

THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor;

JACOB J. LEW, in his official capacity as Secretary of the United States Department of Treasury;

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

UNITED STATES DEPARTMENT OF LABOR;

UNITED STATES DEPARTMENT OF TREASURY,

Defendants–Appellants.

Appeal from the United States District Court
for the Southern District of Texas
No. 4:12-CV-3009

* * * * * * * * * * * * * * *

No. 14-10241

UNIVERSITY OF DALLAS,
Plaintiff–Appellee,

versus

SYLVIA MATHEWS BURWELL, in her official capacity as
Secretary of the United States Department of Health and Human Services;

THOMAS PEREZ, in his official capacity as
Secretary of the United States Department of Labor;

JACOB J. LEW, in his official capacity as
Secretary of the United States Department of Treasury;

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

UNITED STATES DEPARTMENT OF LABOR;

UNITED STATES DEPARTMENT OF TREASURY,
Defendants–Appellants.

Appeal from the United States District Court
for the Northern District of Texas
No. 4:12-CV-314

* * * * * * * * * * * * * * *

No. 14-40212

CATHOLIC DIOCESE OF BEAUMONT; CATHOLIC CHARITIES OF SOUTHEAST TEXAS, INCORPORATED,

Plaintiffs–Appellees,

versus

SYLVIA MATHEWS BURWELL, in her official capacity as
Secretary of the United States Department of Health and Human Services;

THOMAS PEREZ, in his official capacity as
Secretary of the United States Department of Labor;

JACOB J. LEW, in his official capacity as
Secretary of the United States Department of Treasury;

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

UNITED STATES DEPARTMENT OF LABOR;

UNITED STATES DEPARTMENT OF TREASURY,

Defendants–Appellants.

Appeal from the United States District Court
for the Eastern District of Texas
No. 1:13-CV-709

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No. 14-10661

CATHOLIC CHARITIES, DIOCESE OF FORT WORTH, INCORPORATED,

Plaintiff–Appellee,

versus

SYLVIA MATHEWS BURWELL, in her official capacity as

Secretary of the U.S. Department of Health and Human Services;

THOMAS PEREZ, in his official capacity as

Secretary of the U.S. Department of Labor;

JACOB J. LEW, in his official capacity as

Secretary, U.S. Department of Treasury;

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

UNITED STATES DEPARTMENT OF LABOR;

UNITED STATES DEPARTMENT OF TREASURY,

Defendants–Appellants.

Appeal from the United States District Court
for the Northern District of Texas
No. 4:12-CV-314

O R D E R:

The unopposed motion of the appellees to stay issuance of the mandate pending the filing of a petition for writ of certiorari is GRANTED.

/s/ Jerry E. Smith
JERRY E. SMITH

United States Circuit
Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROMAN CATHOLIC DIOCESE OF FORT WORTH; UNIVERSITY OF DALLAS; OUR LADY OF VICTORY CATHOLIC SCHOOL; CATHOLIC CHARITIES, DIOCESE OF FORT WORTH, INC.,	
Plaintiffs,	
v.	**Civil Action No. 4:12-CV-314-Y**
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 Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN	**DEMAND FOR JURY TRIAL**

SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF TREASURY	)))))
Defendants.	)))

DECLARATION OF THOMAS W. KEEFE

I, Thomas W. Keefe, on behalf of the University of Dallas, declare and state as follows:

1. I am over the age of eighteen (18) and competent to make this statement. I submit this declaration in support of Plaintiffs' Motion for Preliminary Injunction and Summary Judgment in the above-captioned matter.

2. I have served as the President of the University of Dallas ("UD") since March 1, 2010.

3. As UD's President, I am very familiar with UD's mission, religious beliefs, and health insurance policy. The facts set forth in this declaration are based upon my personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

4. UD is an academic community of higher learning, organized as a private, independent Catholic, co-educational, liberal arts university in Irving, Texas. Incorporated in 1955 and founded in 1956 by the Western Province of the Sisters of Saint Mary of Namur to be a co-educational institution welcoming students of all faiths and backgrounds, the University seeks to provide a Catholic

environment that prepares students spiritually and intellectually for their future vocations and careers.

5. As described in its mission statement, "The University as a whole is shaped by the long tradition of Catholic learning and acknowledges its commitment to the Catholic Church and its teaching. The University is dedicated to the recovery of the Christian intellectual tradition, and to the renewal of Catholic theology in fidelity to the Church and in constructive dialogue with the modem world It seeks to maintain the dialogue of faith and reason in its curriculum and programs without violating the proper autonomy of each of the arts and sciences."

6. Over 1,300 students are currently enrolled in the University's undergraduate programs, and another 1,300 are enrolled in its graduate programs.

7. The school maintains a full-time faculty of approximately 125 members and over 100 adjunct faculty members. In total, the University employs approximately 500 full- and part-time individuals, 356 of whom were benefits-eligible as of August 2013.

8. Faith is at the heart of all of the University's efforts, and the University's commitment to Catholic teachings permeates campus life. Many undergraduates are housed on campus in residence halls that are predominantly single-sex, and rooms for male students and female students in co-educational residence halls are separated by floor or wing. The University maintains visiting hours that forbid male students from being in female dormitories overnight and vice versa.

9. The University does not make contraception available to its students, faculty, or staff at its on-campus health care facility.

10. The University's Catholic educational mission is furthered by its leadership. The President of the University has always been a Catholic, and the University's President from 1996-2003 was a cleric, Monsignor Milam J. Joseph. The University's Board of Trustees is entrusted with supervising the management of the University and determining University policy. A majority of the Trustees on the University's Board are Catholic, and two clerics currently serve as trustees: Most Reverend Kevin F. Farrell, Bishop of Dallas; and Monsignor Greg Kelly.

11. A significant percentage of the University's annual funds are raised from Catholics, including alumni, who donated, and continue to donate, to further its mission.

12. I am informed that the University does not 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 exemption to the U.S. Government Mandate.

13. The University is a member of a healthcare consortium called Collegiate Association Resource of the Southwest ("CARES"). The University is part of a partially self-insured benefits plan with a voluntary employees' beneficiary association trust offered to employees through the CARES consortium. The University pays a premium to the CARES consortium. That premium is placed in a pool designated for the University that is used to pay the claims of its

employees and their eligible dependents, reserve requirements, administrative expenses, and stop loss insurance. Under this plan, the University pays for its employees' claims, including all claims for covered preventive services, subject to an individual stop-loss limit.

14. For medical benefits, the CARES plan is administered by a third-party administrator, Blue Cross/Blue Shield of Texas. Prescription-drug benefits, however, are administered by Express Scripts, a separate third-party administrator.

15. As I mentioned above, the University's Catholic faith is at the heart of its education mission. The Catholic Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral. Accordingly, the University will never provide the objectionable services to its employees because each such service violates Catholic teachings.

16. The CARES plan offered by the University to its employees does not cover abortion-inducing products or sterilization. Consistent with Church teachings, the University's plan covers products commonly used as contraceptives only when prescribed with the intent of treating a medical condition, not with the intent to prevent pregnancy.

17. The CARES plan offered by the University provides rich coverage with a very low cost to employees. Co-pays and employee premiums are very low, especially given the University's size. The

generosity of the plans springs from the University's religious mission.

18. The University's CARES plan year begins on January 1.

19. Because the CARES plan year begins on January 1, the University must be prepared to comply with the regulations at issue in this lawsuit (the "Mandate"), by that date.

20. The CARES plan offered by the University to its employees does not meet the definition of a "grandfathered" plan within the meaning of the Affordable Care Act. The plan was changed after March 23, 2010. In January 2011, the University changed plan administrators from CIGNA to Blue Cross / Blue Shield of Texas. Additionally, the University has not included a statement in plan materials provided to participants or beneficiaries informing them that it believes its plan is a grandfathered health plan within the meaning of section 1251 of the Affordable Care Act.

21. The University also makes several health plans available to its students and their eligible dependants. For domestic students enrolled at the University's Irving campus, the University offers a health plan provided by Aetna. International students enrolled at the University's Irving campus are offered a health plan provided by Starr Indemnity & Liability Co. Domestic students studying at the University's overseas campus in Rome can receive insurance through STA Travel/ISIC Basic Travel Insurance Plan.

22. Like the University's employee plan, the plans offered to its students do not cover abortion-inducing

products or sterilization. The health plans the University offers to its students covers products commonly used as contraceptives only when prescribed with the intent of treating a medical condition, not with the intent to prevent pregnancy or induce abortion.

23. The plan years for the University's student health plans begin on August l.

24. The health plans offered by the University to its students do not meet the Affordable Care Act's definition of "grandfathered" plans. The University has not included a statement in plan materials provided to participants or beneficiaries informing them that it believes its plan is a grandfathered health plan within the meaning of section 1251 of the Affordable Care Act.

25. The Mandate requires employers, on pain of substantial financial penalties, to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling through their employer health-care plan.

26. The so-called "accommodation" does not resolve the University's religious objection. The Mandate, even in its revised form, forces the University to take actions that facilitate access to products and services antithetical to the Catholic faith. Among other things, the University's employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of the University's decision to provide health coverage. The University would also be required to self-certify its religious objection, which will trigger the provision of the mandated coverage.

This mandated coverage will be made available to the University's employees only for so long as they remain on the University's plan. The University will be forced to further facilitate access to the mandated coverage by, among other things, identifying its benefits-eligible employees for the insurance company or third party administrator. Ultimately, under both the original and final versions of the Mandate, the University is forced, in violation of its sincerely held religious beliefs, to participate in a scheme that provides its employees with access to contraceptive benefits.

27. For similar reasons, facilitating access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling through its student health-care plan in the manner required by the Mandate would also violate the University's sincerely held religious beliefs.

28. Moreover, as a Catholic entity, the University bears a particular responsibility to witness to the Church's teachings. The University bears witness to those teachings not only by word, but also by deed, including its actions regarding the provision of employee health insurance. Were the University to comply with the Mandate, in addition to impermissibly facilitating access to the objectionable products and services, the University would commit the further offense of giving scandal by acting in a way inconsistent with Church teachings.

29. Compliance with the Mandate would be contrary to the University's beliefs even in the event that the University does not directly fund the

objectionable products and services. Of course, any use of the University's funds to provide the mandated products and services would only exacerbate the violation of the University's religious beliefs.

30. There is no resolution to the dilemma created by the Mandate for the University. Even eliminating the employee group health plan in its entirety fails to resolve the injuries to the University caused by the implementation of the Mandate.

31. Beginning January 1, 2014, the University will be exposed to significant liability. The University employs approximately 500 full- and part-time individuals, 356 of whom were benefits-eligible as of August 2013. If the University ceases offering employee health plans or fails to provide the required coverage, the University will face fines of $2,000 per employee after the first thirty (30) employees per year or $100 per individual per day.

32. Potential liability for significant fines and uncertainty regarding the University's ability to offer and provide health benefits undermines the University ability to retain and recruit employees and students. Were the University to stop offering health benefits, it would be at a competitive disadvantage to institutions who do not have religious objections to the Mandate.

33. Further adding to the uncertainty surrounding UD's health plan, UD is also uncertain about how its third party administrators will handle implementation of the accommodation, if the accommodation is invoked. UD has contacted its third party administrators as recently as October 1, 2013 to inquire about how the

accommodation would be implemented and the administrators not sure how they would implement it.

34. The Mandate places substantial pressure on the University to violate its sincerely held religious beliefs by threatening fines and other negative consequences if the University refuses to facilitate access to the objectionable products and services.

35. The University is further harmed by the Mandate's attempt at creating an artificial separation between the University from the Catholic Church.

36. Despite being inextricably connected to the Church and governed by its mission and beliefs, the University falls outside the scope of the so-called "religious employer" exemption, leaving it without protection from the Mandate's requirements.

37. The Mandate splits the Catholic Church in two, a religious wing and a charitable wing, the former which is exempt from the Mandate and the latter which is not – preventing the Church from exercising supervisory authority over its constituents in a way that ensures compliance with Church teachings.

38. I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 4, 2013.

/s/ *Thomas W. Keefe*
Thomas W. Keefe

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

ROMAN CATHOLIC DIOCESE OF FORT WORTH; UNIVERSITY OF DALLAS; OUR LADY OF VICTORY CATHOLIC SCHOOL; CATHOLIC CHARITIES, DIOCESE OF FORT WORTH, INC.,	
Plaintiffs,	
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 Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF TREASURY,	**Civil Action No. 4:12-CV-314-Y** **DEMAND FOR JURY TRIAL**

)
Defendants.)

DECLARATION OF MARY M. GOOSENS

I, Mary M. Goosens, on behalf of Catholic Charities, Diocese of Fort Worth, Inc., declare and state as follows:

1. I am over the age of eighteen (18) and competent to make this statement. I submit this declaration in support of Plaintiffs' Motion for Preliminary Injunction and Summary Judgment in the above-captioned matter.

2. I am the Vice President of Administration and CFO of Catholic Charities, Diocese of Fort Worth, Inc. ("Catholic Charities"). l have served in this capacity since January 1, 2010.

3. Due to my responsibilities as VP of Administration and CFO, I am very familiar with Catholic Charities' mission, religious beliefs, and health insurance policy. The facts set forth in this declaration are based upon my personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

4. Catholic Charities, one of the largest nongovernmental social service providers in the region, annually provides services to over 120,000 people. It "is a faith-driven, service driven, and forward-driven organization committed to living out the commission of Jesus Christ throughout the diocese of Fort Worth by welcoming the stranger, caring for children, and strengthening families."

5. To that end, it carries out the mandates of the Gospel and the social teaching of the Church through works of Christian charity, service, and social justice by providing competent and caring social services, special assistance to those in great need, and programs of community outreach and advocacy using the skills and talents of professional staff and volunteers. Catholic Charities pursues these goals through its own programs and through partnerships with parishes, community groups, and governmental agencies.

6. Over forty programs run by Catholic Charities provide a panoply of services to the community. These programs are "designed to combat poverty by promoting self sufficiency through a range of solutions including helping the homeless, sheltering at "risk children, teaching financial literacy courses, resettling refugees, and much more."

7. Catholic Charities has approximately 272 full-time and 60 part-time employees.

8. Catholic Charities is a member-director corporation.

9. I am informed that Catholic Charities does not qualify as an entity described in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. Accordingly, Catholic Charities does not qualify as a "religious employer" under the exemption to the U.S. Government Mandate.

10. Catholic Charities employees are offered health insurance through CIGNA, an insurance company. The plan does not cover abortion, contraceptives, or sterilization.

11. Due to plan changes in 2010 and 2011, the group health insurance plan offered by Catholic Charities to its employees does not meet the definition of a "grandfathered" plan within the meaning of the Affordable Care Act. Additionally, Catholic Charities has not included a statement in plan materials provided to participants or beneficiaries informing them that it believes its plan is a grandfathered health plan within the meaning of section 1251 of the Affordable Care Act.

12. Catholic Charities' plan year begins August l.

13. Catholic Charities' Catholic faith is at the heart of its charitable mission. The Catholic Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral. Accordingly, Catholic Charities will never provide the objectionable services to its employees because each such service violates Catholic teachings.

14. Catholic Charities is required by the Mandate to facilitate access to abortion inducing products, artificial contraception, medical sterilization procedures, and related counseling through their employer health-care plan.

15. The so-called "accommodation" does not resolve Catholic Charities' religious objection. The Mandate, even in its revised form, forces Catholic Charities to take actions that facilitate access to products and services antithetical to the Catholic faith. Among other things, Catholic Charities

employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of Catholic Charities' decision to provide health coverage. Catholic Charities would also be required to self-certify its religious objection, which will trigger the provision of the mandated coverage. This mandated coverage will be made available to the Catholic Charities' employees only for so long as they remain on the Catholic Charities plan. Catholic Charities will be forced to further facilitate access to the mandated coverage by, among other things, identifying its benefits-eligible employees for the insurance company. Ultimately, under both the original and final versions of the Mandate, Catholic Charities is forced, in violation of its sincerely held religious beliefs, to participate in a scheme that provides its employees with access to contraceptive benefits.

16. Moreover, as a Catholic entity, Catholic Charities bears a particular responsibility to witness to the Church's teachings. Catholic Charities bears witness to those teachings not only by word, but also by deed, including its actions regarding the provision of employee health insurance. Were Catholic Charities to comply with the Mandate, in addition to impermissibly facilitating access to the objectionable products and services, Catholic Charities would commit the further offense of giving scandal by acting in a way inconsistent with Church teachings.

17. Compliance with the Mandate would be contrary to Catholic Charities' beliefs even in the event that Catholic Charities does not directly fund the objectionable products and services. Of course, any use of Catholic Charities' funds to provide the

mandated products and services would only exacerbate the violation of Catholic Charities' religious beliefs.

18. There is no resolution to the dilemma created by the Mandate for Catholic Charities. Even eliminating the employee group health plan in its entirety fails to resolve the injuries to Catholic Charities caused by the implementation of the Mandate. If Catholic Charities ceases offering employee health plans or fails to provide the required coverage, Catholic Charities will face fines of $2,000 per employee after the first thirty (30) employees per year or $100 per individual per day.

19. Potential liability for significant fines and uncertainty regarding Catholic Charities' ability to offer and provide health benefits undermines Catholic Charities' ability to retain and recruit employees. Were Catholic Charities to stop offering health benefits, it would be at a competitive disadvantage to institutions who do not have religious objections to the Mandate.

20. The Mandate places substantial pressure on Catholic Charities to violate its sincerely held religious beliefs by threatening fines and other negative consequences if Catholic Charities refuses to facilitate access to the objectionable products and services.

21. Catholic Charities is further harmed by the Mandate's attempt at creating an artificial separation between Catholic Charities from the Catholic Church and, in particular, the Roman Catholic Diocese of Fort Worth.

22. Catholic Charities is the social justice arm of the church. Each year, Catholic Charities receives funding from the Diocese through an annual appeal.

23. Despite being inextricably connected to the Church and the Diocese, and being governed by the Church's mission and beliefs, Catholic Charities falls outside the scope of the so-called "religious employer" exemption, leaving it without protection from the Mandate's requirements.

24. The Mandate splits the Catholic Church in two, a religious wing and a charitable wing, the former which is exempt from the Mandate and the latter which is not – preventing the Church from exercising supervisory authority over its constituents in a way that ensures compliance with Church teachings.

25. I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 8, 2013.

_____

Mary M. Goosens

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

CATHOLIC DIOCESE OF BEAUMONT; CATHOLIC CHARITIES OF SOUTHEAST TEXAS, INC., **Plaintiffs** **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 Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF**	**Civil Action No.: 1:13-cv-00709-RC** **DEMAND FOR JURY TRIAL**

TREASURY	)
	)
Defendants.	)
	)

DECLARATION OF BISHOP CURTIS J. GUILLORY, S.V.D., D.D.

I, Bishop Curtis J. Guillory, on behalf of the Roman Catholic Diocese of Beaumont ("Diocese"), declare and state as follows:

1. I am over the age of eighteen (18) and competent to make this statement. I submit this declaration in support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction in the above-captioned matter.

2. I have served as the Bishop of the Diocese from 2002 to the present time. As Bishop, I am responsible for the Diocese.

3. I am very familiar with the Diocese's mission, religious beliefs, and the Diocese's health insurance policy. The facts in this declaration are based upon my personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

4. The Diocese is a nonprofit religious organization organized and existing according to the Code of Canon Law of the Roman Catholic Church and recognized by the State of Texas.

5. The Diocese employs over 950 people, approximately 370 of whom are currently eligible for health plan benefits offered through the Diocese.

6. The Diocese carries out a tripartite spiritual, educational, and social service mission, reflecting the

several dimensions of its ministry. This mission is rooted in and animated by the Roman Catholic faith, shared by all parishioners in our parishes and schools.

7. The spiritual ministry of the Diocese is conducted largely through its parishes. Through the ministry of its priests, the Diocese ensures the regular availability of the sacraments to all Catholics living in or visiting Beaumont and the surrounding 9 counties.

8. The educational ministry of the Diocese is conducted through its schools and Religious Education Programs. The Diocese includes 3 Parish schools and 2 diocesan schools that serve approximately 1,088 students. The Religious Education Programs in our 44 parishes and 7 missions serve over 6,304 children.

9. Much of the Diocese's social service and charitable work is performed through its parishes and missions, which, like the schools discussed above, are organized as part of the Diocese.

10. Furthermore, the Diocese also provides services to the poor and vulnerable through an independent entity, Catholic Charities of Southeast Texas (which is separately incorporated) that is closely aligned with the Church and comports itself in accordance with Church teaching. Catholic Charities employs 18 people, 9 of whom are currently eligible for coverage on the diocesan health plan.

11. Consistent with Church teachings on social justice, the Diocese makes health insurance benefits available to its religious personnel, seminarians, and full-time employees working at least 30 hours a week through the diocesan health plan.

12. The Diocese is part of the Roman Catholic Church. The Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral.

13. Offering a health insurance plan that provides coverage for or facilitates access to abortion-inducing products, contraceptives, sterilization, and related education and counseling is thus inconsistent with the core moral and religious beliefs of the Diocese.

14. The Diocese provides its employees' health plan through the Christian Brothers Employee Benefit Trust, a self-funded church plan which serves employers of the Catholic Church by providing medical benefits to health plan participants. Health plan materials specifically state that "the Trust works within the framework of the tenets of the Catholic Church." To that end, the Trust health plan does not cover abortion or sterilization drugs or services, nor does it cover contraceptives except when prescribed to treat a medical illness and approved by the Trust.

15. The Diocese's employee health plan does not meet the Affordable Care Act's definition of a "grandfathered" plan.

16. The plan year for the Diocese (and Catholic Charities as an adopting employer) begins on March 1.

17. The Mandate requires employers, on pain of substantial financial penalties, to facilitate access to abortion-inducing products, artificial contraception,

medical sterilization procedures, and related counseling through their employer health-care plans.

18. Consistent with Church teachings regarding the sanctity of life, the diocesan health plan has historically excluded coverage for abortion, contraceptives (except when used for non-contraceptive purposes), sterilization, and related education and counseling.

19. Though the Diocese meets the Mandate's definition of a religious employer and is thus exempt from facilitating access to the mandated products and services for its own employees, this exemption does not apply to the employees of non-exempt, affiliated entities such as Catholic Charities which participates in the Diocesan Employee Health Plan.

20. Catholic Charities is charged by the Diocese of Beaumont to defend and insure the preservation of human dignity by reflecting the values and tenets of the Catholic Church, while showing no preference for any particular religion when serving those in need. In my capacity as Bishop of the Diocese, I am responsible for the adherence by Catholic Charities to the teachings and beliefs of the Roman Catholic Church.

21. The Mandate artificially splits the Diocese (and the Catholic Church for that matter) in two: a religious wing and a charitable wing. The former is to be exempt from the Mandate and the latter is not—preventing the Diocese from exercising supervisory authority over its constituent Catholic Charities in a way that ensures compliance with Church teachings and beliefs.

22. The Mandate thus interferes with the Church's ability to ensure that its various charitable and educational ministries adhere to Church teaching through participation in a single insurance plan. By serving as the insurance provider for Catholic Charities, the Diocese can directly ensure that Catholic Charities offers its employees a health plan that is in all ways consistent with Catholic beliefs.

23. The Mandate disrupts this internal arrangement by forcing the Diocese to either (i) facilitate, through its insurance plan, the provision of contraception, abortion-inducing products, sterilization, and related counseling to employees of Catholic Charities (a non-exempt entity) from participating in the Diocese's plans; or (ii) expel Catholic Charities from its plans, thereby forcing it as a non-exempt organizations to enter into an arrangement with another insurance provider or third-party administrator that will, in turn, be required to provide the objectionable products and services to their employees.

24. The first option forces the Diocese to act contrary to its sincerely-held religious beliefs. The second option not only makes the Diocese complicit in the provision of objectionable coverage, by forcing Catholic Charities out of its plan and to obtain the objectionable coverage through another insurance provider, but also compels the Diocese to submit to the Government's interference with its structure and internal operations by accepting a construct that divides churches from their ministries.

25. Moreover, as a Catholic entity, the Diocese bears a particular responsibility to witness to the

Church's teachings. The Diocese bears witness to those teachings not only by word, but also by deed, including its actions regarding the provision of employee health insurance. Were the Diocese to sponsor a plan that triggered the provision of objectionable products and services to the employees of its affiliated entities or expel those organizations from its plan, the Diocese would commit the further offense of giving scandal by acting in a way inconsistent with Church teachings.

26. Taking action that would trigger the provision of the objectionable products and services for the employees of its affiliated entities would be contrary to the Diocese's beliefs even if the Diocese does not directly fund the objectionable coverage. Of course, any use of the Diocese's funds to provide the mandated products and services would only exacerbate the violation of the Diocese's religious beliefs.

27. The Diocese provides health benefits to its employees because it follows the Catholic social teaching that health care is among those basic rights which flow from the sanctity and dignity of human life. To drop health care benefits—in order to avoid the provision of objectionable drugs and services—would inhibit the Diocese's ability to follow this teaching.

28. Potential liability for significant fines and uncertainty regarding the Diocese's ability to offer and provide health benefits undermines Diocese's ability to retain and recruit employees. Were the Diocese to stop offering health benefits, it would be at

a competitive disadvantage to institutions to who do not have religious objections to the Mandate.

29. The Mandate places substantial pressure on the Diocese to violate its sincerely held religious beliefs by threatening fines and other negative consequences if the Diocese refuses to facilitate access to the objectionable products and services.

30. I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 10, 2013

/s/ *Curtis J. Guillory*
Bishop Curtis J. Guillory, S.V.D., D.D.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

CATHOLIC DIOCESE OF BEAUMONT; CATHOLIC CHARITIES OF SOUTHEAST TEXAS, INC., *Plaintiffs,* **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 Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF**	**Civil Action No.: 1:13-cv-00709-RC** **DEMAND FOR JURY TRIAL**

TREASURY,)
)
Defendants.)
)

DECLARATION OF CAROLYN R. FERNANDEZ

I, Carolyn R. Fernandez, on behalf of Catholic Charities of Southeast Texas, Inc., declare and state as follows:

1. I am over the age of eighteen (18) and competent to make this statement. I submit this declaration in support of Plaintiffs' Motion for Temporary Restraining Order and for Preliminary Injunction in the above-captioned matter.

2. I am the President and CEO of Catholic Charities of Southeast Texas, Inc. ("Catholic Charities"). I have served in this capacity since 2009. I began my service in the Catholic Charities network in 2007.

3. Due to my responsibilities as President and CEO, I am very familiar with Catholic Charities' mission, religious beliefs, and health insurance policy. The facts set forth in this declaration are based upon my personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

4. Catholic Charities annually provides services to approximately 6,000 people. It "is a faith-driven, service-driven, and forward-driven organization committed to living out the commission of Jesus Christ throughout the Diocese of Beaumont by

welcoming the stranger, caring for children, and strengthening families."

5. To that end, it carries out the mandates of the Gospel and the social teaching of the Church through works of Christian charity, service, and social justice by providing competent and caring social services, special assistance to those in great need, and programs of community outreach and advocacy using the skills and talents of professional staff and volunteers. Catholic Charities pursues these goals through its own programs and through partnerships with parishes, community groups, and governmental agencies.

6. The seven programs of Catholic Charities bring child and family services, emergency assistance, financial and homebuyer education, daily food service, immigration legal assistance, grief support and counseling services to the community.

7. Catholic Charities has ten full-time and seven part-time employees.

8. Catholic Charities is a member-director corporation.

9. I am informed that Catholic Charities does not qualify as an entity described in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. Accordingly, Catholic Charities does not qualify as a "religious employer" under the exemption to the U.S. Government Mandate.

10. Catholic Charities employees are offered health insurance through the Diocese of Beaumont. The plan does not cover abortion, contraceptives, or sterilization.

11. Due to plan changes in 2010 and 2011, the group health insurance plan offered to Catholic Charities employees through the Diocese does not meet the definition of a "grandfathered" plan within the meaning of the Affordable Care Act. Additionally, Catholic Charities has not included a statement in plan materials provided to participants or beneficiaries informing them that it believes its plan is a grandfathered health plan within the meaning of section 1251 of the Affordable Care Act.

12. Catholic Charities' plan year begins March 1.

13. Catholic Charities' Catholic faith is at the heart of its charitable mission. The Catholic Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral. Accordingly, Catholic Charities will never provide the objectionable services to its employees because each such service violates Catholic teachings.

14. Catholic Charities is required by the Mandate to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling through their employer health-care plan.

15. The so-called "accommodation" does not resolve Catholic Charities' religious objection. The Mandate, even in its revised form, forces Catholic Charities to take actions that facilitate access to products and services antithetical to the Catholic faith. Among other things, Catholic Charities'

employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of Catholic Charities' decision to provide health coverage. Catholic Charities would also be required to self-certify its religious objection, which will trigger the provision of the mandated coverage. This mandated coverage will be made available to the Catholic Charities' employees only for so long as they remain on the Diocese of Beaumont's plan. Catholic Charities will be forced to further facilitate access to the mandated coverage by, among other things, identifying its benefits-eligible employees for the insurance company. Ultimately, under both the original and final versions of the Mandate, Catholic Charities is forced, in violation of its sincerely held religious beliefs, to participate in a scheme that provides its employees with access to contraceptive benefits.

16. Moreover, as a Catholic entity, Catholic Charities bears a particular responsibility to witness to the Church's teachings. Catholic Charities bears witness to those teachings not only by word, but also by deed, including its actions regarding the provision of employee health insurance. Were Catholic Charities to comply with the Mandate, in addition to impermissibly facilitating access to the objectionable products and services, Catholic Charities would commit the further offense of giving scandal by acting in a way inconsistent with Church teachings.

17. Compliance with the Mandate would be contrary to Catholic Charities' beliefs even in the event that Catholic Charities does not directly fund the objectionable products and services. Of course, any use of Catholic Charities' funds to provide the

mandated products and services would only exacerbate the violation of Catholic Charities' religious beliefs.

18. There is no resolution to the dilemma created by the Mandate for Catholic Charities. Even eliminating the employee group health plan in its entirety fails to resolve the injuries to Catholic Charities caused by the implementation of the Mandate. If Catholic Charities ceases offering employee health plans or fails to provide the required coverage, Catholic Charities will face fines of $2,000 per employee after the first thirty (30) employees per year or $100 per individual per day.

19. Potential liability for significant fines and uncertainty regarding Catholic Charities' ability to offer and provide health benefits undermines Catholic Charities' ability to recruit and retain employees. Were Catholic Charities to stop offering health benefits, it would be at a competitive disadvantage to institutions who do not have religious objections to the Mandate.

20. The Mandate places substantial pressure on Catholic Charities to violate its sincerely held religious beliefs by threatening fines and other negative consequences if Catholic Charities refuses to facilitate access to the objectionable products and services.

21. Catholic Charities is further harmed by the Mandate's attempt at creating an artificial separation between Catholic Charities from the Catholic Church and, in particular, the Diocese of Beaumont.

22. Catholic Charities is the social justice arm of the church. Each year, Catholic Charities receives funding from the Diocese through an annual appeal.

23. Despite being inextricably connected to the Church and the Diocese, and being governed by the Church's mission and beliefs, Catholic Charities falls outside the scope of the so-called "religious employer" exemption, leaving it without protection from the Mandate's requirements.

24. The Mandate splits the Catholic Church in two, a religious wing and a charitable wing, the former which is exempt from the Mandate and the latter which is not—preventing the Church from exercising supervisory authority over its constituents in a way that ensures compliance with Church teachings.

25. I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 10, 2013.

/s/ *Carolyn R. Fernandez*
Carolyn R. Fernandez

APPENDIX L

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CATHOLIC DIOCESE OF BEAUMONT, ET AL	DOCKET 1:13CV709
vs.	DECEMBER 30, 2013
KATHLEEN SEBELIUS, ET AL	9:07 A.M.
	BEAUMONT, TEXAS

VOLUME 1 OF 1, PAGES 1 THROUGH 119

REPORTER'S TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE RON CLARK
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	RANDAL G. CASHIOLA
	CASHIOLA & BEAN
	2090 BROADWAY, SUITE A
	BEAUMONT, TEXAS 77701
FOR THE DEFENDANTS:	BRADLEY PHILIP HUMPHREYS
	US DEPARTMENT OF JUSTICE
	20 MASSACHUSETTS AVE NW

ROOM 7108
WASHINGTON, DC 20530

COURT REPORTER: CHRISTINA L. BICKHAM, CRR, RMR
FEDERAL OFFICIAL REPORTER
300 WILLOW, SUITE 221
BEAUMONT, TEXAS 77701

* * *

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lawyers and we've got probably a lot of legal discussion. Let's go ahead and get the testimony out of the way first so the witnesses—they're more than welcome to stay, of course, but if they have other things to do, then we can get that over with.

So, who would be your first witness?

MR. CASHIOLA: Plaintiffs call bishop Guillory.

THE COURT: Any objection to just going right into the testimony?

MR. HUMPHREYS: No, your Honor. Defendants again, as I indicated at the status conference, object generally to the testimony as cumulative of other evidence in the record. The defendants do not contest the sincerity of the plaintiffs' religious beliefs. And to the degree the witnesses will testify as to the operation of the regulations, respectfully, the defendants don't believe they are qualified to do so and that the court's review should be limited to the administrative record.

THE COURT: Okay.

All right. Go ahead.

MR. CASHIOLA: Thank you, judge.

(The oath is administered.)

MR. CASHIOLA: Your Honor, Bishop Guillory

* * *

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THE COURT: No. We're not in front of a jury. I'm not as concerned about leading and so forth on this. If it gets too much, I'll say something.

MR. CASHIOLA: Thank you, judge.

BY MR. CASHIOLA:

Q. Bishop, is there a concept in the Catholic Church called "material cooperation with evil"?

A. Yes.

Q. And will you explain that concept or precept, please?

A. Material cooperation with evil is like in this particular case, for instance, we, for instance, as copayers with the insurance, would be cooperating in what we think is morally wrong. In other words, it's cooperating in—into something that we consider evil, or morally evil; and we are a part of that. We are a participant in that action or that program, and that's what we call "material cooperation."

Q. And as bishop of the—can you explain generally what your role is as bishop of the Diocese of Beaumont?

A. My role as the bishop of the Diocese of Beaumont is to govern and also to see to it—well, to teach and to see to it that the teachings of the Catholic Church are abided by and also carried out.

Those are my responsibilities, in all of our Catholic institutions.

Q. Is Catholic Charities one of those Catholic institutions?

A. Catholic Charities would fall under that category as well as our schools would.

Q. Do you decide whether or not Catholic Charities is materially cooperating with evil in—

A. Yes, absolutely.

Q. In your charge as bishop of the diocese, are you allowed in any way under the Catholic teaching to allow any of the Catholic institutions to materially cooperate with evil?

A. No. No.

Q. And, bishop, for the benefit of the court, can you focus in on Catholic Charities and tell us what your role is there in terms of how you interact with Catholic Charities to make sure it follows Catholic teaching?

A. Okay. The way Catholic Charities is set up, we have a board that runs the—what I would call the "everyday operation" of Catholic Charities. I'm what we call a "member, "and my responsibility is to oversee programming and oversee programming inasmuch as whether they follow Catholic teaching. And, so, that would be my primary responsibility.

For instance, if a new program were developed and there were some questions as to obviously that program. I would review that program to see whether or not it is following Catholic teaching; so, that would be my relationship with Catholic

Charities. And as such, it is an entity of the Catholic Church of the Diocese of Beaumont.

Q. And what is—when you're looking at these programs, bishop, what is it that the Catholic Church does in its ministry at least in the Diocese of Beaumont?

A. I'm sorry. What?

Q. What is the Catholic mission that you're looking at when you examine these programs?

A. Well, the Catholic mission that I would be looking at—for instance, we have a number of programs that serve the poor. We have a hospitality center which feeds the poor. We have immigration. We have counseling. We have, you know, interacting and helping the poor in their given situation if they need assistance, and also—anyway, to see whether those are in keeping with the mission—the Catholic mission of Catholic Charities.

Q. Catholic Charities—or through the diocese, Catholic Charities has a health plan with Christian Brothers, correct?

A. That's correct.

Q. And who helps administer that at the diocese?

A. At the diocese I have—our human resource person

* * *

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A. I would.

Q. Okay. If Catholic Charities decided—if its board decided not to sign the self-certification form, what would you do, bishop?

A. I would go with them, with their decision.

Q. You would go with their decision not to—to sign it or—

A. Not to sign.

Q. Okay. Now, if they—have you advised them that—have you advised them about whether or not to sign, so far?

A. Yes. We have talked about it.

Q. Okay. Now, if they—if Catholic Charities went out on its own and disobeyed you and signed the self-certification form, what would you do as the bishop of the diocese?

A. Well, I guess the first thing I would do, I would try to show them why this is wrong; and I would have to take the stand that this is first of all, they are going against the teachings of the church and the policies of the diocese. And as a member, I have a right to pull—or to terminate the board if they are not complying with Catholic teaching.

Q. Could it lead, bishop, to, in fact, that Catholic Charities would no longer be certifiable as a Catholic institution?

A. Absolutely, it could.

Q. Does the diocese provide financial assistance to Catholic Charities out of just surplus, or is that a need?

A. Is it out of surplus, or is it a need?

Q. Yeah. Is it something the diocese has to do?

A. This is something we have to do. I mean, we look—in terms of ministries, we look at Catholic Charities as what we call a "service ministry" which

either the—a particular program may or may not generate any kind of monies. So, as a service program, as a ministry of the diocese, we—or I feel obligated to subsidize them in order that Catholic Charities may continue and continue in an effective way to meet the needs of the people that it serves.

Q. If, for example, bishop, the Catholic Charities refused to sign the self-certification form and at some point in time were levied fines in the neighborhood of $300,000, where do you think that money would have to come from?

A. That money would come from the people in the pews who give of their donation specifically for the design or specified ministries of Catholic Charities. And that's their intention and I have to respect the intention of

MR. HUMPHREYS: No, your Honor. I mean, the diocese as an exempt organization—doesn't have the responsibility to sign the self-certification on behalf of the diocese, but someone would have to sign the self-certification on behalf of the Catholic Charities. That could be Catholic Charities itself; or perhaps because of the way the two entities have structured themselves, it could be someone from the diocese.

THE COURT: All right. So, it does depend all right. So, I do need to look at that, all right, as to who is authorized to and who would have to make the signature.

MR. CASHIOLA: Okay.

BY MR. CASHIOLA:

Q. And, bishop, can you help the judge in that regard in terms of—there needs to be a signature on

the self-certification form. And would that be—that could be someone either at the diocese or at Catholic Charities; is that correct?

A. Yes, but—well—

Q. I'm just talking about the signature itself.

A. Yeah, but that signature itself has—if it's not mine, it has to be approved by me.

Q. Exactly.

A. I mean, a person—let's say the president of Catholic Charities just cannot—well, just can't go and say, "Well, I'm going to sign this" without my approval.

Q. And can Catholic Charities—in your experience since 2000 as bishop of this diocese, can Catholic Charities, do you believe, function as well as it does now without being able to provide insurance, health insurance?

A. No.

MR. CASHIOLA: Judge, assuming you don't have any more questions of Bishop Guillory, I'll pass the witness at this time.

THE COURT: All right. Any cross?

MR. HUMPHREYS: Very limited cross, your Honor.

THE COURT: Go ahead.

CROSS-EXAMINATION OF CURTIS GUILLORY

BY MR. HUMPHREYS:

Q. Good morning, Mr. Guillory.

A. Good morning.

Q. Thank you for being with us here this morning. I have just a couple of questions.

Currently in—well, let me back up. You said that the diocese and Catholic charities offer insurance to their employees through Christian Brothers?

A. Christian Brothers, yes.

* * *

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Q. All right. And over the past couple of years, what has been the average operating budget of Catholic Charities?

A. It's about a million four.

Q. All right. So, the bishop

A. It used to be—

Q. The bishop had his numbers—

A. Well, it used to be a lot larger when we had another program. We didn't renew a contract on a program that did result in a lot of revenue; and our revenue stream shrunk appreciably, as did the number of employees.

Q. How does the Catholic charities receive its income generally?

A. We receive a small portion in fees, probably about 180,000 in fees; and then everything else of that million four is raised either coming from the diocese or our own fund-raising activities or grants.

Q. And approximately how much did the diocese contribute or fund for Catholic Charities over the past couple of years on an annual basis?

A. Two years ago it was 300,000. The past year it was 320,000.

Q. If the diocese decided to not fund Catholic Charities for any reason, such as it's not following Catholic teachings and can't be certified as a Catholic institution, what would happen to Catholic Charities?

A. It would be devastating financially to us.

Q. And devastating financially to Catholic Charities, what impact would that have on Catholic Charities' ministries?

A. Well, it would put an end to those ministries and certainly to a lot of the services of those ministries. We simply wouldn't have the wherewithal to continue those employees.

Q. To the poor, the immigrants?

A. Right.

Q. And then if Catholic Charities was faced with a fine of, say, $365,000, calculated at a hundred dollars per day for its ten employees, what would happen if Catholic Charities was forced to pay that fine?

A. It would be hugely devastating to us. We simply don't have that money. We have funds, but they are allocated for specific programs; so, those funds would not be able to be—the limited funds that we have we really couldn't spend in that particular fashion—

Q. Generally

A. —I don't believe.

Q. Generally, Mr. Sherlock, you're an accomplished businessman, is that correct?

* * *

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2014, I electronically filed the document with the Clerk of the Court for the United States Court of Fifth Circuit, using the electronic case filing system of the court. The case filing system sent a "Notice of Electronic Filing" to all the of record for Appellants who have consented in writing to accept this service of this document by electronic means.

/s/ Thomas F. Allen, Jr.

Thomas F. Allen, Jr.
Counsel for Appellees University of Dallas; Catholic Charities, Diocese of Fort Worth, Incorporated; Catholic Diocese of Beaumont; and Catholic Charities of Southeast Texas, Incorporated

APPENDIX M

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 meets the criteria of paragraphs (a)(1) through (3) of this section.

(1) The organization opposes providing coverage for some or all of any contraceptive items or services required to be covered under § 54.9815–2713(a)(1)(iv) on account of religious objections.

(2)(i) The organization is organized and operates as a nonprofit entity and holds itself out as a religious organization; or

(ii) The organization is organized and operates as a closely held for-profit entity, as defined in paragraph (a)(4) of this section, and the organization's highest governing body (such as its board of directors, board of trustees, or owners, if managed directly by its owners) has adopted a resolution or similar action, under the organization's applicable rules of governance and consistent with state law, establishing that it objects to covering some or all of the contraceptive services on account of the owner's sincerely held religious beliefs.

(3) The organization must self-certify in the form and manner specified by the Secretary of Labor or provide notice to the Secretary of Health and Human Services as described in paragraph (b) or (c) of this section. The organization must make such self-certification or notice 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 or notice must be executed by a person authorized to make the certification or notice on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(4) A closely held for-profit entity is an entity that—

(i) Is not a nonprofit entity;

(ii) Has no publicly traded ownership interests, (for this purpose, a publicly traded ownership interest is any class of common equity securities required to be registered under section 12 of the Securities Exchange Act of 1934); and

(iii) Has more than 50 percent of the value of its ownership interest owned directly or indirectly by five or fewer individuals, or has an ownership structure that is substantially similar thereto, as of the date of the entity's self-certification or notice described in paragraph (b) or (c) of this section.

(iv) For the purpose of the calculation in paragraph (a)(4)(iii) of this section, the following rules apply:

(A) Ownership interests owned by a corporation, partnership, estate, or trust are

considered owned proportionately by such entity's shareholders, partners, or beneficiaries. Ownership interests owned by a nonprofit entity are considered owned by a single owner.

(B) An individual is considered to own the ownership interests owned, directly or indirectly, by or for his or her family. Family includes only brothers and sisters (including half-brothers and half-sisters), a spouse, ancestors, and lineal descendants.

(C) If a person holds an option to purchase ownership interests, he or she is considered to be the owner of those ownership interests.

(v) A for profit entity that seeks further information regarding whether it qualifies for the accommodation described in this section may send a letter describing its ownership structure to the Department of Health and Human Services. An entity must submit the letter in the manner described by the Department of Health and Human Services. If the entity does not receive a response from the Department of Health and Human Services to a properly submitted letter describing the entity's current ownership structure within 60 calendar days, as long as the entity maintains that structure it will be considered to meet the requirement set forth in paragraph (a)(4)(iii) of this section.

(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.

(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 (that is, 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.

(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 (that is, 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 § 54.9815–2713(a)(1)(iv) must—

(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).

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 provides:

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

(a) Eligible organizations. An eligible organization is an organization that meets the criteria of paragraphs (a)(1) through (3) of this section.

(1) The organization opposes providing coverage for some or all of any contraceptive items or services required to be covered under § 2590.715–2713(a)(1)(iv) on account of religious objections.

(2)(i) The organization is organized and operates

as a nonprofit entity and holds itself out as a religious organization; or

(ii) The organization is organized and operates as a closely held for-profit entity, as defined in paragraph (a)(4) of this section, and the organization's highest governing body (such as its board of directors, board of trustees, or owners, if managed directly by its owners) has adopted a resolution or similar action, under the organization's applicable rules of governance and consistent with state law, establishing that it objects to covering some or all of the contraceptive services on account of the owners' sincerely held religious beliefs.

(3) The organization must self-certify in the form and manner specified by the Secretary or provide notice to the Secretary of Health and Human Services as described in paragraph (b) or (c) of this section. The organization must make such self-certification or notice 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 or notice must be executed by a person authorized to make the certification or notice on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(4) A closely held for-profit entity is an entity that—

(i) Is not a nonprofit entity;

(ii) Has no publicly traded ownership interests (for this purpose, a publicly traded ownership interest is any class of common equity securities

required to be registered under section 12 of the Securities Exchange Act of 1934); and

(iii) Has more than 50 percent of the value of its ownership interest owned directly or indirectly by five or fewer individuals, or has an ownership structure that is substantially similar thereto, as of the date of the entity's self-certification or notice described in paragraph (b) or (c) of this section.

(iv) For the purpose of the calculation in paragraph (a)(4)(iii) of this section, the following rules apply:

(A) Ownership interests owned by a corporation, partnership, estate, or trust are considered owned proportionately by such entity's shareholders, partners, or beneficiaries. Ownership interests owned by a nonprofit entity are considered owned by a single owner.

(B) An individual is considered to own the ownership interests owned, directly or indirectly, by or for his or her family. Family includes only brothers and sisters (including half-brothers and half-sisters), a spouse, ancestors, and lineal descendants.

(C) If a person holds an option to purchase ownership interests, he or she is considered to be the owner of those ownership interests.

(v) A for-profit entity that seeks further information regarding whether it qualifies for the accommodation described in this section may send a letter describing its ownership structure to the Department of Health and Human Services. An entity must submit the letter in the manner described by the Department of Health and Human Services. If the entity does not receive a response

from the Department of Health and Human Services to a properly submitted letter describing the entity's current ownership structure within 60 calendar days, as long as the entity maintains that structure it will be considered to meet the requirement set forth in paragraph (a)(4)(iii) of this section.

(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 meets the criteria of paragraphs (b)(1) through (3) of this section.

(1) The organization opposes providing coverage for some or all of any contraceptive items or services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2)(i) The organization is organized and operates as a nonprofit entity and holds itself out as a religious organization; or

(ii) The organization is organized and operates

as a closely held for-profit entity, as defined in paragraph (b)(4) of this section, and the organization's highest governing body (such as its board of directors, board of trustees, or owners, if managed directly by its owners) has adopted a resolution or similar action, under the organization's applicable rules of governance and consistent with state law, establishing that it objects to covering some or all of the contraceptive services on account of the owners' sincerely held religious beliefs.

(3) The organization must self-certify in the form and manner specified by the Secretary of Labor or provide notice to the Secretary of Health and Human Services as described in paragraph (c) of this section. The organization must make such self-certification or notice 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 or notice must be executed by a person authorized to make the certification or notice on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(4) A closely held for-profit entity is an entity that—

(i) Is not a nonprofit entity;

(ii) Has no publicly traded ownership interests (for this purpose, a publicly traded ownership interest is any class of common equity securities required to be registered under section 12 of the Securities Exchange Act of 1934); and

(iii) Has more than 50 percent of the value of

its ownership interest owned directly or indirectly by five or fewer individuals, or has an ownership structure that is substantially similar thereto, as of the date of the entity's self-certification or notice described in paragraph (b) or (c) of this section.

(iv) For the purpose of the calculation in paragraph (b)(4)(iii) of this section, the following rules apply:

(A) Ownership interests owned by a corporation, partnership, estate, or trust are considered owned proportionately by such entity's shareholders, partners, or beneficiaries. Ownership interests owned by a nonprofit entity are considered owned by a single owner.

(B) An individual is considered to own the ownership interests owned, directly or indirectly, by or for his or her family. Family includes only brothers and sisters (including half-brothers and half-sisters), a spouse, ancestors, and lineal descendants.

(C) If a person holds an option to purchase ownership interests, he or she is considered to be the owner of those ownership interests.

(v) A for-profit entity that seeks further information regarding whether it qualifies for the accommodation described in this section may send a letter describing its ownership structure to the Department of Health and Human Services. An entity must submit the letter in the manner described by the Department of Health and Human Services. If the entity does not receive a response from the Department of Health and Human Services to a properly submitted letter describing the entity's current ownership structure within 60 calendar days,

as long as the entity maintains that structure it will be considered to meet the requirement set forth in paragraph (b)(4)(iii) 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 § 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 as defined in 20 U.S.C. 1002 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.