FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 8, 2014 Decided November 14, 2014

No. 13-5368

PRIESTS FOR LIFE, ET AL.,
APPELLANTS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
APPELLEES

Consolidated with 13-5371, 14-5021

Appeals from the United States District Court
for the District of Columbia
(No. 1:13-cv-01261)
(No. 1:13-cv-01441)

Robert J. Muise argued the cause for appellants/cross-appellees Priests For Life, et al. *Noel J. Francisco* argued the cause for appellants/cross-appellees Roman Catholic Archbishop of Washington, et al. With them on the briefs were *Eric Dreiband* and *David Yerushalmi*.

Kimberlee Wood Colby was on the brief for *amici curiae* The Association of Gospel Rescue Missions, et al. in support of cross-appellants/cross-appellees.

Mark B. Stern, Attorney, U.S. Department of Justice, argued the cause for appellees/cross-appellants. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Ronald C. Machen Jr.*, U.S. Attorney, *Beth S. Brinkmann*, Deputy Assistant Attorney General, and *Alisa B. Klein* and *Adam C. Jed*, Attorneys.

Martha Jane Perkins was on the brief for *amici curiae* National Health Law Program, et al. in support of appellees/cross-appellants.

Marcia D. Greenberger and *Charles E. Davidow* were on the brief for *amici curiae* The National Women's Law Center, et al. in support of appellees/cross-appellants.

Ayesha N. Khan was on the brief for *amici curiae* Americans United for Separation of Church and State, et al. in support of appellees/cross-appellants.

Before: ROGERS, PILLARD and WILKINS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* PILLARD.

PILLARD, *Circuit Judge*: These consolidated cases present the question whether a regulatory accommodation for religious nonprofit organizations that permits them to opt out of the contraceptive coc.12Tjcsn coc.12Tjcsn c1br

facilitating contraceptive coverage. They view the regulation as thereby substantially burdening their religious exercise by involving them in what the Plaintiffs and their faith call "scandal," i.e., leading others to do evil. Plaintiffs claim that the government lacks a compelling interest in requiring them to use the specific accommodation the regulations authorize, making the burden unjustified and unlawful. They contend that RFRA gives them a right to exclude contraceptive coverage from their employees' and students' plans without notice, and requires that the government be enjoined from implementing the contraceptive coverage requirement.

* * *

As a consequence of a period of wage controls after World War II during which employers created new fringe benefits, the majority of people in the United States with health insurance receive it under plans their employers arrange through the private market. Congress chose in the ACA not to displace that basic system. It sought instead to expand the number of Americans insured and to improve and subsidize health insurance coverage, in part by building on the market-based system of employer-sponsored private health insurance already in place. The contraceptive coverage requirement and accommodation operate through that system.

The regulations implementing the ACA and its Women's 0946.2(plem)9cont em any(e)s.1(harJ-13.1)]T 0 TD3.g th Tc.23156Tw[(as therebym)7

included the Women's Health Amendment in the ACA to remedy the problem that women were paying significantly more out of pocket for preventive care and thus often failed to seek preventive services, including consultations, prescriptions, and procedures relating to contraception. The medical evidence prompting the contraceptive coverage requirement showed that even minor obstacles to obtaining contraception led to more unplanned and risky pregnancies, with attendant adverse effects on women and their families.

Some employers, including the Catholic nonprofits in this case, oppose contraception on religious grounds. The Catholic Church teaches that contraception violates God's

Faced with an employer-based health insurance system, forceful impetus to require coverage of contraceptive services, and religious opposition by some employers to contraception, the government sought to accommodate religious objections. As detailed below, the ACA's implementing regulations allow religious nonprofits to opt out of including contraception in the coverage they arrange for their employees and students. The regulations assure, however, that the legally mandated coverage is in place to seamlessly provide contraceptive services to women who want them, for whom they ar

I. Background

A. The ACA & Accommodation

The ACA requires group health plans, including both insured and self-insured employer-based plans, to include minimum coverage for a variety of preventive health services without imposing cost-sharing requirements on the covered beneficiary.[1] 42 U.S.C. § 300gg-13(a); *see also id.* § 300gg-91(a) (defining "group health plan"); 45 C.F.R. § 147.131(c)(2)(ii) (cost-sharing includes copayments, coinsurance, and deductibles). In view of the greater

preventive services that include any "[FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling." Health Resources & Servs. Admin., *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womensguidelines/, *quoted in* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012).

The three agencies responsible for the ACA's implementation—the Department of Health and Human Services, the Department of Labor, and the Department of the Treasury (collectively, the "Departments")—issued regulations requiring coverage of all preventive services contained in the HRSA guidelines, including contraceptive services. *See* 45 C.F.R. § 147.130(a)(1)(iv) (HHS); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. § 54.9815-2713(a)(1)(iv) (Treasury). The Departments determined that contraceptives prevent unintended pregnancies and the negative health risks associated with such pregnancies; they "have medical benefits for women who are contraindicated for pregnancy," and they offer "demonstrated preventive health benefits .

Objections by religious nonprofits to the use of contraception, and to arranging health insurance for their employees that covers contraceptive services, prompted the Departments to create two avenues for religious organizations to exclude themselves from any obligation to provide such coverage. Those avenues track a longstanding and familiar distinction between houses of worship (e.g., temples, mosques, or churches) and religious nonprofits (e.g., schools, hospitals, or social service agencies with a religious mission or affiliation). First, in order to "respect[] the unique relationship between a house of worship and its employees in ministerial positions," the Departments categorically exempted "religious employers," defined as churches or the exclusively religious activities of any religious order, from the contraceptive coverage requirement.[2] 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011); *see* 45 C.F.R. § 147.131(a). Second, the Departments created a mechanism for nonprofit "eligible organizations," i.e., groups that are not houses of worship but nonetheless present themselves as having a religious character, to opt out

contraception or to be co-religionists—could obtain coverage for contraceptive services directly through separate plans from the same plan providers. *See id.* at 39,874. Plaintiffs challenge this second mechanism, which the regulations refer to as the "accommodation."

The government designed the accommodation to avoid encumbering Plaintiffs' sincere religious belief that providing, paying for, or facilitating insurance coverage for contraceptives violates their religion, but the government sought at the same time to preserve unhindered access to contraceptives for insured individuals who use them. Many

First, the Roman Catholic Archbishop of Washington (the "Archdiocese"), a corporation sole, is part of the Catholic Church. It provides pastoral care and spiritual guidance to nearly 600,000 Catholics. It is undisputed that the Archdiocese itself is a religious employer and thus is categorically exempt from the requirement to include coverage for contraceptive services for its employees in its self-insured health plan. The Archdiocese operates a self-insured health plan that is considered a "church plan." Church plans are exempt from the Employee Retirement Income Security Act of 1974 ("ERISA"), which regulates private, employer-sponsored benefit plansch p a pl705 s5.6i9TJ-13.13 -1496 Tc.4137 T[(

Comprising the second of the four categories are the so-called "church-plan Plaintiffs," nonprofits affiliated with the Archdiocese that provide educational, housing, and social services to the community and arrange for health insurance coverage for their employees through the Archdiocese's self-insured plan.[4]

Plaintiff Thomas Aquinas College falls under a third category. It also self-insures. It offers its employees health insurance coverage through an organization called the RETA trust, which oversees an ERISA-covered plan set up by the Catholic bishops of California and run by a third-party administrator ("TPA"). The parties agree that the College's plan is not exempt from ERISA as a church plan.

In the fourth category are those Plaintiffs that provide insurance coverage through group health insurance plans they negotiate with private insurance companies. Catholic

Catholic tenets.[5] Priests for Life, for example, was founded to spread the Gospel of Life, which "affirms and promotes the culture of life and actively opposes and rejects the culture of death." Pls.' Br. 11. Catholic doctrine prohibits "impermissible cooperation with evil," and thus opposes providing access to "contraceptives, sterilization, and abortion-inducing products," which the Church views as "immoral regardless of their cost." *Id.* at 12. The specific acts to which Plaintiffs object are "provid[ing], pay[ing] for, and/or facilitat[ing] access to contraception," any of which they believe would violate the Catholic Church's teachings. *Id.* at 15.

In the past, in accordance with their religious beliefs, Plaintiffs have offered health care coverage to their employees[6] that excluded coverage for "abortion-inducing products, contraception [except when used for non-contraceptive purposes], sterilization, or related counseling." *Id.* at 16. They structured the coverage in a variety of ways, including through self-insured health plans and group health plans, which they directed to exclude all contraceptive services. Plaintiffs object to the contraceptive coverage requirement and the accommodation's opt-out mechanism because, they assert, the accommodation fails adequately to dissociate them from the provision of contraceptive coverage and, by making them complicit with evil, substantially burdens their religious exercise in violation of RFRA. In

[5] For ease of reference, we refer to contraception, sterilization, and related counseling services as "contraception" or "contraceptive services."

[6] Throughout this opinion we discuss Plaintiffs' "employees." We use this term to refer to all individuals covered by Plaintiffs' insurance plans, including employees, students, and other beneficiaries, such as covered dependents.

particular, they contend that the regulations, by requiring the plans or TPAs with which they contract to provide the coverage, effectively require Plaintiffs to facilitate it.

C. Procedural History

Plaintiffs brought two separate suits that proceeded on parallel tracks in district court. The *Priests for Life* Plaintiffs filed their complaint in August 2013 and promptly moved for a preliminary injunction. They challenged the contraceptive coverage requirement and the accommodation as an unjustified substantial burden on their religious exercise in violation of RFRA and raised a variety of constitutional challenges under the Speech and Religion Clauses of the First Amendment and the Equal Protection Clause of the Fifth Amendment.

The district court considered Plaintiffs' request for a preliminary injunction together with the merits, granted the government's motion to dismiss the complaint for failure to state a claim, and denied as moot the parties' cross-motions for summary judgment. Reasoning that "[t]he accommodation specifically ensures that provision of contraceptive services is entirely the activity of a third party—namely the issuer—and Priests for Life plays no role in that activity," the court held that the *Priests for Life* Plaintiffs failed to show a substantial burden on their religious

purposes of the contraceptive coverage requirement.[8] *Id.* at *24. The court granted the government's cross-motion for summary judgment on the other constitutional and APA claims.[9]

All Plaintiffs appealed and sought injunctions pending appeal, while the government cross-appealed the rulings in favor of the *RCAW* Plaintiffs. We consolidated the appeals and granted an injunction pending appeal.

II. Standard of Review

Whether claims are decided on a motion to dismiss or for summary judgment, we review the district courts' determinations *de novo*. *Rudder v. Williams*, 666 F.3d 790, 794 (D.C. Cir. 2012); *Potter v. District of Columbia*, 558 F.3d 542, 547 (D.C. Cir. 2009). A motion to dismiss for failure to state a claim should be granted if the complaint does not

[8] The court also granted summary judgment to both Thomas Aquinas College and the church-plan Plaintiffs on their challenge to the so-called "non-interference" regulation, which prevented a self-insured organization from seeking to "influence" a TPA. The court concluded that the regulation imposed an unconstitutional content-based limitation that "directly burdens, chills, and inhibits" Plaintiffs' free speech. *RCAW*, 2013 WL 6729515, at *37-38. That regulation has since been rescinded, 79 Fed. Reg. 51,092, 51,095 (Aug. 27, 2014), rendering that claim moot.

[9] The district court believed that, because the Archdiocese is exempt from the contraceptive coverage requirement, it was "not joined in" the RFRA claim, *RCAW*, 2013 WL 6729515, at *8, and that the church-plan Plaintiffs lacked standing to bring such a claim, *id.* at *24-27. The court also concluded that some Plaintiffs lacked standing to raise some of the other claims alleged in the complaint. *See, e.g.*, *id.* at *43-44, 47. To the extent necessary to establish this Court's subject matter jurisdiction, we address standing below.

contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a);

from their plans, the regulations require someone else to provide it in a way that they contend amounts to their

Whether or not the obligation is enforceable, however, it is undisputed that, if the church-plan Plaintiffs want a religious accommodation, they are legally required to request it through the opt-out process. Like all the other Plaintiffs, the church-plan Plaintiffs allege that their religious beliefs forbid them from availing themselves of the accommodation because doing so would render them complicit in a scheme aimed at providing contraceptive coverage. They thus contend that the burden on their religious exercise is the same as the burden on any Plaintiff whose TPA or insurer provides coverage according to the regulations. Their burdens are equally concrete, even though the asserted burden on the other Plaintiffs is backed by a threat of enforcement against a potentially recalcitrant TPA, whereas the church-plan Plaintiffs' asserted burden is not. Because the regulations require the church-plan Plaintiffs to take an action that they contend substantially burdens their religious exercise, they, like the other Plaintiffs, have alleged a sufficiently concrete injury.

regulation. It contends that

impose a substantial burden, Congr

would providing contraceptive coverage to their employees. But the opt out already available to Plaintiffs is precisely the alternative the Supreme Court considered in *Hobby Lobby* and assumed would not impinge on the for-profit corporations' religious beliefs even as it fully served the government's interest.[13] *Id.* at 2782.

This case also differs from *Hobby Lobby* in another crucial respect: In holding that Hobby Lobby must be accommodated, the Supreme Court repeatedly underscored that the effect on women's contraceptive coverage of extending the accommodation to the complaining businesses "would be precisely zero." *Id*. at 2760; *see also id*. at 2781 n.37 ("Our decision in these cases need not result in any detrimental effect on any third party."); *id.* at 2782 (extending accommodation to Hobby Lobby would "protect the asserted needs of women as effectively" as not doing so). Justice Kennedy in his concurrence emphasized the same point, that extending the accommodation to for-profit corporations "equally furthers the Government's interest but does not

[13] Plaintiffs also have a fourth option under the ACA: ceasing to offer health insurance as an employment benefit, and instead paying the shared responsibility assessment and leaving the employees to obtain subsidized health care coverage on a health insurance exchange. *See* 26 U.S.C. § 4980H. That is permitted by the Act and regulations and might well be less expensive to employers than contributing to employee health benefits. Plaintiffs, however, contend that declining to arrange health insurance benefits for their employees also would injure them because it would be inconsistent with their religious mission and would deny them the recruitm.0005 T9 ctemion benefits of providing tax-advantaged health care coverage to their employees. *See* Oral Arg. Tr. at 19:5-15; *see also* Pls.' R. Br. 21 n.9; *see generally Hobby Lobby*, 134 S. Ct. at 2776-77 & n. 32. The governm.000has not pressed the point here.

impinge on the plaintiffs' religious beliefs." *Id*. at 2786. The relief Plaintiffs seek here, in contrast, would hinder women's access to contraception. It would either deny the contraceptive coverage altogether or, at a minimum, make the coverage no longer seamless from the beneficiaries' perspective, instead requiring them to take additional steps to obtain contraceptive coverage elsewhere.

Second, Plaintiffs' claim is extraordinary and potentially far reaching: Plaintiffs argue that a religious accommodation, designed to permit them to free themselves entirely from the contraceptive coverage requirement, itself imposes a substantial burden. As the Seventh Circuit put the point, "[w]hat makes this case and others like it involving the contraception exemption paradoxical and virtually unprecedented is that the beneficiaries of the religious exemption are claiming that the exemption process itself imposes a substantial burden on their religious faiths." *Notre Dame*, 743 F.3d at 557. As the *Notre Dame* court noted, it is analogous to a religious conscientious objector to a military draft claiming that the act of identifying himself as such on his Selective Service card constitutes a substantial burden because that identification would then "trigger" the draft of a fellow selective service registrant in his place and thereby implicate the objector in facilitating war. *Id.* at 556.

Religious objectors do not suffer substantial burdens under RFRA where the only harm to them is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out. *Cf. id.* at 556. They have no RFRA right to be free from the unease, or even anguish, of knowing that third parties are legally privileged or obligated to act in ways their religion abhors. *See generally Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988) (distinguishing

between right to avoid being "coerced . . . into violating their religious beliefs" and the lack of right to pursue "spiritual fulfillment according to their own religious beliefs"). "Government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Id.* at 453.

We now turn to the substance of Plaintiffs' RFRA claims. We first consider their contention that the accommodation imposes a substantial burden on their religious exercise that is cognizable under RFRA. We then analyze the government's claim that any such burden is justified under RFRA because it could not be made any lighter and still serve the government's compelling interests.

A. The Accommodation Does Not Substantially Burden Plaintiffs' Religious Exercise

In our cosmopolitan nation with its people of diverse convictions, freedom of religious exercise is protected yet not absolute. That is true under the heightened standard Congress enacted in RFRA as well as the constitutional baseline set by the Free Exercise Clause. The limitations that prove determinative here are that only "substantial" burdens on religious exercise require accommodation, and that an adherent may not use a religious objection to dictate the conduct of the government or of third parties. This Court explained in *Kaemmerling* that "[a] substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" 553 F.3d at 678 (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)). A burden does not rise to the level of being substantial when it places "[a]n inconsequential or *de minimis* burden" on an adherent's religious exercise. *Id.* (citing *Levitan v. Ashcroft*, 281 F.3d 1313, 1320-21 (D.C. Cir.

2002)). An asserted burden is also not an actionable substantial burden when it falls on a third party, not the religious adherent. *See, e.g.*, *Bowen v. Roy*, 476 U.S. 693, 699 (1986).

Plaintiffs' objection rests on their religious belief that "they may not provide, pay for, and/or facilitate access to contraception, sterilization, abortion, or related counseling in a manner that violates the teachings of the Catholic Church." Pls.' Br. 15. But the regulations do not compel them to do any of those things. Instead, the accommodation provides Plaintiffs a simple, one-step form for opting out and washing their hands of any involvement in providing insurance coverage for contraceptive services.

1. The Court Must Evaluate Assertions of Substantial Burden

The sincerity of Plaintiffs' religious commitment is not at issue in this litigation. Plaintiffs are correct that they—and not this Court—determine what religious observance their faith commands. There is no dispute about the sincerity of Plaintiffs' belief that providing, paying for, or facilitating access to contraceptive services would be contrary to their faith.

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 TPAs. Whether a law substantially burdens religious exercise under RFRA is a question of law for courts to decide, not a question of fact. *See Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011) (stating that judicial inquiry into the substantiality of the

burden "prevent[s] RFRA claims from being reduced into questions of fact, proven by the credibility of the claimant"); *Kaemmerling*, 553 F.3d at 679 ("[a]ccepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened"). "[A]lthough we acknowledge that the [plaintiffs] 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 [plaintiffs'] exercise of religion." *Mich. Catholic Conf.*, 755 F.3d at 385; *see also Notre Dame*, 743 F.3d at 558 ("Notre Dame may consider the [self-certification] process a substantial burden, but substantiality—like compelling governmental interest—is for the court to decide.").

Our own decision in *Kaemmerling* requires that we determine whether a burden asserted by Plaintiffs qualifies as "substantial" under RFRA. In *Kaemmerling*, a federal prisoner sought to enjoin the Bureau of Prisons under RFRA from collecting a sample of his blood, claiming a religious objection to "DNA sampling, collection and storage with no clear limitations of use." 553 F.3d at 678. We observed that "Kaemmerling's objection to 'DNA sampling and collection'" was not "an objection to the [Bureau] collecting any bodily specimen that contains DNA material . . . , but rather an objection to the government extracting DNA information from the specimen." *Id.* at 679. We did not simply accept Kaemmerling's characterization of his burden as "substantial," but instead independently evaluated the nature of the claimed burden on his religious beliefs. *See id.* at 678-79. The plaintiff failed to "allege facts sufficient to state a substantial burden on his religious exercise because he [could not] identify any 'exercise' which is the subject of the

burden to which he objects." *Id.* at 679. The court acknowledged that "the government's activities with his fluid or tissue sample after the [Bureau] takes it may offend Kaemmerling's religious beliefs," but it rejected the substantial burden contention because "Kaemmerling alleges no religious observance that the DNA Act impedes, [n]or acts in violation of his religious beliefs that it pressures him to perform." *Id.*

In *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001), this Court similarly rejected the plaintiffs' formulation of the substantial-burden test as forbidding the government's general application of religiously neutral law where it would impose *any* burden on religiously motivated conduct because doing so would "read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement." As RFRA sponsor Senator Orrin Hatch explained, the Act "does not require the Government to justify every action that has some effect on religious exercise. Only action that places a substantial burden on the exercise of religion must meet the compelling State interest . . . ." 139 Cong. Rec. 26,180 (1993) (statement of Sen. Hatch).

Under free exercise precedents that RFRA codified, the Supreme Court distinguished between substantial burdens on religious exercise, which are actionable, and burdens that are not. Burdens that are only slight, negligible, or *de minimis* are not substantial. And burdens that fall only on third parties not before the court do not substantially burden plaintiffs. *See, e.g.*, *Bowen*, 476 U.S. at 699 ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."); *Lyng*, 485 U.S. at 447 (finding it undisputed that the government's action "will

have severe adverse effects on the practice of [plaintiffs'] religion," but disagreeing that such burden was "heavy enough" to subject that action to strict scrutiny).

In *Bowen*, a Native American plaintiff brought a free exercise challenge to a statute requiring the state to use his daughter's social security number to process welfare benefits requests. 476 U.S. at 695-96. Roy, the father, believed that the government's use of the social security number of his daughter, Little Bird of the Snow, would serve to "'rob the spirit' of his daughter and prevent her from attaining greater spiritual power." *Id.* at 696. The Court rejected Roy's claim on the basis that, rather than complaining about a restriction on his own conduct, Roy sought to "dictate the conduct of the Government's internal procedures." *Id.* at 700. Roy's claim failed because, even though it seriously offended Roy's religious sensibilities, "[t]he Federal Government's use of a Social Security number for Little Bird of the Snow d[id] not itself in any degree impair Roy's freedom to believe, express, and exercise his religion." *Id.* at 700-01 (internal quotation marks omitted).

Building on the analysis in *Bowen*, the Supreme Court refused to apply strict scrutiny to the government's land use decision in *Lyng*. 485 U.S. at 450. There, members of Indian tribes claimed that the federal government violated their right to free exercise by permitting timber harvesting and construction on land they used for religious purposes. *Id.* at 441-42. The Court stated that its free exercise jurisprudence "does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Id.* at 450-51.

According to Plaintiffs, this Court is bound to accept their understanding of the obligations the regulations impose—including their view of the existence and substantiality of any burden on their own religious exercise—because to do otherwise would be tantamount to questioning the sincerity of their beliefs. Indeed, under Plaintiffs' view, we must accept a RFRA claimant's understanding of what the challenged law requires her to do (or to refrain from doing), even if that subjective understanding is at odds with what the law actually requires.[14] Plaintiffs' approach collapses the distinction between sincerely held belief and substantial burden. We must give effect to each term in the governing statute, however, including the requirement that only "substantial" burdens on religious exercise trigger strict

[14] Plaintiffs elaborated their position in their responses to a hypothetical posed during oral argument. We posited a situation in which an adherent, similar to the plaintiff in *Thomas*, objected to working in a factory on the grounds that the tools he was

scrutiny. We cannot accept Plaintiffs' proposal to prevent the court from evaluating the substantiality of the asserted burden.

2. The Accommodation Frees Eligible Organizations from the Contraceptive Coverage Requirement

A review of the regulatory accommodation shows that the opt-out mechanism imposes a *de minimis* requirement on any eligible organization: The organization must send a single sheet of paper honestly communicating its eligibility and sincere religious objection in order to be excused from the contraceptive coverage requirement. Once an eligible organization has taken the simple step of objecting, all action taken to pay for or provide its employees with contraceptive services is taken by a third party.

Specifically, the regulations require that, to be eligible

51,094-95 (Aug. 27, 2014). An alternative notice to HHS must identify the forms of contraceptive services to which the employer objects, and specify, among other things, the name of the plan, the plan type, and the contact information for the plan issuer or TPA.[16] 45 C.F.R. § 147.131(c)(1)(ii); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B). Once an eligible organization avails itself of the accommodation, that organization has discharged its legal obligations under the challenged regulations. *See* 45 C.F.R. § 147.131(c)(1), (e)(2); 29 C.F.R. § 2590.715-2713A(b)(1); 79 Fed. Reg. at 51,094-95.

The accommodation here works in the way such mechanisms ordinarily do: the objector completes the written equivalent of raising a hand in response to the government's query as to which religious organizations want to opt out. Once the eligible organization expresses its desire to have no involvement in the practice to which it objects, the government ensures that a separation is effectuated and arranges for other entities to step in and fill the gap as required to serve the legislatively mandated regime. Specifically, the regulations:

> require that the group health plan insurer expressly exclude contraceptive coverage from the eligible

[16] Initially, an eligible organization could only avail itself of the accommodation byiv

organization's group health plan,[17] 45 C.F.R. § 147.131(c)(2)(i)(A);

fully divorce the eligible organization from payments for contraceptive coverage, *see* 45 C.F.R. § 147.131(c)(2); 29 C.F.R. § 2590.715-2713A(b)(2)(i);

require that the insurer or TPA notify the beneficiaries in separate mailings that it will be providing separate contraceptive coverage, 45 C.F.R. § 147.131(d); 29 C.F.R. § 2590.715-2713A(d);

require that the insurer or TPA specify to the beneficiaries in those separate mailings that their employer is in no way "administer[ing] or fund[ing]" the contraceptive coverage. (The regulations include model language for such notice, suggesting that the insurer or TPA specify to employees that "your employer will not contract, arrange, pay, or refer for contraceptive coverage.") 45 C.F.R. § 147.131(d); 29 C.F.R. § 2590.715-2713A(d); and

demand separate mailings and accounting on the part of the insurer or TPA, keeping contraceptive coverage separate for all purposes from the eligible organization's plan that exclude it, 45

[17] There is no analogous requirement for TPAs because it is the self-insured employer that controls the scope of coverage provided under its plan. Once it has opted out, a self-insured employer has satisfied its legal obligation under the contraceptive-coverage regulations. 29 C.F.R. § 2590.715-2713A(b)(1).

> C.F.R. § 147.131(c)(2)(ii), (d); 29 C.F.R. § 2590.715-2713A(b)(2), (d).

The regulations leave eligible organizations free to express to their employees their opposition to contraceptive coverage. In sum, both opt-out mechanisms let eligible organizations extricate themselves fully from the burden of providing contraceptive coverage to employees, pay nothing toward such coverage, and have the providers tell the employees that their employers play no role and in no way should be seen to endorse the coverage.

Plaintiffs' opposition to the consequences of the ACA's Women's Health Amendment, even with the accommodation, amounts to an objection to the regulations' requirement that third parties provide to Plaintiffs' beneficiaries products and services that Plaintiffs believe are sinful. What Plaintiffs object to here are "the government's independent actions in mandating contraceptive coverage, not to any action that the government has required [Plaintiffs] themselves to take." *Notre Dame*, 743 F.3d at 559 (quoting Order at 3, *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368 (Dec. 31, 2013) (Tatel, J., statement) (hereinafter "Emergency Injunctions Order")). But RFRA does not grant Plaintiffs a religious veto against plan providers' compliance with those regulations, nor the right to enlist the government to effectuate such a religious veto against legally required conduct of third parties. *See, e.g.*, *Lyng*, 485 U.S. at 452; *Bowen*, 476 U.S. at 699-700; *Kaemmerling*, 553 F.3d at 679; *see also Mich. Catholic Conf.*, 755 F.3d at 388-89; *Notre Dame*, 743 F.3d at 552.

Plaintiffs seek to distinguish *Kaemmerling* and *Bowen* on the ground that, unlike the plaintiffs in those cases, they object to what the regulations require of *them*. But the only

action the regulations require of Plaintiffs—completion of the self-certification or alternative notice—imposes a *de minimis* administrative obligation.[18] To the extent that their objection is to the role of that action in the broader regulatory scheme—a scheme that permits or requires independent coverage providers to take actions to which Plaintiffs object—their challenge is governed by *Kaemmerling* and *Bowen*. As in *Bowen*, even though Plaintiffs' "religious views may not accept this distinction between individual and governmental conduct," the Constitution does "recognize such a distinction." 476 U.S. at 701 n.6. So, too, does RFRA. And just as the plaintiffs in *Bowen* and *Kaemmerling* could not successfully challenge what the government chose to do with their social security numbers or DNA specimens, respectively, Plaintiffs have no RFRA claim against the government's arrangements with others to provide coverage to women left partially uninsured as a result of Plaintiffs' opt out. RFRA does not treat the government requiring third parties to provide contraceptive coverage in the face of an employer's religious disapproval as tantamount to the government requiring the employer itself to sponsor such coverage. *See Mich. Catholic Conf.*, 755 F.3d at 388-89; *Notre Dame*, 743 F.3d at 554-55; *id.* at 559 (quoting Emergency Injunctions Order at 3 (Tatel, J., statement)).

Plaintiffs nonetheless insist that, even with the accommodation, the regulations substantially burden their religious exercise by continuing to require that they play a

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role in the facilitation of contraceptive use. In particular, they

contraceptive coverage, and instead obligate a third party to provide that coverage separately.

contraceptive coverage to be provided for their employees and students by the same entities with which Plaintiffs have contracted to provide non-contraceptive health coverage. Once Plaintiffs opt out of the contraceptive coverage requirement, however, contraceptive services are not provided to women because of Plaintiffs' contracts with insurance companies; they are provided because federal law requires insurers and TPAs to provide insurance beneficiaries with coverage for contraception. Plaintiffs' contracts do not in any way authorize or condone the insurers' or TPAs' provision of the coverage. The separate interactions between non-objecting insurance companies and beneficiaries do not substantially burden Plaintiffs' religious exercise, just as third-party actions in other religious-exercise cases have been held not to burden plaintiffs. *See, e.g.*, *Bowen*, 476 U.S. at 699-700; *Kaemmerling*, 553 F.3d at 679; *see also Notre Dame*, 743 F.3d at 552. We do not understand Plaintiffs to contend that RFRA privileges them generally to require that the extra-contractual rights and legal obligations of individuals and entities with whom they contract conform to Plaintiffs' religious beliefs, nor could they.

c. Plaintiffs' Plans Are Not Conduits for Contraceptive Coverage

Plaintiffs also argue that the regulations substantially burden their religious exercise by permitting their insurance plans to be used as conduits through which their employees receive contraception. Plaintiffs identify a number of acts—such as paying premiums and offering enrollment paperwork—that they contend they must take that ensure that the contraceptive "pipeline" remains open. None of those acts, however, requires Plaintiffs to contract, arrange, pay, or refer for access to contraception. Once Plaintiffs take advantage of the accommodation, they are dissociated from

the provision of contraceptive services. The premiums and enrollment paperwork support the provision of health care coverage to which Plaintiffs have no objection—and nothing more.

Plaintiffs contend that their plans remain a conduit for the provision of contraceptives because they are required to pay premiums or fees to entities in charge of the plans that provide contraceptive benefits. The regulations, however, expressly prevent insurers and TPAs from directly or indirectly charging Plaintiffs for the cost of contraceptive coverage and obligate third parties to pay for the contraceptive services. 45 C.F.R. § 147.131(c)(2)(ii); 29 C.F.R. § 2590.715-2713A(b)(2). Therefore, although Plaintiffs are required to pay premiums and fees to their group health plan issuers or TPAs, those entities are legally prohibited from using Plaintiffs' payments to fund contraceptive services.

Plaintiffs further contend that their plans are used as conduits because, they assert, they must provide their beneficiaries with enrollment paperwork to enable them to participate in a plan that provides coverage for contraceptives, and they must send, or tell their beneficiaries where to send, the enrollment paperwork. Under the regulations, however, the employer has no such obligation. The insurer or TPA is entirely responsible for any paperwork related to contraceptive coverage. The insurer or TPA must provide beneficiaries with notice of the availability of contraceptive coverage, the notice must be separate from any materials distributed in connection with the individual's enrollment in the employer's plan, and the notice must make clear that the employer is not playing any role in the contraceptive coverage. 45 C.F.R. § 147.131(d); 29 C.F.R. § 2590.715-2713A(d).

Plaintiffs also argue that their plans serve as conduits because they must identify their health plan beneficiaries to their insurers or TPAs. No regulation related to the accommodation imposes any such duty on Plaintiffs. *See Mich. Catholic Conf.*, 755 F.3d at 389. Plaintiffs will have necessarily provided their plans or TPAs with the names of employees enrolling in their health care plan so that those individuals may be provided with health care coverage. To the extent that Plaintiffs object to the actions the insurers or TPAs will take after receiving those names, Plaintiffs are objecting to an independent obligation imposed on a third party by the government. As discussed above, RFRA does not protect parties from obligations imposed on third parties by outside sources. In short, none of the actions that Plaintiffs identify is actually required of them under the regulations, and none of those actions makes their plans conduits for contraceptive coverage.[19]

d. Regulations Specific to the Self-Insured Plaintiffs Do Not Create a Substantial Burden

Finally, the self-insured Plaintiffs object to the regulatory provisions that apply particularly to self-insured organizations. They object that their self-certification forms are what designate their TPAs as the plan administrators for contraceptive benefits under section 3(16) of ERISA and also

[19] On a related note, Plaintiffs contend that they must refrain from canceling their contract with a third party authorized to provide coverage for contraceptive services and from attempting to influence a third party's decision to provide the coverage for contraception. The government denied that the regulations would require Plaintiffs to refrain from taking either of those actions. Gov. Br. 33-34; Oral. Arg. Tr. at 46:15-48:1. In any event, as discussed *infra* note 28, the regulations have been revised to remove the provision that Plaintiffs alleged so constrained them.

serve as instruments under which the health plans are operated. *See* 29 C.F.R. § 2510.3-16(b). They argue that the regulations thus put them in the position of facilitating the provision of contraceptives by authorizing the TPAs to take actions they previously could not have taken.

That argument miscasts the regulations, which do not require the self-insured Plaintiffs to name their TPAs as ERISA plan fiduciaries. Plaintiffs submit forms to communicate their decisions to opt out, not to authorize TPAs to do anything on their behalf. The regulatory treatment of the form as sufficient under ERISA does not change the reality that the objected-to

instrument, and it is this authority the regulations deploy. Once the government receives the alternative notice, it directs the TPA to cover contraceptive services and, treating its own direction as the new plan instrument, the government names the TPA as the plan administrator of contraceptive coverage. ERISA expressly permits a plan instrument to name a plan administrator. 29 U.S.C. § 1002(16)(A)(i) (defining "administrator" as "the person specifically so designated by the terms of the instrument under which the plan is operated").[20] By naming the plan administrator in the plan instrument, the government complies with ERISA. The government's approach does not, contrary to Plaintiffs' contention, amend or alter Plaintiffs' own plan instruments; the government directs only the contraceptive coverage.

The self-insured Plaintiffs also contend that they are required to facilitate access to contraceptive coverage because, if their existing TPAs decline to assume the responsibility to provide contraceptive coverage, the regulations obligate Plaintiffs to take affirmative steps to identify and contract with new TPAs. The district court granted summary judgment for Plaintiff Thomas Aquinas College on this ground. *RCAW*, 2013 WL 6729515, at *24. Upon *de novo* review, we reject Thomas Aquinas's argument as premature. Thomas Aquinas has not made any showing that its TPA has any intention of refusing to provide contraceptive coverage to its employees.[21] Moreover, the

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[20] iedERISA("also states that ifi5 also case) 9fexi plan"for which an "the ection Secrets th.1(rs thatyt [illegible]

government has clarified that, if an eligible organization's existing TPA were to decline to assume responsibility for providing contraceptive coverage, the regulations do not require the eligible organization to identify and contract with a new one. *See* 78 Fed. Reg. at 39,880-81. We believe that clarification requires us to vacate the district court's grant of summary judgment for Thomas Aquinas.

* * *

In sum, RFRA grants Plaintiffs a right to be free of any unjustified substantial governmental burden on their religious exercise. The regulatory requirement that they use a sheet of paper to signal their wish to opt out is not a burden that any precedent allows us to characterize as substantial. 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 regulations go to great lengths to separate Plaintiffs from the provision of contraceptive coverage. Plaintiffs have failed to demonstrate a substantial burden on their religious exercise that would

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in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the [TPA] shall provide or arrange payments for contraceptive services . . ." (emphasis added)); 78 Fed. Reg. at 39,880.

subject the contraceptive coverage requirement to strict judicial scrutiny.

B. The Accommodation Survives Strict Scrutiny

When the parties filed their initial briefs on appeal, the government conceded that this Court's decision in *Gilardi v. U.S. Department of Health & Human Services*, 733 F.3d 1208 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014), controlled the compelling-interest inquiry here. Gov. Br. 44. In *Gilardi*, we held at the preliminary injunction stage that, while a closely-held, for-profit business corporation was not a "person" whose religious exercise was protected by RFRA, its individual owners had RFRA rights that were injured by application of the contraceptive coverage requirement to their firm. 733 F.3d at 1214-19. Lack of a regulatory accommodation applicable to such religious objectors constituted a substantial burden, and the government failed to establish a compelling interest that justified it. *Id.* at 1219-22.

While this appeal was pending, the Supreme Court vacated *Gilardi* in view of its decision in *Hobby Lobby*. 134 S. Ct. 2902 (2014). The Court also, in *Wheaton College v. Burwell*, 134 S.Ct. 2806 (2014), preliminarily enjoined the requirement that a party seeking to opt out use the self-certification form as specified in the regulations. The plaintiff in that case already had notified the government of its eligibility and desire for exemption without using that form, and the Court required HHS to accept that as adequate notice. Because the Court's decisions and a new Interim Final Rule responding to the *Wheaton College* order (*see* 79 Fed. Reg. at

51,092) unsettled the governing law, we requested supplemental briefing.[22]

We directed the parties to brief the implications for this appeal of the intervening legal developments. We specifically requested briefing on the substantial-burden and

women's well-being. The government claims an interest in independently assuring seamless contraceptive coverage, regardless of whether the insured woman receives her other health insurance coverage through her (or her family member's) employment at a religious nonprofit that objects to providing it.

The Supreme Court's char

here at issue furthers a legitimate and compelling interest in the health of female employees." *Id.* at 2786. He noted that the government "makes the case" that the contraceptive coverage requirement "serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee." *Id.* at 2785-86. Justice Ginsburg, writing for four dissenting justices, recounted the government's evidence establishing the importance of contraception to a range of women's health needs, and concluded that contraceptive coverage under the ACA "furthers compelling interests in public health and women's well being." *Id.* at 2799-2800.

There is no simple formula for identifying which governmental interests rank as compelling, but certain touchstones aid our analysis. Interests in public health, safety, and welfare—and the viability of public programs that guard those interests—may qualify as compelling, as may legislative measures to protect and promote women's well being and remedy the extent to which health insurance has not served women's specific health needs as fully as those of men.

The government's asserted compelling interest here, writ large, is in a sustainable system of taxes and subsidies under the ACA to advance public health. That interest is as strong as those asserted in cases such as *United States v. Lee*, 455 U.S. 252, 258 (1982), and *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699-700 (1989), recognizing governmental interests in broad participation in public tax and benefits systems as sufficiently compelling to outweigh countervailing claims that they unjustifiably burdened religious exercise.

Massachusetts, 321 U.S. 158, 165-67 (1944); *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). The Court in *Prince* sustained child labor laws against a free exercise challenge based on the government's paramount interest in protecting the health and welfare of children. 321 U.S. at 165-71. In *Jacobson*, a mandatory, mass vaccination program withstood a constitutional liberty challenge because it served the government's interest in "the public health and the public safety." 197 U.S. at 25-26. Those cases support the strength of health interests behind the contraceptive coverage regulations, which include interests in avoiding health risks to women and children from unplanned pregnancies. Indeed, these very same interests—pediatric care and immunizations—are protected by companion provisions to the Women's Health Amendment in the ACA. *See* 42 U.S.C. § 300gg-13(a)(2), (3). Under Plaintiffs' argument, and contrary to *Prince* and *Jacobson*, those interests could fall to the same type of religious challenge as is leveled here by organizations that sincerely object to the types of care they cover.

The Supreme Court has recognized the interest in eliminating discrimination against women as sufficiently compelling to justify incursions on rights to expressive association. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 625-26 (1984) (recognizing compelling interest in creating "rights of public access" to private goods and services in order to promote women's equal enjoyment of leadership skills, business contacts, and employment promotions). Those cases lend gravitas to the government's interest in the contraceptive coverage requirement as an effort to eradicate lingering effects of sex discrimination. *See generally Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

Health Insurance Proposals 1 (2008) ("CBO Report"); *see also* Remarks by the President at the Annual Conference of the American Medical Association (June 15, 2009), http://www.whitehouse.gov/the-press-office/remarks-president-annual-conference-american-medical-association. The United States in recent years spent far more on health care than did many other developed nations. At the same time, the quality of care Americans received was lower and our population was no healthier than people in countries that spent less. CBO Report at 1.

Congress understood that improved health at affordable cost cannot be attained without increased reliance on preventive care. Most people underestimate the importance of prevention and are easily hindered from undertaking preventive steps because the costs and effort of preventive health care are immediate while benefits typically are uncertain and deferred. Many adverse health conditions and an enormous amount of costly care can be avoided if people better understand risky behavior, plan more carefully, and take measures to reduce their risks, exposures, and errors. Inst. of Med., *Clinical Preventive Services for Women:*

spending went to prevention. *See* Centers for Disease Control and Prevention, *The Power of Prevention* (2009), *available at* http://www.cdc.gov/chronicdisease/pdf/2009-power-of-prevention.pdf.

to choose less effective methods: "Even small increments in cost sharing have been shown

with those conditions have especially critical needs to time their pregnancies appropriately, such as by waiting until their conditions are under control. Doctors also recommend that women taking certain medications that pose risk to maternal and fetal health avoid getting pregnant. Hormones manufactured and sold as contraception are also used to treat, manage, or prevent other diseases, such as "certain cancers, menstrual disorders, and pelvic pain." *Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting); *see also* 78 Fed. Reg. 39,872; IOM Report at 107.

The Institute of Medicine reported that, for similar reasons, contraceptive use also promotes the he12.6.l9Snb.ku

b. Assuring Women Equal Benefit of Preventive Care By Requiring Coverage of Their Distinctive Health Needs

The government also relied on evidence that advancing women's well being by meeting their health needs as fully as those of men was a compelling reason for a contraceptive coverage requirement. In enacting and implementing the ACA, the government sought to provide coverage that offers equal benefit for men and women. 78 Fed. Reg. at 39,887. Before the ACA, insurance coverage for a female employee was "significantly more costly than for a male employee." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). Women paid more for the same health insurance coverage available to men and "in general women of childbearing age spen[t] 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. 28,843 (2009) (statement of Sen. Gillibrand); *see* 78 Fed. Reg. at 39,887.

The government recognized that women pay more for the same health benefits in part because services more important or specific to women have not been adequately covered by health insurance. *See* 155 Cong. Rec. 28,843 (2009) (statement of Sen. Gillibrand). Contraception is a key element of preventive care for many women, yet the methods that are most reliable and are under a woman's control require prescriptions and are disproportionately more expensive than non-prescription forms of contraception. *See* IOM Report at 105, 108. Condoms, which are inexpensive and widely available over the counter, require men's cooperation and are substantially less effective in pregnancy prevention than prescription methods. *See id.* at 105. When Congress added the Women's Health Amendment to the ACA, which requires group health plans to include preventive health care services for women without cost sharing, it did so precisely to end "the

punitive practices of the private insurance companies in their gender discrimination." 155 Cong. Rec. 28,842 (daily ed. Dec. 1, 2009) (statement of Sen. Mikulski). The government concluded that a preventive care package that failed to cover contraception would not give women access, equal to that enjoyed by men, to the full range of health care services recommended for their specific needs. *See* 78 Fed. Reg. at 39,887.

For most women, whether and under what circumstances to bear a child is the most important economic decision of their lives. An unintended pregnancy is virtually certain to impose substantial, unplanned-for expenses and time demands on any family, and those demands fall disproportionately on women. As the Supreme Court has recognized "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Se. Penn. v. Casey*

The government has amply substantiated its compelling interests in the accommodation. The government has overlapping and mutually reinforcing compelling interests in promoting public health and gender equality. The contraceptive coverage requirement specifically advances those interests. It was adopted to promote women's equal access to health care appropriate to their needs, which in turn serves women's health, the health of children, and women's equal enjoyment of their right to personal autonomy without unwanted pregnancy. We hold that the accommodation is supported by the government's compelling interest in providing women full and equal benefits of preventive health coverage, including contraception and other health services of particular relevance to women.

2. The Regulations Use the Least Restrictive Means to Ensure Contraceptive Coverage While Accommodating Religious Exercise

In addition to calling on us to inquire whether the challenged contraceptive coverage requirement serves a compelling interest, RFRA demands that we guard against unnecessary impositions on religious exercise by carefully examining the particular way the government has gone about serving that interest. The Departments designed the challenged accommodation for eligible organizations fully cognizant of RFRA's mandate. *See* 78 Fed. Reg. at 39,886-

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Leave Act of 1986: Joint Hearing before the Subcommittee on Labor–Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 100 (1986)); *see also* S. Rep. No. 95-331, at 3 (1977) ("A failure to address discrimination based on pregnancy, in fringe benefits or in any other employment practice, would prevent the elimination of sex discrimination in employment.").

88. As already described, the accommodation excuses eligible organizations from the contraceptive coverage requirement, severs them from any involvement in the separate contraceptive coverage to which the employees are entitled, and specifies that employees must be notified that the objecting organizations have no involvement in providing their contraceptive coverage.

Adverting to this accommodation in *Hobby Lobby*, the Supreme Court stressed that it alleviates the burden on the plaintiffs of having to provide contraceptive coverage and "serves HHS's stated interests equally well." *Hobby Lobby*, 134 S. Ct. at 2782. The Court described the accommodation as "an alternative that achieves all of the Government's aims while providing greater respect for religious liberty." *Id.* at 2759; *see id.* at 2786 (Kennedy, J., concurring) (the "accommodation equally furthers the Government's interest but does not impinge on the plaintiff's religious beliefs"). In fact, the Court explained that the effect of the accommodation on women "would be precisely zero." *Id.* at 2760.

imposition on religious exercise by allowing eligible organizations to opt out, but requiring them to identify themselves when they do. Only if the eligible organizations communicate that they are dropping contraceptive coverage from the health insurance they have arranged for their employees will the government be able to ensure that the resultant gaps in employees' coverage are otherwise filled. The government contends that its interests would be impaired if eligible organizations were entitled to exempt themselves from the contraceptive coverage requirement without notifying either HHS, or their insurers or TPAs.

The government has an interest in the uniformity of the health care system the ACA put in place, under which all eligible citizens receive the same minimum level of coverage. Like the Social Security system at issue in *Lee*, the ACA "serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants." 455 U.S. at 258. Contraceptive coverage must be effective if it is to serve the government's compelling interests, and the Departments were justified in concluding that, to be effective, the coverage must be provided to all women who want it, on the same terms as other preventive care. Providing contraceptive services seamlessly together with other health services, without cost sharing or additional administrative or logistical burdens and within a system familiar to women, is necessary to serve the government's interest in effective access. Imposing even minor added steps would dissuade women from obtaining contraceptives and defeat the compelling interests in enhancing access to such coverage. *See* 78 Fed. Reg. at 39,888.

The evidence shows that contraceptive use is highly vulnerable to even seemingly minor obstacles. Plaintiffs suggest that the government could offer tax deductions or

employ employees who share the religious tenets of the organization are more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives." 77 Fed. Reg. at 8,728. The evidence justifying the contraceptive coverage requirement equally supports its application to Plaintiffs.

Accommodating religious entities need not come at the cost of the compelling interests the government program serves. When the interests of religious adherents collide with an individual's access to a government program supported by a compelling interest, RFRA calls on the government to reconcile the competing interests. In so doing, however, RFRA does not permit religious exercise to "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Hobby Lobby*, 134 S. Ct. at 2786-87 (Kennedy, J., concurring); *see also id.* at 2781 n.37 ("It is certainly true that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'"). The opt out offered to religious adherents allows the government to further its compelling interests with the least restriction on religious exercise. Under the accommodation, eligible organizations are relieved of the obligation to include contraceptive coverage in their health care plans, but "women would still be entitled to all FDA-approved contraceptives without cost sharing." *Id.* at 2760. Allowing eligible organizations to exempt themselves completely from the contraceptive coverage requirement, without so much as notifying their plan or HHS that they have done so, would undermine the government's interest in the breadth of the scheme established in the ACA.

The government's interest in a comprehensive, broadly available system is not undercut by the other exemptions in

Fed. Reg. 34,538, 34,552 (June 17, 2010). The exemption for small employers (those with fewer than 50 employees) is not an exemption from the contraceptive coverage requirement, but from the requirement to provide any health insurance to their employees. 26 U.S.C. § 4980H(c)(2). Employees who do not get insurance through their jobs because they work for exempt small employers are eligible to purchase it through the exchanges, where all listed plans are required to cover contraceptive services without cost sharing. None of the three exemptions is analogous to what the Plaintiffs here seek.

* * *

The accommodation is the least restrictive method of ensuring that women continue to receive contraceptive coverage in a seamless manner while simultaneously relieving the eligible organizations of any obligation to provide such coverage. Because the government has used the least restrictive means possible to further its compelling interest, RFRA does not excuse Plaintiffs from their duty under the ACA either to provide the required contraceptive coverage or avail themselves of the offered accommodation to opt out of that requirement. The accommodation meets the twin aims of respecting religious freedom and ensuring that women continue to receive contraceptive coverage without administrative, financial, or logistical burdens. The regulations thus respond appropriately to RFRA's explicit demand for "sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5).

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http://kaiserhealthnews.files.wordpress.com/2013/11/8465-employer-health-benefits-20131.pdf.

V. Constitutional Claims

Plaintiffs raise several constitutional challenges to the regulations. We address each in turn, concluding that the regulations do not violate any of the constitutional provisions identified by Plaintiffs.

A. Free Exercise of Religion

Plaintiffs claim that the contraceptive coverage requirement violates the Free Exercise Clause of the First Amendment because it categorically exempts houses of worship from the contraceptive coverage requirement and temporarily relieves grandfathered plans from the requirement to cover any preventive services without cost sharing, while not similarly exempting Plaintiffs. The Free Exercise Clause embodies a "fundamental nonpersecution principle." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). But it "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879 (internal quotation marks omitted). A Free Exercise Clause challenge, in contrast to a claim under RFRA, receives strict scrutiny only if the challenged law is either not neutral or not generally applicable. *See Lukumi Babalu*, 508 U.S. at 531. We have held that the regulations comply with RFRA; they readily satisfy the less stringent free exercise standard.

"Neutrality and general applicability are interrelated," but distinct. *Id.* A law is not neutral if it facially "refers to a religious practice without a secular meaning discernable from the language or context," or if "the object of a law is to infringe upon or restrict practices because of their religious

motivation." *Id.* at 533. A law is not generally applicable if, "in a selective manner," it "impose[s] burdens only on conduct motivated by religious belief." *Id.* at 543.

Plaintiffs do not contend that the challenged contraceptive coverage requirement is religiously non-neutral on its face, nor that it was enacted for an anti-religious purpose, but that the exemptions provided to houses of worship and grandfathered plans render the contraceptive coverage requirement non-neutral and not generally applicable. Those exemptions, however, do not impugn the contraceptive coverage requirement's neutrality and generality: it is both, in the relevant sense of not selectively targeting religious conduct, whether facially or intentionally, and broadly applying across religious and nonreligious groups alike. *See Mich. Catholic Conf.*, 755 F.3d at 394; *RCAW*, 2013 WL 6729515, at *27-31; *Priests for Life*, 7 F. Supp. 3d at 105-07.

The contraceptive coverage requirement is a religiously neutral part of a national effort to expand health coverage and make it more efficient and effective. The ACA's limited or temporary exemptions do not amount to the kind of pattern of exemptions from a facially neutral law that demonstrate that the law was motivated by a discriminatory purpose. *See supra* Section IV.B.2. The Florida prohibition on animal killing invalidated in *Lukumi Babalu*, by contrast, responded to the opening of a Santeria church, which practiced religious animal-sacrifice rituals. 508 U.S. at 524. The ordinance elaborated a putatively general prohibition on animal killings with specific disapproval of killing for "sacrifice" as part of "any type of ritual," while exempting as "necessary" killings for sport hunting, slaughtering animals to eat them, eradication of pests, and euthanasia—killings that were "no more necessary or humane" than the forbidden Santeria

sacrifices. *Id.* at 536-37. That exemption for so many non-religious types of animal killing helped to make clear that "suppression of the central element of the Santeria worship service was the object of the ordinances." *Id.* at 534. The exemptions in the ACA do not single out any religion and are wholly consistent with the law's neutral purpose. Indeed, the existence of an exemption for religious employers substantially undermines contentions that government is hostile toward such employers' religion.[26]

The contraceptive coverage requirement also does not target religious organizations, but applies across the board. The exemptions do not render the law so under-inclusive as to belie the government's interest in protecting public health and promoting women's well-being or to suggest that disfavoring Catholic or other pro-life employers was its objective. *See RCAW*, 2013 WL 6729515, at *30. For example, the Supreme Court has held that, despite statutory exemptions for self-employed Amish employers, the social security system was "uniformly applicable to all." *United States v. Lee*, 455 U.S. 252, 260-61 (1982); *see also id.* at 262 (Stevens, J., concurring in the judgment) (describing the challenged law as "a valid tax law that is entirely neutral in its general

Mich. Catholic Conf., 755 F.3d at 394 (internal quotation marks omitted).

Plaintiffs contend that the ACA's exemptions make it under-inclusive in a way that suggests that the government believes that "secular motivations [for providing an exemption] are more important than religious motivations," Pls.' Br. 50 (internal quotation marks omitted), evidencing that the government "devalues religious reasons," Pls.' R. Br. 25 (internal quotation marks omitted). But, for the same reasons the exemptions do not undermine the government's interest in a uniform system, *see supra*

to disclose the identities of their employees and plan beneficiaries. *See, e.g.*, Pls.' Br. 52-53. They do not.

A law may violate the First Amendment right to expressive association where it directly interferes with an expressive association's member

message. Just as the students and faculty in *FAIR* remained "free to associate to voice their disapproval of" the military's policy against gays or lesbians serving openly in the military, *id.* at 69-70, Priests for Life's members and employees remain free to associate with each other to promote their religious views on contraception and other matters, and to voice their disapproval of health-care products and services that they believe to be immoral. "Nothing in the[] final regulations prohibits an eligible organization from expressing its opposition to the use of cont

terms.[27] The self-certification form and alternative notice are the methods through which Plaintiffs can opt out of the requirement to provide their employees with health insurance

when, or how they may say it. *See Mich. Catholic Conf.*, 755 F.3d at 392. Indeed, unlike the law schools in *FAIR* that had to host military recruiters and thus might have mistakenly been viewed as endorsing the military's discriminatory recruitment approach, the opt out here is designed to ensure that Plaintiffs do not have to express, in words or symbolic backing, any support for contraception. *Cf. FAIR*, 547 U.S. at 64-65 (government is limited in its "ability to force one speaker to host or accommodate another speaker's message" where accommodating that message interferes with the plaintiff's desired message).

Finally, Plaintiffs object to the regulations because they require that Plaintiffs' plan participants receive notice of the availability of payments for contraceptive services. Thus, according to Plaintiffs, the regulations coerce them to provide access to their plan participants and either create the appearance that Plaintiffs agree with the notification or call on them to respond to the notice to inform participants of Plaintiffs' objections to contraception.

But the regulations actually require quite the contrary: the plan issuer or TPA must send a message explicitly distancing the employer from the offered contraceptive

administered by, or connected to Plaintiffs. That is a long way from unconstitutionally compelling Plaintiffs to speak.[28]

D. Establishment of Religion

Plaintiffs advance two Establishment Clause claims. They first contend that the regulations impermissibly discriminate between types of religious institutions by making a general distinction, familiar in tax law, between churches and other houses of worship (which are automatically exempt), and nonprofit organizations that may have a religious character or affiliation, such as universities and hospitals (which may use the accommodation to opt out). 26 U.S.C. § 6033(a)(3)(A)(i), (iii) (exempting "churches, their integrated auxiliaries, and conventions or associations of churches," and "the exclusively religious activities of any

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[28] The *RCAW* Plaintiffs challenged the regulations' "non-interference" provision as an unconstitutional speech restriction, but as that provision has been rescinded, their challenge is moot. The provision originally barred self-insured employers from "directly or indirectly, seek[ing] to influence the [TPA's] decision" to provide or arrange separate payments for contraceptive services. 79 Fed. Reg. at 51,095. The government interpreted that bar as applicable only to the use of bribery, threats, or coercion to dissuade or hinder a TPA from fulfilling its legal obligation to provide contraceptive coverage. *Id.* The government has now rescinded the non-interference provision in its entirety. *Id.* Plaintiffs maintain that they still challenge the non-interference provision "to the extent the Government contends it continues to be unlawful to 'say to the[ir] TPA, if you don't stop making the payments for contraceptives, we're going to fire you.'" Pls.' Supp'l Br. 27 n.12 (internal brackets omitted). As the government asserted at oral argument, however, even when the non-interference

religious order" from an annual return filing requirement). Second, they contend that the regulations entail excessive entanglement between the government and religious institutions. Specifically, to the extent that the regulations seek to be more nuanced and context specific, looking at specific attributes of each organization in an effort accurately

invalidated a regulatory line that effectively asked whether certain schools were "*sufficiently* religious" to be exempt from NLRB jurisdiction, administration of which line had drawn the government into questioning whether the university "was legitimately 'Catholic.'" *Id.* *University of Great Falls* favors a test relying on more objective factors about the institution's structure and activities. *Id.* The regulations at issue here draw distinctions based on organizational form and purpose, and not religious belief or denomination, in keeping with *Larson*, *Colorado Christian*, and *University of Great Falls.* *See also Mich. Catholic Conf.*, 755 F.3d at 395; *Notre Dame*, 743 F.3d at 560.

Additionally, Plaintiffs assert that the regulations violate the Establishment Clause because they believe they call on the government impermissibly to "'troll[] through a person's or institution's religious beliefs.'" Pls.' Br. 60 (quoting *Mitchell v. Helms*

the Establishment Clause. They complain that the IRS factors "favor some types of religious groups over others" and that "they do so on the basis of intrusive judgments regarding beliefs, practices, and organizational structures." Pls.' Br. at 61. It is undisputed in this case that the Archdiocese is a religious employer, and no other Plaintiff contends that it was improperly denied religious-employer treatment. As a result, Plaintiffs do not challenge a determination that has been made using those factors, nor can they argue that the factors were impermissibly applied to them. Therefore, we agree with the district court that this challenge is not ripe for review. *RCAW*, 2013 WL 6729515 at *43-44.

E. Internal Church Governance

Relying on *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), the *RCAW* Plaintiffs allege that the regulations violate the Religion Clauses of the First Amendment by impermissibly interfering with matters of internal church governance. They claim that the regulations "artificially split[]" the Catholic Church in two—into the Archdiocese (an exempt religious employer) and its related nonprofit organizations—and prevent the Archdiocese from "ensur[ing] that these organizations offer health plans consistent with Catholic beliefs." Pls.' Br. at 63-64. Neither *Hosanna-Tabor*, nor any other precedent interpreting either of the Constitution's Religion Clauses, supports this novel claim.

The ACA's regulations do not address religious governance at all. The regulations' separate treatment of functions that Plaintiffs might prefer to group together does not interfere with how the Plaintiffs govern themselves internally. Plaintiffs invoke *Hosanna-Tabor*, but that case does not stand for Plaintiffs' proposition that the First

Amendment precludes application of a law simply because it may affect different types of religious institution differently.

In *Hosanna-Tabor*, the Supreme Court recognized a "ministerial exception, grounded in the First Amendment, that precludes application of [Title VII and other employment discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers." 132 S. Ct. at 705 (internal quotation marks omitted); *see id.* at 710. The Court expressly limited its holding to "an

eligible organization in order to avail itself of the exemption or an accommodation." *Id.*

An agency's interpretation of its own regulation is entitled to substantial deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The *RCAW* Plaintiffs contend that such deference is not appropriate here, however, for two reasons. First, they argue that, contrary to the government's contention, the regulation unambiguously states that the exemption applies on a plan-by-plan basis. *See Christensen v. Harris Cnty.*

"Coverage of Certain Preventive Services Under the Affordable Care Act," the Departments made clear that they intended the exemption to apply on an employer-by-employer basis. *See* 78 Fed. Reg. at 8,467. ("The Departments propose to make the accommodation or the religious employer exemption available on an employer-by-employer basis. That is, each employer would have to independently meet the definition of eligible organization or religious employer in order to take advantage of the accommodation or the religious employer exemption with respect to its employees and their

issued. *See* 79 Fed. Reg. at 51,095-96. Second, the regulations the interim final rule modifies were recently enacted pursuant to notice and comment rulemaking, and presented virtually identical issues; moreover, HHS will expose its interim rule to notice and comment before its permanent implementation. *See* 5 U.S.C. § 553(b)(3)(B) (good cause exists when "notice and public procedure . . . are . . . unnecessary"). Third, the modifications made in the interim final regulations are minor, meant only to "augment current regulations in light of the Supreme Court's interim order in connection with an application for an injunction in *Wheaton College*." 79 Fed. Reg. at 51,092; *see also Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992) ("We have . . . indicated that the less expansive the

decision, we vacate the district court's grant of summary