UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RIGHT TO LIFE OF MICHIGAN,	
Plaintiff,	
v.	**No. 1:13-cv-1202**
SYLVIA M. BURWELL, *et al.*,	
Defendants.	

DEFENDANTS' MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

INTRODUCTION

The Affordable Care Act established additional minimum standards for group health plans, including coverage of certain preventive health services for women without cost-sharing. Regulations implementing this provision generally require group health plans to include coverage of contraceptive services as prescribed by a health care provider. The regulations contain accommodations, however, for plans established by non-profit organizations that hold themselves out as religious and that have a religious objection to providing contraceptive coverage. Such organizations may opt out of the contraceptive coverage requirement by notifying either their insurers or third-party administrators, or the Secretary of Health and Human Services ("HHS"), that they are eligible for an accommodation and are declining to provide contraceptive coverage. When an eligible organization declines to provide such coverage, the regulations generally require the insurer or third-party administrator to provide contraceptive coverage separately for the affected women, at no cost to the eligible organization.

Plaintiff Right to Life of Michigan concedes that it is eligible for an accommodation. Plaintiff nevertheless claims that the regulations violate its rights under the Religious Freedom Restoration Act ("RFRA"). The implications of plaintiff's argument are sweeping. It is one thing to urge that the government may not impose a requirement to provide contraceptive coverage on a religious organization that objects on religious grounds. It is quite another thing to urge that the government may not ensure that women have access to separate coverage through third parties after such an organization exercises its option not to provide such coverage. That latter argument, if accepted, would make access to contraceptive coverage for the female employees of eligible organizations dependent on the religious beliefs of their employers.

Plaintiff's theory—that it "triggers" the provision of coverage by opting out—is fundamentally mistaken. A number of courts, including the only courts of appeals to have

addressed the merits of claims like plaintiff's, have rejected them. *See Geneva Coll. v. Secretary, U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015), *reh'g en banc denied*, Nos. 14-1376, 14-1377 (Apr. 6, 2015), Nos. 13-3536, 14-1374 (Apr. 13, 2015)[1]; *Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014), *petition for reh'g en banc filed*, Nos. 13-5368, 13-5371, 14-5021 (Dec. 26, 2014); *see also Michigan Catholic Conference v. Burwell* ("*Michigan Catholic Conf. II*"), 755 F.3d 372 (6th Cir. 2014), *vacated*, No. 14-701, 2015 WL 1879768 (S. Ct. Apr. 27, 2015) [2]; *University of Notre Dame v. Sebelius* ("*Notre Dame III*"), No. 13-3853 (7th Cir. 2015) (Attachment 1).[3]

The infirmity of plaintiff's position is further underscored by the Supreme Court's recent decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). The Supreme Court in that case held that the contraceptive coverage requirement violated RFRA with respect to closely held for-profit corporations that, unlike plaintiff, could not opt out of the requirement. The existence of the opt-out regulations that plaintiff challenges here was crucial to the Court's

[1] In two of the Third Circuit cases, Circuit Justice Alito entered an administrative stay of the mandate, pending further decision on a motion to stay the mandate. *Zubik v. Burwell*, No. 14A1065 (S. Ct.). This prompted the Third Circuit to recall and stay the mandate in the third case pending the Supreme Court's further action in *Zubik*. *See* No. 13-3536 (3d Cir.) (order of May 6, 2015).

[2] In *Michigan Catholic Conference* and *Notre Dame*, the Supreme Court granted petitions for writs of certiorari, vacated the decisions below, and remanded (GVR) for further consideration in light of the subsequent decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). "A GVR makes no decision as to the merits of a case," *Diaz v. Stephens*, 731 F.3d 370, 378 (5th Cir. 2013), and "does not indicate, nor even suggest, that the lower court's decision was erroneous." *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 459 F.3d 676, 680 (6th Cir. 2006); *accord, e.g., Gonzalez v. Justices of Mun. Court of Boston*, 420 F.3d 5, 7-8 (1st Cir. 2005). Rather, a GVR "promotes fairness and respects the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it." *Stutson v. United States*, 516 U.S. 193, 197 (1996). On May 19, 2015, the Seventh Circuit again affirmed the district court's denial of a preliminary injunction on remand in *Notre Dame III*, No 13-3853 (7th Cir. 2015).

[3] *See also, e.g., Eternal World Television Network, Inc. v. Burwell* ("*EWTN*"), 26 F. Supp. 2d 1228,1232-36 (S.D. Ala. 2014), *injunction pending appeal granted*, No. 14-12696 (11th Cir., June 30, 2014); *Diocese of Cheyenne v. Sebelius*, 21 F. Supp. 2d 1215, 1221-27 (D. Wyo. 2014), *injunction pending appeal granted*, No. 14-8040 (10th Cir., June 30, 2014); *Mich. Catholic Conf. v. Sebelius* ("*Mich. Catholic Conf. I*"), 989 F. Supp. 2d 577, 584-88 (W.D. Mich. 2013), and *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-cv-1303, 2013 WL 6834375, at *4-5 (M.D. Tenn., Dec. 26, 2013), *aff'd sub nom. Mich. Catholic Conf. II*, 755 F.3d 372 (6th Cir. 2014); *Univ. of Notre Dame v. Sebelius* ("*Notre Dame I*"), 988 F. Supp. 2d 912, 920-27 (N.D. Ind. 2013), *aff'd*, 743 F.3d 547 (7th Cir. 2014); *Priests for Life v. HHS*, 7 F. Supp. 2d 88, 98-104 (D.D.C. 2013), *aff'd*, 772 F.3d 229 (D.C. Cir. 2014).

reasoning. The Court observed that the opt-out regulations "effectively exempt[]" organizations that are eligible for an accommodation. *Id*. at 2763. The Court expressly stated that the regulations "seek[] to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." *Id*. at 2759.

The Supreme Court concluded that the opt-out regulations demonstrated that HHS "ha[d] at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs." *Id*. at 2782. The Court reasoned that the accommodations allowed under the regulations "serve[] HHS's stated interests equally well" because "female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to 'face minimal logistical and administrative obstacles'" in obtaining the coverage. *Id*. at 2782 (citation omitted). Indeed, "[t]he effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero." 134 S. Ct. at 2760 (emphasis added); *see also id.* at 2759 (explaining that the accommodation "ensur[es] that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage").

On August 22, 2014, the Departments augmented the regulatory accommodation process in light of the Supreme Court's interim order in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014). *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092 (Aug. 27, 2014) (interim final regulations). In its *Wheaton College* order, the

Supreme Court identified an alternative form of accommodation that would neither affect "the ability of [Wheaton College's] employees and students to obtain, without cost, the full range of FDA approved contraceptives," nor preclude the government from relying on the notice it receives from Wheaton College "to facilitate the provision of full contraceptive coverage under the [Affordable Care] Act." 134 S. Ct. at 2807. The accommodation, as originally challenged in *Wheaton College* and in this case, contemplated that an eligible organization would notify its insurer or third-party administrator of its decision to opt out. Under the interim final regulations, an organization may also opt out by notifying HHS directly of its decision rather than by notifying its insurance issuer or third-party administrator. 79 Fed. Reg. at 51,094-95. This provides eligible organizations like plaintiff with an alternative mechanism for opting out of the contraceptive coverage requirement.

Because plaintiff is eligible for the accommodations, it is—in the words of the Supreme Court—"effectively exempt[]" from the contraceptive coverage requirement. *Hobby Lobby*, 134 S. Ct. at 2763. Plaintiff's argument goes beyond its own exemption from providing contraceptive coverage and would preclude the government from independently ensuring that plaintiff's employees have the "same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." *Id*. at 2759. That argument lacks support in precedent and contradicts the reasoning of *Hobby Lobby*.

Plaintiff's First Amendment claims are likewise meritless. Similar challenges to the regulations have been rejected by nearly every court to have considered them, including the Sixth Circuit. *See, e.g., Mich. Catholic Conf. II*, 755 F.3d at 393-96. Plaintiff's Administrative Procedure Act ("APA") claims similarly fail.

BACKGROUND

I. Statutory and Regulatory Background

Congress has long regulated employer-sponsored group health plans. In 2010, the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119, established certain additional minimum standards for group health plans as well as health insurance issuers that offer coverage in the group and individual health insurance markets. The ACA requires non-grandfathered group health plans, and health insurance issuers offering non-grandfathered health insurance coverage, to cover four categories of recommended preventive-health services without cost-sharing—that is, without requiring plan participants and beneficiaries to make copayments or pay deductibles or coinsurance. 42 U.S.C. § 300gg-13. As relevant here, these services include preventive care and screenings for women as provided for in comprehensive guidelines supported by the Health Resources and Services Administration ("HRSA," a component of HHS). *Id.* § 300gg-13(a)(4).

HHS requested the assistance of the Institute of Medicine ("IOM") in developing such comprehensive guidelines for coverage of preventive services for women. 77 Fed. Reg. 8,725, 8,726 (Feb. 15, 2012). Experts, "including specialists in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines," developed a list of services "shown to improve well-being, and/or decrease the likelihood or delay the onset of a targeted disease or condition." *See* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS (IOM REP.) 2-3 (2011). These include the "full range" of "contraceptive methods" approved by the Food and Drug Administration ("FDA"), *id.* at 10, which the IOM found can greatly decrease the risk of unwanted pregnancies, adverse pregnancy outcomes, and other adverse health consequences, and vastly reduce medical expenses for women, *see id.* at

102-10.[4] FDA approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and ella), and intrauterine devices ("IUDs"). *See id.* at 105.

Consistent with those recommendations, the HRSA Guidelines include coverage of "'all [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed" by a health care provider. 77 Fed. Reg. at 8,725 (quoting HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines, AR at 283-84 ("HRSA Guidelines")). The relevant regulations adopted by the three Departments implementing this portion of the ACA (HHS, Labor, and Treasury) require coverage of, among other preventive services, the contraceptive services recommended in the HRSA Guidelines. 45 C.F.R. § 147.130(a)(1)(iv) (HHS); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. § 54.9815-2713(a)(1)(iv) (Treasury).

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

When the initial final regulations were issued, the Departments announced, in response to religious objections raised by some commenters, that they would develop "'changes to these final regulations that would meet two goals'—providing contraceptive coverage without cost-sharing to covered individuals and accommodating the religious objections of [additional] non-

[4] The IOM, which was established by the National Academy of Sciences in 1970, is funded by Congress to provide expert advice to the federal government on matters of public health. IOM REP. at iv.

profit organizations." *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012) (per curiam) (quoting 77 Fed. Reg. at 8,727).

After notice and comment rulemaking, the Departments published the regulations that plaintiff challenges in its complaint. 78 Fed. Reg. 39,869 (July 2, 2013) ("the 2013 final rules"). The 2013 final rules maintain the exemption for "religious employers," 45 C.F.R. § 147.131(a), and also provide accommodations for additional nonprofit religious organizations, *id.* § 147.131(b). The accommodations are available to group health plans established or maintained by "eligible organizations" (and group health insurance coverage provided in connection with such plans). *Id*. An "eligible organization" is an organization that satisfies the following criteria:

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

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

An eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. *Id*. at 39,874. Under the 2013 final rules, to be relieved of any such obligations, the organization need only "self-certify" that it is an eligible organization that "opposes providing coverage for particular contraceptive services" and provide a copy of that self-certification to its insurance issuer or third-party administrator ("TPA"). *Hobby Lobby*, 134 S. Ct. at 2782; *see* 78 Fed. Reg. at 39,878-79; 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1), (c)(1).

If an eligible organization opts out, individuals covered under its plan generally will "still have access to insurance coverage without cost-sharing for all FDA-approved contraceptives," but without involvement by the objecting organization. *Hobby Lobby*, 134 S. Ct. at 2759; *see* 78 Fed. Reg. at 39,847. Where, as here, the eligible organization is one that offers an insured plan, the insurance issuer—in this case, Blue Cross/Blue Shield of Michigan—is required to "provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries." *Hobby Lobby*, 134 S. Ct. at 2763; *see* 45 C.F.R. § 147.131(c)(2); Pl.'s Am. Compl. at ¶ 79.[5] Indeed, the accommodations are what enable eligible organizations' issuers to comply with their independent legal obligation to cover contraceptive services. *See id.* § 147.131(c)(2)(i) (cross-referencing 45 C.F.R. § 147.130(a)(1)(iv)); 78 Fed. Reg. at 39,876. The issuer must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the . . . plan," 45 C.F.R. § 147.131(c)(2)(i)(A), and "segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services," *id.* § 147.131(c)(2)(ii). The issuer must "not impose . . . any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization[or] the group health plan." *Id.*[6]

[5] Where the eligible organization is one that offers a self-insured plan, its TPA ordinarily "must 'provide or arrange payments for contraceptive services' for the organization's employees without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries." *Hobby Lobby*, 134 S. Ct. at 2763 n.8 (quoting 78 Fed. Reg. at 39,893); *see* 29 C.F.R. § 2590.715-2713A(b)(2). Any costs incurred by the TPA will be reimbursed through an adjustment to Federally-facilitated Exchange user fees. 78 Fed. Reg. at 39,880. Because plaintiff has an insured group health plan, Pl.'s Compl. ¶ 79, no claims involving self-insured plans or TPAs are before this Court.

[6] Plaintiff is therefore incorrect when it states that were it to avail itself of an accommodation it would "still pay for" coverage of contraceptives. Pl.'s Compl. at 46. (citing 78 Fed. Reg. at 39,877). As explained above, the regulations *specifically prohibit* plaintiff's issuer from charging any premium or otherwise passing on any costs to plaintiff with respect to the issuer's payments for contraceptive services. 45 C.F.R. § 147.131(c)(2)(ii).

In addition, the Departments have augmented the regulatory accommodation process in light of the Supreme Court's interim order in connection with an application for an injunction in *Wheaton College*. The interim order provided that, "[i]f [Wheaton College] informs the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services, the [Departments] are enjoined from enforcing against" Wheaton College provisions of the ACA and related regulations "pending final disposition of appellate review." *Wheaton Coll.*, 134 S. Ct. at 2807. The order stated that this relief neither affected "the ability of [Wheaton College's] employees and students to obtain, without cost, the full range of FDA approved contraceptives," nor precluded the government from relying on the notice it receives from Wheaton College "to facilitate the provision of full contraceptive coverage under the Act." *Id.*

The *Wheaton College* injunction does not reflect a final Supreme Court determination that RFRA requires the government to apply the accommodations in this manner. Nevertheless, the Departments issued regulations that augment the accommodation process in light of *Wheaton College* by "provid[ing] an alternative process for the sponsor of a group health plan or an institution of higher education to provide notice of its religious objection to coverage of all or a subset of contraceptive services." 79 Fed. Reg. at 51,094. Under the interim final regulations, an organization may opt out by notifying HHS of its decision directly rather than by notifying its insurance issuer or TPA. An organization need not use any particular form and need only indicate the basis on which it qualifies for an accommodation and its objection to providing some or all contraceptive services, as well as the type of plan and contact information for the plan's issuer. 45 C.F.R. § 147.131(c)(1)(ii).

If a group health plan notifies HHS that it is opting out, the Departments will then make the necessary communications to ensure that health insurance issuers or TPAs make or arrange separate payments for contraception. In the case of an "insured" group health plan, such as plaintiff's, HHS "will send a separate notification to each of the plan's health insurance issuers informing the issuer" that HHS "has received a notice" that the group health plan is opting out of providing contraceptive coverage on religious grounds "and describing the obligations of the issuer" under the regulations. *Id.* An issuer that receives such a notice from HHS will "remain responsible for compliance with the statutory and regulatory requirement to provide coverage for contraceptive services to participants and beneficiaries," but the objecting organization "will not have to contract, arrange, pay, or refer for such coverage." 79 Fed. Reg. at 51,095.

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

II. Nature and Stage of the Proceeding

Plaintiff filed suit on November 4, 2013, ECF No. 1, and amended its complaint on January 27, 2014, challenging the contraceptive coverage regulations under the Free Exercise Clause (Counts I, II, and III), Establishment Clause (Count IV), and Free Speech Clause (Counts V, VI) of the First Amendment of the United States Constitution; the Religious Freedom Restoration Act (Count VII); and the Administrative Procedure Act (Count VIII). The case was stayed pending the Sixth Circuit's decision in *Michigan Catholic Conference II*. *See* Order

Granting Motion To Stay, ECF No. 25. On February 17, 2015, the Court lifted the stay and set a briefing schedule for dispositive motions.[7] *See* Order Lifting Stay and Setting Briefing Sechedule, ECF No. 38. In lieu of a motion for summary judgment, plaintiff filed a motion for declaratory relief ("Pl.'s Mot.") on May 13, 2015.[8] ECF No. 42.

STANDARD OF REVIEW

Defendants move to dismiss plaintiff's Amended Complaint in its entirety for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Under this Rule, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

To the extent that the Court must consider the administrative record in addition to the allegations in plaintiff's Amended Complaint, defendants move, in the alternative, for summary judgment pursuant to Rule 56. Defendants are entitled to summary judgment where the administrative record demonstrates that they are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ARGUMENT

I. The Opt-Out Regulations Do Not Violate RFRA

A. The Supreme Court's Decision in *Hobby Lobby* and Order in *Wheaton College* Confirm the Validity of the Accommodations

[7] Defendants will file the administrative record on or before May 22, 2105.
[8] Plaintiff's counsel confirmed plaintiff's intention not to file an additional summary judgment motion. Defendants will therefore respond to plaintiff's motion for declaratory judgment on June 22, 2015, in accordance with this Court's order. April 29, 2015 Order, ECF No. 41.

The Affordable Care Act generally requires group health plans to cover recommended women's preventive health services without cost sharing. Under the regulations implementing that requirement, group health plans generally must cover FDA-approved contraceptives as prescribed by a health care provider without cost sharing. The regulations automatically exempt from the contraceptive coverage requirement all religious employers as defined by reference to a provision of the Internal Revenue Code, and also provide accommodations for non-profit religious organizations that meet criteria set forth in the regulations such that they also are relieved of the requirement to provide contraceptive coverage.

To opt out of the contraceptive coverage requirement, an organization need only provide to its insurance issuer or TPA a copy of a form stating that it is an eligible organization, *see* 78 Fed. Reg. 39,870, 39,874-39,875 (July 2, 2013); *see also*, *e.g.*, 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1), (c)(1), or notify HHS of its objection, the plan name and type, and the name and contact information of the insurance issuer(s) or TPA(s), *see*, *e.g.*, 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii).

If an eligible organization declines to provide contraceptive coverage, the regulations generally require the insurance issuer or third party administrator to make or arrange separate payments for contraceptive services for the plan participants and beneficiaries. *See*, *e.g.*, 29 C.F.R. § 2590.715-2713A(c). The regulations bar the insurance issuer or third party administrator from charging the eligible organization, directly or indirectly, with respect to payments for contraceptive services. *See* 45 C.F.R. § 147.131(c)(2)(ii) (insured plans) ("With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the

group health plan, or plan participants or beneficiaries."); 29 C.F.R. § 2590.715-2713A(b)(2)(i), (ii) (same for self-insured plans).

The insurance issuer or third party administrator—not the eligible organization—must notify plan participants and beneficiaries of the availability of separate payments for contraceptive services, and "[t]he notice must specify that the [organization] does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services[.]" 45 C.F.R. § 147.131(d) (insured plans); *accord* 29 C.F.R. § 2590.715-2713A(d) (same for self-insured plans).

Plaintiff here is eligible to opt out of the contraceptive coverage requirement. Plaintiff urges, however, that it is insufficient that plaintiff is free to decline to provide contraceptive coverage, and that the government may not require third parties to provide the coverage that plaintiff declines to provide itself.

The Supreme Court's decision in *Hobby Lobby* confirms the validity of the regulatory accommodations, and its reasoning cannot be reconciled with plaintiff's position here. The Supreme Court held that application of the contraceptive coverage requirement to the plaintiffs in that case—closely held companies that were not eligible for the regulatory opt-out—violated their rights under RFRA. Central to the Court's reasoning was the existence of the opt-out alternative that the Departments afford to organizations such as the plaintiff here. As the D.C. Circuit has noted, "the opt out already available to [p]laintiff[] 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." *Priests For Life*, 772 F.3d at 245 (citing *Hobby Lobby*, 134 S. Ct. at 2782).

In *Hobby Lobby*, the Court explained that the opt-out regulations "effectively exempt[]" organizations that are eligible for an accommodation. 134 S. Ct. at 2763. This accommodation, the Supreme Court explained, "seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." *Id.* at 2759. The Court declared that this accommodation is "an alternative" that "achieves" the aim of seamlessly providing coverage of recommended health services to women "while providing greater respect for religious liberty." *Id.*

The Supreme Court did not suggest that employers could (or should be entitled to) prevent their employees from obtaining contraceptive coverage from third parties through the regulatory accommodations. *See Hobby Lobby*, 134 S. Ct. at 2781 n.37 ("in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries'") (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)). Indeed, the *Hobby Lobby* majority found it necessary to emphasize in at least seven separate places that the accommodations would not interfere with the ability of female employees to access contraceptives without additional burdens. *See, e.g., id.* at 2759 (the accommodations "ensur[e] that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage"); *id.* (the "system available to religious nonprofits . . . . constitutes an alternative that achieves all of the Government's aims"); *id.* at 2760 ("The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero."); *id.* at 2781 n.37 ("[O]ur decision in these

cases need not result in any detrimental effect on any third party"); *id.* at 2782 (the accommodations would "protect the asserted needs of women as effectively" insofar as employees "would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to face minimal logistical and administrative obstacles because their employers' insurers would be responsible for providing information and coverage") (internal quotation marks and citation omitted); *id.* (the accommodation "serves HHS's stated interests equally well"); *id.* at 2783 (the accommodations would not "'[i]mped[e] women's receipt of benefits by "requiring them to take steps to learn about, and to sign up for, a new government funded and administered health benefit"'") (alterations in original, quoting dissent (in turn quoting 78 Fed. Reg. 39,870, 39,888 (July 2, 2013) (with alterations))).

Justice Kennedy's concurrence similarly emphasized that "the means to reconcile" the "two priorities" of respecting religious freedom without "unduly restrict[ing] other persons, such as employees, in protecting their own interests, interests the law deems compelling" "are at hand in the existing accommodation." *Hobby Lobby*, 134 S. Ct. at 2787 (Kennedy, J., concurring). And he confirmed that "a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees" and explained that the accommodation "works by requiring insurance companies" to provide contraceptive coverage and "equally furthers the Government's interest." *Id.* at 2786. He also made clear that the majority opinion should not be read to suggest that religious objectors need be accommodated through the adoption of a new government program. *Id*.

The Supreme Court's interim order in connection with an application for an injunction in *Wheaton College* further underscores the validity of the alternative method of opting out promulgated in the interim final regulations. The Supreme Court's interim order provided that

Wheaton College could "inform[] the Secretary of Health and Human Services in writing" that it satisfied the eligibility requirements for the accommodations and made clear that the Departments could "rely[] on" this notice to "facilitate the provision of full contraceptive coverage under the Act." *Id.* at 2807. Accordingly, the Court emphasized that "[n]othing in [its] interim order affects the ability of [Wheaton's] employees and students to obtain, without cost, the full range of FDA approved contraceptives." *Id.* The Supreme Court's acknowledgment that an objector must notify the government that it is opting out, and the government may rely on that notice to compel third parties to provide coverage, is in significant tension with plaintiff's position here—that it may state a RFRA claim by alleging that the government will rely on plaintiff's opt-out to arrange for these third parties to provide coverage.

The Supreme Court's interim order in *Wheaton College* made clear that it was not a decision on the merits and does not reflect a final determination that RFRA requires the government to apply the accommodations in this manner. 134 S. Ct. at 2807. Nevertheless, the Departments augmented the accommodations to provide an alternative means by which plaintiff may opt out of providing contraceptive coverage that, like the Supreme Court's interim order, provides for notice to the government, rather than to the insurer or third party administrator.

B. The Challenged Accommodations, Which Allow Plaintiff To Opt Out Of Providing Contraceptive Coverage, Do Not Substantially Burden Plaintiff's Religious Exercise Under RFRA

RFRA's compelling interest test applies only where government action "substantially burden[s]" a person's exercise of religion. 42 U.S.C. § 2000bb-1(a); *see, e.g.*, *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001) ("only *substantial* burdens on the exercise of religion trigger the compelling interest requirement" (emphasis added)). Whether a burden is "substantial" under RFRA is "a question of law for the courts to decide, not a question of fact."

Priests for Life, 772 F.3d at 247; *accord Mich. Catholic Conf. II*, 755 F.3d at 385 (quoting *Mahoney* v. *Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011)); *Notre Dame III*, No. 13-3853 at p. 33 (concurrence, Hamilton J.) ("Under *Roy*, whether the government is causing a substantial burden on a person's religious exercise is a question of federal law."); *Kaemmerling* v. *Lappin*, 553 F.3d 669, 673-674, 678-679 (D.C. Cir. 2008); *see also Bowen* v. *Roy*, 476 U.S. 693, 701 n.6 (1986) ("Roy's religious views may not accept this distinction between individual and governmental conduct," but the law "recognize[s] such a distinction."); *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448 (1988) (similar).

In determining whether a law imposes a substantial burden on a plaintiff's religious exercise under RFRA, courts must determine (1) whether the plaintiff's religious objection to the challenged law is sincere, (2) whether the law applies significant pressure to comply, and (3) whether the challenged regulations actually require plaintiff to modify its behavior in a significant—or more than *de minimis*—way. *See, e.g.*, *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004); *Mich. Catholic Conf. II*, 755 F.3d at 384 (citing *Lyng*, 485 U.S. at 449); *Kaemmerling*, 553 F.3d at 678 (citing *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981)). "An inconsequential or *de minimis* burden on religious practice does not rise to this level, nor does a burden on activity unimportant to the adherent's religious scheme." *Id.*

Defendants do not dispute that plaintiff's objection to opting out of providing contraceptive coverage is based on a sincere religious belief, but do argue that the challenged regulations do not substantially burden plaintiff's religious exercise. Indeed "[a]ccepting the sincerity of Plaintiffs' beliefs . . . does not relieve this Court of its responsibility to evaluate the substantiality of any burden on Plaintiffs' religious exercise." *Priests for Life*, 772 F.3d at 247.

Plaintiff does not object to informing third parties or the government that it is legally permitted to opt out of providing contraceptive coverage and chooses to do so. Plaintiff has done so in the past and would presumably continue to do so even if it obtained the injunction that it seeks. Nor would doing so impose a financial burden on plaintiff, because the regulations bar an insurance issuer from charging the eligible organization, directly or indirectly, with respect to payments for contraceptive services. *See* 45 C.F.R. § 147.131(c)(2)(ii). The insurance issuer must also notify plan participants and beneficiaries of the availability of separate payments for contraceptive services, and "[t]he notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services." 45 C.F.R. § 147.131(d).

Plaintiff objects instead to the fact that after it opts out of providing contraceptive coverage, the government requires companies like BlueCross/Blue Shield of Michigan to make or arrange separate payments for contraceptive services for the plan participants and beneficiaries. But "[t]he 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." *Priests For Life*, 772 F.3d at 250. Plaintiff is then discharged from any responsibility to provide contraceptive coverage, and the government tasks third-parties, who do not share plaintiff's religious objections, with providing contraceptive coverage in plaintiff's stead. *Id.* at 250-52.

The linchpin of plaintiff's RFRA claim is its insistence that because out, the government will require someone else to provide coverage after plaintiff opts, the act of opting out is a "trigger" and the third party's provision of these services is a "substantial burden" under RFRA. *See* Pl.'s Am. Compl. at ¶¶ 41, 181, Pl.'s Mot. at 20. But, plaintiff cannot attempt to collapse its

decision not to provide contraceptive coverage with the government's arrangements for others to provide such coverage in plaintiff's stead. "*Federal law*, rather than any involvement by the [plaintiff] in filling out or submitting the self-certification form, creates the obligation of the insurance issuers and third-party administrators to provide coverage for contraceptive services." *Geneva Coll.*, 778 F.3d at 437; *Priests For Life*, 772 F.3d at 253 ("[T]he beneficiaries receive contraceptive coverage not because Plaintiffs have completed the self-certification or alternative notice, but because the ACA imposes an independent obligation on insurers and [third party administrators] to provide this coverage."); *Notre Dame III*, No. 13-3853 at 15-16 (""It is federal law, rather than the religious organization's signing and mailing the form, that requires health-care insurers . . . to cover contraceptive services."); *see also Michigan Catholic Conference II*, 755 F.3d at 387).

Plaintiff's contrary argument is "extraordinary and potentially far reaching." *Priests For Life*, 772 F.3d at 245. Plaintiff's view that its opt-out can constitute a "substantial burden" under RFRA is at odds with our Nation's long history of allowing religious objectors to opt out and the government then requiring others to fill the objectors' shoes. *See, e.g.*, *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716-18 (1981); *cf.* EEOC Compliance Manual § 12-IV.C. (Example 43) (July 22, 2008), *available at* http://www.eeoc.gov/policy/docs/religion.html#_Toc203359529 (explaining that reasonable accommodations of workplace religious objections can include requiring the objecting employee to transfer objectionable tasks to co-workers). Plaintiff's reasoning "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." *Priests For Life*, 772 F.3d at 246. Similarly, under plaintiff's logic, the claimant in *Thomas* could have demanded not only that he not make weapons but also that he not be required to *opt out* of doing so, because his opt-out would cause someone else to take his place on the assembly line. Plaintiff's claim that it is substantially burdened by the opt-out procedure merely because contraceptives will be provided despite that opt-out is thus "paradoxical and virtually unprecedented." *Id.* (quotation ommitted.).

In arguing that the challenged regulations impose a substantial burden under RFRA, plaintiff seeks to pretermit the pertinent legal inquiry by urging that it views the burden as significant. But while it is not for this Court to "say [whether plaintiff's] religious beliefs are mistaken," *Hobby Lobby*, 134 S. Ct. at 2779, it is the Court that determines whether the type of burden alleged is a "substantial burden" under RFRA, the type of burden that triggers RFRA's compelling interest test. *See, e.g., Priests For Life*, 772 F.3d at 247 (this "is a question of law for courts to decide, not a question of fact."); *Notre Dame III*, No. 13-3853 at p. 33 (concurring, Hamilton, J.); *cf. Bowen v. Roy*, 476 U.S. 693, 701 n.6 (1986) ("Roy's religious views may not accept this distinction between individual and governmental conduct," but the law "recognize[s] such a distinction."); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448 (1988) (similar). In framing this Court's inquiry into the burden at issue here, plaintiff incorrectly states that "[t]he focus is . . . on [its] religious belief." Pl.'s Mot. at 19. But plaintiff may not "collapse[] the distinction between sincerely held belief and substantial burden." *Priests For Life*, 772 F.3d at 249; *see also Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (explaining that

"[i]n addition to showing . . . a sincerely held religious belief," plaintiffs "also b[ear] the burden of proving" that the challenged policy constitutes a substantial burden).[9]

As to that legal question, plaintiff's argument hinges on its attempt to collapse its decision not to provide contraceptive coverage with the government's arrangements for others to provide such coverage in plaintiff's stead. As courts of appeals have repeatedly recognized, it is the government that requires or offers to pay third parties to provide contraceptive coverage if an eligible organization declines to do so.

Plaintiff does not advance its argument by noting that the government will enlist the same insurer that administers plaintiff's health coverage to provide contraceptive coverage to plaintiff's employees. *See, e.g.*, Pl.'s Mot. at 20 (claiming that the "objectionable abortifacient coverage is still accessible through Plaintiff"); Pl.'s Am. Compl. at ¶ 41. Plaintiff objects not to a requirement imposed on itself but to obligations that the government imposes on third parties. It is those entities—such as BlueCross/Blue Shield of Michigan—not the plaintiff, that would provide coverage. And they would do so "separate from" materials that are distributed in connection with plaintiff's group health coverage and would have to make clear that plaintiff is neither administering nor funding the contraceptive benefits. 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(d). *See Notre Dame III*, No. 13-3853 at 14-15 ("The university is permitted

[9] While the initial version of RFRA applied where government action resulted in any "burden" on religious exercise, Congress added the word "substantially" "to make it clear that the compelling interest standards set forth in the act" apply "only to Government actions [that] place a substantial burden on the exercise of" religion, as contemplated by the case law leading up to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *See* 139 Cong. Rec. S14350, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *id.* (statement of Sen. Hatch). Consistent with RFRA's restorative purpose, Congress expected courts considering RFRA claims to "look to free exercise cases decided prior to *Smith* for guidance." S. Rep. No. 111, 103d Cong., 1st Sess. 8-9 (1993); *see* H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993) (same); *see also* 146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy) (explaining that, for purposes of the Religious Land Use and Institutionalized Persons Act of 2000, which was modeled on RFRA, "[t]he term 'substantial burden' . . . is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise").

to opt out of providing federally mandated contraceptive services, and the federal government determines (enlists, drafts, conscripts) substitute providers, and it is not surprising that they are the providers who already are providing health services to university students and staff."); *see also Priests For Life*, 772 F.3d at 253-54 (rejecting argument that there is a substantial burden because the plans serve as a "conduit"). The fact that plaintiff has a contractual relationship with BlueCross does not strip the government of its regulatory authority over this non-party.

In sum, plaintiff's attempt to collapse the provision of contraceptive coverage by third parties with its own decision not to provide such coverage fails. If employees of organizations that have opted out of providing contraceptive coverage nonetheless receive contraceptive coverage, they will do so "'*despite* plaintiffs' religious objections, not *because* of them.'" *Michigan Catholic Conference*, 755 F.3d at 389 (emphases added; citation omitted).

C. Plaintiff's Reasoning Would Deprive The Government Of Reasonable Means To Advance Its Compelling Interests In Seamlessly Providing Contraceptive Coverage

Plaintiff's claims would fail even if the accommodations were subject to RFRA's compelling interest test. The challenged accommodations serve a number of interrelated and compelling interests, as the Supreme Court acknowledged in *Hobby Lobby*. And they are the least restrictive means of vindicating those interests.

1. As the Supreme Court acknowledged in *Hobby Lobby*, the challenged accommodations serve interrelated and compelling interests. Five members of the Court endorsed the position that providing contraceptive coverage to employees "serves the [g]overnment'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." *Hobby Lobby*, 134 S. Ct. at 2785-86 (Kennedy, J., concurring); *accord id.* at 2799-800 & n.23 (Ginsburg, J., dissenting).

The remaining Justices assumed without deciding that the contraceptive coverage requirement furthers compelling interests, *id.* at 2780, and emphasized that, under the accommodations for eligible non-profit organizations, employees "would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to face minimal logistical and administrative obstacles because their employers' insurers would be responsible for providing information and coverage," *id.* at 2782 (citation and internal quotation marks omitted); *see id.* at 2760 (stressing that "[t]he effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero"); *id.* at 2783 (emphasizing that the accommodations would not "'[i]mped[e] women's receipt of benefits by "requiring them to take steps to learn about, and to sign up for, a new government funded and administered health benefit"'") (alterations in original, quoting dissent (in turn quoting 78 Fed. Reg. at 39,888 with alterations)); *id.* at 2786 (Kennedy, J., concurring) (explaining that the accommodation "works by requiring insurance companies" to provide contraceptive coverage and "equally furthers the Government's interest").

Hobby Lobby confirms that, when religious objectors opt out of their legal obligations, the government may fill those gaps and do so as seamlessly as possible. *See* 134 S. Ct. at 2782-83. In our diverse Nation, many requirements may be the object of religious objections. But government programs, and particularly national systems of health and welfare, need not vary from point to point or, for example, be based around what, if any, method of provision of medical coverage can be agreed upon by all parties, including those who object. The challenged accommodations provide an administrable way for organizations to state that they object and opt out, and for the government to require third parties to provide contraceptive coverage. The Supreme Court has made clear that "[t]he Free Exercise Clause simply cannot be understood to

require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen*, 476 U.S. at 699. It cannot be correct that the government may not accommodate religious concerns by permitting an objector to opt out of an objectionable requirement and then filling the resulting gap by shifting the objector's obligations to a third party.

The D.C. Circuit correctly found that "[a] confluence of compelling interests supports maintaining seamless application of contraceptive coverage to insured individuals even as Plaintiffs are excused from providing it." *Priests For Life*, 772 F.3d at 237; *see id.* at. 259-64. The government's requirement that insurance issuers and third party administrators provide contraceptive coverage after employers decline to do so in particular furthers compelling interests by directly and substantially reducing the incidence of unintended pregnancies, improving birth spacing, protecting women with certain health conditions for whom pregnancy is contraindicated, and otherwise preventing adverse health conditions. *See* 78 Fed. Reg. at 39,872; IOM Report 103-09; *see also Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) ("There are many medical conditions for which pregnancy is contraindicated," and "[i]t is important to confirm that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees.").

Physician and public health organizations, such as the American Medical Association, the American Academy of Pediatrics, and the March of Dimes accordingly "recommend the use of family planning services as part of preventive care for women." IOM Report 104. Use of contraceptives reduces the incidence of unintended pregnancies. IOM Report 102-04. Unintended pregnancies pose special health risks because a woman with an unintended pregnancy "may not immediately be aware that [she is] pregnant, and thus delay prenatal care"

and engage in behaviors that "pose pregnancy-related risks." 78 Fed. Reg. at 39,872; *see* IOM Report 103. As a result, "[s]tudies show a greater risk of preterm birth and low birth weight among unintended pregnancies." 78 Fed. Reg. at 39,872. And, because contraceptives reduce the number of unintended pregnancies, they "reduce the number of women seeking abortions." *Id*.

The contraceptive coverage regulations, including the religious accommodations, also advance the government's related compelling interest in assuring that women have equal access to recommended health care services. 78 Fed. Reg. at 39,872, 39,887. Congress enacted the women's preventive-services coverage provision because "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein); *see* IOM Report 18. Prior to the Affordable Care Act, "[w]omen of childbearing age spen[t] 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. at 29,070 (statement of Sen. Feinstein); *see* Ctrs. for Medicare & Medicaid Servs., *National Health Care Spending By Gender and Age: 2004 Highlights*, *available at* http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/downloads/2004GenderandAgeHighlights.pdf. These disproportionately high costs had a tangible impact: Women often found that copayments and other cost sharing for important preventive services "[were] so high that they avoid[ed] getting [the services] in the first place." 155 Cong. Rec. at 29,302 (statement of Sen. Mikulski). Studies have demonstrated that "even moderate copayments for preventive services" can "deter patients from receiving those services." IOM Report 19.

Plaintiff's contention that its employees share its religious beliefs (Pl.'s Mot. at 11), does not further its argument. Plaintiff cannot contend that, to satisfy strict scrutiny, the government

must conduct discovery of these non-parties' gender, age, medical needs, religious views, and sexual activities to determine how many will benefit from the availability of FDA-approved, doctor-prescribed contraception.[10] Regardless of plaintiff's employees' beliefs or intentions with respect to contraceptive services, if plaintiff declines to provide those individuals with important medical coverage, the government should be able to make such coverage available.

Plaintiff notes that not every employer is presently required to provide contraceptive coverage. Pl.'s Mot. at 7, 22. But, of course, "[t]he government can have an interest in the uniform application of a law, even if that law allows some exceptions." *Priests For Life*, 772 F.3d at 266. Numerous organizations are not required to pay taxes; more than half of the country is exempt from registering for the draft; and Title VII does not apply to the 80% of employers in the United States that have fewer than fifteen employees. *See* 42 U.S.C. § 2000e(b).[11] Yet it does not follow that raising tax revenue, raising an army, and combatting race discrimination are not compelling interests.

For example, plaintiff notes that houses of worship are exempted from the regulations. Pl.'s Mot. at 21. But, as discussed above, this exemption must be understood in light of the long

[10] In determining whether application of a "burden to the person" being burdened "is in furtherance of a compelling governmental interest," 42 U.S.C. § 2000bb-1(b), courts must look to the type of exception being demanded. The outcome does not vary, for example, based on whether there is a large class of plaintiffs (and thus a high likelihood that some employees or students will benefit from contraceptive coverage), or a small class. Thus, in analogous contexts, the Supreme Court looked at the effect of a religious exception writ large, not just as applied to particular plaintiffs before the Court. *See Wisconsin* v. *Yoder*, 406 U.S. 205, 221 (1972) (evaluating the effects of "the claimed Amish exemption" even though only three families were before the Court); *see also Thomas*, 450 U.S. at 719 (considering "the number of people" who may be affected by the kind of accommodation sought in the case); *United States v. Lee*, 455 U.S. 252, 260 (1982) (looking at the effect if other adherents opted out of the Social Security system). This mode of analysis was preserved in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006), which described *Yoder* as having recognized an "Amish exemption," and described *Sherbert v. Verner*, 374 U.S. 398 (1963), as relating to claims of "those who would not work on Saturdays," rather than that of the single plaintiff in that case.

[11] Nearly 79% of firms that employed others in 2008 had nine or fewer employees, while more than 89% of those firms had 19 or fewer employees. *See* U.S. Census Bureau, U.S. Dep't of Commerce, *Statistics about Business Size (including Small Business)*, tbl. 2a (2008), https://www.census.gov/econ/smallbus.html.

tradition of protecting the autonomy of a church through exemptions of this kind, and the Religion Clauses of the First Amendment, which limit "government interference with an internal church decision that affects the faith and mission of the church itself." *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012); 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011) (exemption intended in part to "respect[ ] the unique relationship between a house of worship and its employees in ministerial positions"). Indeed, the exception for religious employers draws on the definition used in 26 U.S.C. § 6033(a)(3)(A)(i) and (iii), which defines the organizations exempt from filing a tax return. *See* 45 C.F.R. § 147.131(a). Under plaintiff's logic, there can be no interest in requiring Catholic hospitals and schools to file tax returns because the government has chosen to exempt archdioceses. That a special solicitude has been shown for churches does not mean that there is no compelling interest in providing plaintiff's employees and students with access to important medical services.

2. Plaintiff makes little effort to identify less-restrictive alternative means through which the government could achieve its compelling interests. Indeed, plaintiff could characterize any alternative that is only available if plaintiff declines to provide coverage as rendering plaintiff's provision of health coverage or its opt-out from contraceptive coverage a "trigger." Plaintiff states that "a narrow 'least restrictive means' would be to declare *in this case* that Plaintiff, without further justification or notice, and based on its religious objections, is exempt" from the contraceptive coverage requirement. Pl.'s Mot. at 22 (emphasis in original). Plaintiff also states that the government could assume the cost of providing coverage for the objectionable services. *Id*. But these suggestions ignore the core teachings of *Hobby Lobby*.

As the Supreme Court emphasized, the accommodations ensure that women "would continue to receive contraceptive coverage without cost sharing for all FDA-approved

contraceptives, and they would continue to face minimal logistical and administrative obstacles because their employers' insurers would be responsible for providing information and coverage." *Hobby Lobby*, 134 S. Ct. at 2782 (citation and internal quotation marks omitted); *see also supra* pp. 23-25.

Plaintiff's "alternatives" would not "protect the asserted needs of women as effectively," *Hobby Lobby*, 134 S. Ct. at 2782, or "equally further[] the Government's interest," *id.* at 2786 (Kennedy, J., concurring), because—as the Supreme Court disclaimed—it would require an employee who wants coverage to seek health insurance outside of that provided by her employer. Such an "alternative[] would substantially impair the government's interest" because, at the very least, it "would add steps—requiring women to identify different providers or reimbursement sources, enroll in additional and unfamiliar programs, pay out of pocket and wait for reimbursement, or file for tax credits (assuming their income made them eligible)—or pose other financial, logistical, informational, and administrative burdens." *Priests For Life*, 772 F.3d at 265. Indeed, the very point of requiring that health coverage include coverage of preventive services, including contraception, without cost sharing is that even small burdens prevent people from obtaining important preventive services, including contraception. *See, e.g.*, 78 Fed. Reg. at 39,888 (purpose of the program is "providing coverage of recommended preventive services through the existing employer-based system of health coverage so that women face minimal logistical and administrative obstacles" and "[i]mposing additional barriers to women receiving the intended coverage . . . by requiring them to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women"); IOM Report 18-19, 109; *see also Wheaton College*, 134 S. Ct. at 2807 ("Nothing in this interim order affects the ability of the applicant's employees and students to obtain, without cost, the full range of FDA

approved contraceptives."); *see generally Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) (question under free speech strict scrutiny is whether "less restrictive alternatives would be *at least as effective* in achieving the legitimate purpose that the statute was enacted to serve") (emphasis added).

The regulatory accommodation process is the least restrictive means of ensuring that women seamlessly obtain coverage for contraception alongside their other health coverage. Accordingly, plaintiff's RFRA challenge (Count VII) fails.

III. Plaintiff's Claims Under The First Amendment And The APA Fail

A. The Regulations Do Not Violate the Free Exercise Or Establishment Clauses

Plaintiff explains in its motion for declaratory judgment that its claims under the Free Exercise Clause (Counts I, II, and III) boil down to a challenge that the accommodations are "neither religiously neutral nor generally applicable." Pl.'s Mot. at 22. But nearly every court to have addressed such a free exercise challenge to the regulations has rejected it, including this Court, *see Autocam Corp. v. Sebelius*, No. 12-1096, 2012 WL 6845677 at *4-5 (W.D. Mich. Dec. 24, 2012).[12]

1. The Free Exercise Clause is not implicated in this case, because the regulations are neutral and generally applicable. *See Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). It prohibits only laws with "the unconstitutional object of targeting religious beliefs and practices." *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997). "Neutrality

[12] *See, e.g., Mich. Catholic Conf. II*, 755 F.3d at 393-94, *aff'g Mich. Catholic Conf. I*, 989 F. Supp. 2d at 588-89, and *EWTN*, 2014 WL 2739347 at *5-6; *Catholic Charities of the Archdiocese of Phila. v. Burwell*, No. 14-cv-3096, 2014 WL 2892502, at *7-8 (E.D. Pa., June 26, 2014); *Roman Catholic Archdiocese of Atlanta v. Sebelius*, No. 1:12-cv-3489, 2014 WL 1256373, at *23-26 (N.D. Ga., May 30, 2014), *on reconsideration in part*, No. 1:12-cv-03489, 2014 WL 2441742 (N.D. Ta. May 30, 2014); *Roman Catholic Archbishop of Wash. v. Sebelius*, 19 F. Supp. 2d 48, 2013 WL 6729515, at *27-31 (D.D.C. 2013), *aff'd in part, vacated in part sub nom Priests for Life*, 77 F. Supp. 3d 88 (D.D.C. 2013); *Notre Dame I*, 988 F. Supp. 2d at 927-30. *But see Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 437 (W.D. Pa. Mar. 6, 2013); *Sharpe Holdings v. HHS*, No. 2:12-CV-92-DDN, 2012 WL 6738489, at *5 (E.D. Mo., Dec. 31, 2012).

and general applicability are interrelated." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). A law is not neutral "if the object of the law is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. A law is not generally applicable if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief." *Id.* at 543. The contraceptive coverage requirement "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." *Priests For Life*, 772 F.3d at 268. Plaintiff makes no specific argument to the contrary.

The contraceptive coverage requirement reflects expert medical recommendations about the medical necessity of contraceptive services, without regard to any religious motivations for or against such services. It applies to all non-grandfathered health plans that do not qualify for the religious employer exemption or the accommodations for eligible organizations. Thus, "it is just not true . . . that the burdens of the [regulations] fall on religious organizations 'but almost no others.'" *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (quoting *Lukumi*, 508 U.S. at 536). And "the availability of the exemption and the accommodation means that the law imposes a *lesser* burden on those who object for religious reasons. *Mich. Catholic Conf. II*, 755 F.3d at 394. "To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather than promote, freedom of religion." *Priests for Life*, 2013 WL 6672400, at *10 (quotation omitted).

Furthermore, even if the regulations were not neutral or generally applicable, plaintiff's free exercise challenge still would fail because the regulations satisfy strict scrutiny. *See supra* Section I(C).

2. To the extent plaintiff is attempting to argue that the regulations unconstitutionally discriminate by exempting houses of worship and their integrated auxiliaries from the contraceptive coverage requirement while making opt-out accommodations available to other religious non-profit organizations (Count IV), plaintiff has failed to state a claim to support this challenge.

The D.C. Circuit has rejected the same argument that plaintiff raises here, explaining that "[t]he regulations at issue here draw distinctions based on organizational form and purpose, and not religious belief or denomination." *Priests For Life*, 772 F.3d at 273. Indeed, the regulations "draw a long-recognized and permissible distinction between houses of worship and religious nonprofits." *Id.* at 272.

Plaintiff also refers to the Affordable Care Act's grandfathering provision; however, this provision applies to a wide array of the Act's requirements, and has the effect of allowing a transition period for compliance with a number of the Act's requirements (including, but not limited to, the contraceptive coverage and other preventive-services coverage provisions). And, indeed, grandfathered plans are being steadily phased out. *See Priests For Life*, 772 F.3d at 266 n.25 ("According to a 2013 study conducted by Kaiser Health News, the grandfathering is already quickly phasing down.").

Finally, to the extent plaintiff makes an "unbridled discretion" claim, *see* Pl.'s Am. Compl. ¶¶ 147-48, 154-55, the Court must reject it. Plaintiff alleges incorrectly that the regulations "vest[] HRSA with unbridled discretion in deciding whether to allow exemptions to some, all, or no religious individuals," or to "some, all, or no organizations meeting the definition of 'religious employers.'" *Id*. Under the challenged regulations, an entity that is organized and operates as a nonprofit and that is referred to in Section 6033(a)(3)(A)(i) or

(a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended, qualifies for the exemption. 45 C.F.R. § 147.131(a). And an organization that satisfies the four criteria to be an "eligible organization" is eligible for the accommodation. *Id.* § 147.131(b). There is no discretion, let alone "unbridled discretion," that is left to defendants to decide who is exempt or who is accommodated; the regulations set out the criteria for both determinations.

B. The Regulations Do Not Violate The Free Speech Clause

Plaintiff has alleged two claims—Counts V and VI of the Amended Complaint—raising the same challenge under the Free Speech clause, both of which fail to state a claim for relief.[13]

Plaintiff argues that the regulations unconstitutionally compel speech involved in opting out. Pl.'s Am. Compl. at ¶¶ 158-67. But "[r]equiring Plaintiffs to give notice that they wish to opt out of the contraceptive coverage requirement no more compels their speech in violation of the First Amendment than does demanding that a conscientious objector self-identify as such." *Priests For Life*, 772 F.3d at 271. As the D.C. Circuit has explained, although the opt-out mechanisms "may include 'elements of speech'" they are "'a far cry from the compelled speech' that the Supreme Court previously has found to be unconstitutional." *Id.* (quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47, 61-62 (2006)). "[A]ny speech required by the self-certification or alternative notice is . . . incidental to the accommodation's regulation of conduct." *Id.*; *see FAIR*, 547 U.S. at 61-62. Moreover, "[n]othing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." 78 Fed. Reg. at 39,880 n.41; *see also Priests For Life*, 772 F.3d at 271 ("Completing the self-certification form does not limit what Plaintiffs may say about contraception—or any other topic—nor does it limit where, when, or how they may say

[13] Plaintiff did not raise either of the claims in Counts V and VI of the Amended Complaint in its motion for declaratory judgment.

it."). In fact, by opting out, plaintiff would explicitly proclaim its objection to contraception. "[T]he opt out here is designed to ensure that Plaintiffs do not have to express, in words or symbolic backing, any support for contraception." *Id*.

C. The Regulations Do Not Violate The Administrative Procedure Act

Count VIII[14] of plaintiff's Amended Complaint asserts several disparate and inaccurate claims purporting to allege a violation of the APA; this does not amount to a claim on which relief can be granted, and plaintiff's purported challenge is meritless anyway. First, plaintiff is wrong that Defendants failed to meet the APA's procedural requirements, *see* Pl.'s Am. Compl. at ¶¶189-90. In fact, the preamble to the 2013 final rule demonstrates the multiple opportunities for notice and comment on the proposed regulations—and more than 400,000 comments were submitted in response to the proposed regulations published on February 6, 2013—and specifically addresses issues raised by some of the comments in its analysis. *See* 78 Fed. Reg. 39,871; *see id*. 39,872-884.

Plaintiff's claim that the final rule is arbitrary and capricious is also meritless. First, plaintiff alleges that defendants failed to consider "the full extent of [the regulations'] implications" and did not "take into consideration the evidence against" promulgating the rule. However, the extensive analysis in the preamble to the final rule belies this claim. *See generally* 78 Fed. Reg. 39,870, et seq.

Second, plaintiff errs when it asserts that because the preventive services coverage regulations require group health plans to cover emergency contraception, such as Plan B, they effectively require plaintiff to provide coverage for abortions in violation of federal law. See Am. Compl. ¶¶ 199-204 (citing Section 1303 of the ACA). The regulations at issue in this case

[14] Plaintiff does not raise any APA challenge in its motion for declaratory judgment.

do not require that any health plan cover abortion as a preventive service, or that it cover abortion at all, as that term is defined in federal law. Rather, the regulations require that non-grandfathered, non-exempt, and non-accommodated group health plans cover all FDA-approved "contraceptive methods, sterilization procedures, and patient education and counseling," as prescribed by a health care provider. *See* HRSA Guidelines, AR at 283-84. The government has made clear that the preventive services covered by the regulations do not include abortifacient drugs.[15] Although plaintiff may believe that certain FDA-approved contraceptive services are abortifacient drugs or cause abortions, this Court is not required to accept that characterization, which is inconsistent with the FDA's scientific assessment and with federal law. While plaintiff's religious beliefs may define abortion more broadly than federal law to include emergency contraception, the terms should be construed as a matter of law, and not based on any particular individual's views or beliefs. *See Mich. Catholic Conf. I*, 989 F. Supp. 2d at 593 ("Plaintiffs believe that FDA-approved emergency contraceptives are 'abortion-inducing products'—as is their right. However, federal law does not define them as such." (citation omitted)); *see, e.g.*, 62 Fed. Reg. 8611 (Feb. 25, 1997); 45 C.F.R 46.202(f). Accordingly, plaintiff's APA claims—Count VIII of the Amended Complaint—fail.

CONCLUSION

Defendants respectfully request that the Court grant defendants' motion to dismiss or, in the alternative, for summary judgment on all of plaintiff's claims.

[15] HealthCare.gov, Affordable Care Act Rules on Expanding Access to Preventive Services for Women (August 1, 2011), http://www.hhs.gov/healthcare/facts/factsheets/2011/08/womensprevention08012011a.html (last visited March 3, 2014); *see also* IOM REP. at 22 (recognizing that abortion services are outside the scope of permissible recommendations), AR at 320.

Respectfully submitted this 20th day of May, 2015

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

PATRICK MILES, JR.
United States Attorney

JENNIFER RICKETTS
Director

SHEILA M. LIEBER
Deputy Director

/s/ Julie S. Saltman
JULIE S. SALTMAN (DC Bar 975015)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW, Room 7111
Washington, DC 20530
Tel: (202) 532-4252
Fax: (202) 616-8470
Email: julie.saltman@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2015 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Julie S. Saltman
JULIE S. SALTMAN