No. 15-775

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

CNS INTERNATIONAL MINISTRIES AND HEARTLAND CHRISTIAN COLLEGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under federal law, health insurers and employer-sponsored group health plans generally must cover certain preventive health services, including contraceptive services prescribed for women by their doctors. Respondents object to providing contraceptive coverage on religious grounds and are eligible for a regulatory accommodation that would allow them to opt out of the contraceptive-coverage requirement. The court of appeals held, however, that the accommodation itself violates the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, by requiring third parties to provide respondents' employees and their beneficiaries with separate contraceptive coverage after respondents opt out. The question presented is:

Whether RFRA entitles respondents not only to opt out of providing contraceptive coverage themselves, but also to prevent the government from arranging for third parties to provide separate coverage to the affected women.

PARTIES TO THE PROCEEDINGS

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

Respondents are CNS International Ministries and Heartland Christian College.*

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* The Eighth Circuit caption includes additional parties who, along with respondents, were plaintiffs in the district court: Sharpe Holdings, Inc.; Rita Joanne Wilson; Judi Diane Schaefer; Charles N. Sharpe; CNS Corporation; Ozark National Life Insurance Co.; and N.I.S. Financial Services. Those parties were not "parties to the proceeding in the court whose judgment is sought to be reviewed" under Rule 12.6. They did not participate in the proceedings in the Eighth Circuit and were not covered by the preliminary injunction under review in that court. Instead, they secured relief "[i]n separate orders that [we]re not at issue" in the Eighth Circuit appeal. App., *infra*, 4a n.3.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Department of Health and Human Services, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-35a) is reported at 801 F.3d 927. The order of the district court (App., *infra*, 36a-43a) is not published in the *Federal Supplement* but is available at 2013 WL 6858588.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth in the appendix to this petition. App., *infra*, 44a-82a.

STATEMENT

1. The Patient Protection and Affordable Care Act (Affordable Care Act or Act), Pub. L. No. 111-148, 124 Stat. 119,[1] seeks to ensure universal access to quality, affordable health coverage. Some of the Act's provisions make insurance available to people who previously could not afford it. See *King* v. *Burwell*, 135 S. Ct. 2480, 2485-2487 (2015). Other reforms seek to improve the quality of coverage for all Americans, including the roughly 150 million people who continue to rely on employer-sponsored group health plans. See, *e.g.*, 42 U.S.C. 300gg-11 to 300gg-19a.[2]

One of the Act's reforms requires insurers and employer-sponsored group health plans to cover immunizations, screenings, and other preventive services without imposing copayments, deductibles, or other cost-sharing requirements. 42 U.S.C. 300gg-13. Congress determined that broader and more consistent use of preventive services is critical to improving public health and that people are more likely to obtain appropriate preventive care when they do not have to pay for it out of pocket. 78 Fed. Reg. 39,872 (July 2, 2013); see *Priests for Life* v. *HHS*, 772 F.3d 229, 259-

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[1] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

[2] See Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits 2015 Annual Survey* 58 (2015), http://files.kff.org/attachment/report-2015-employer-health-benefits-survey (*Health Benefits Survey*).

260 (D.C. Cir. 2014) (*PFL*), cert. granted, Nos. 14-1453 and 14-1505 (Nov. 6, 2015).

The Act specifies that the preventive services to be covered without cost-sharing include "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" (HRSA), a component of the Department of Health and Human Services (HHS). 42 U.S.C. 300gg-13(a)(4); see *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014) (*Hobby Lobby*). Congress included a specific provision for women's health services "to remedy the problem that women were paying significantly more out of pocket for preventive care and thus often failed to seek preventive services." *PFL*, 772 F.3d at 235; see *Hobby Lobby*, 134 S. Ct. at 2785-2786 (Kennedy, J., concurring).

In identifying the women's preventive services to be covered, HRSA relied on recommendations from independent experts at the Institute of Medicine (IOM). *Hobby Lobby*, 134 S. Ct. at 2762. IOM recommended including the full range of contraceptive methods approved by the Food and Drug Administration (FDA), which IOM found can greatly decrease the risk of unintended pregnancies, adverse pregnancy outcomes, and other negative health consequences for women and children. IOM, *Clinical Preventive Services for Women: Closing the Gaps* 10, 109-110 (2011) (*IOM Report*). IOM also noted that "[c]ontraceptive coverage has become standard practice for most private insurance and federally funded insurance programs" and that "health care professional associations"—including the American Medical Association and the American Academy of Pediatrics—

"recommend the use of family planning services as part of preventive care for women." *Id.* at 104, 108.

Consistent with IOM's recommendation, the HRSA guidelines include all FDA-approved contraceptive methods, as prescribed by a doctor or other health care provider. 77 Fed. Reg. 8725 (Feb. 15, 2012); see *Hobby Lobby*, 134 S. Ct. at 2762. Accordingly, the regulations adopted by the three Departments responsible for implementing the relevant provisions of the Affordable Care Act (HHS, Labor, and the Treasury) include those contraceptive methods among the preventive services that insurers and employer-sponsored group health plans must cover without cost-sharing. 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).[3]

2. "'[C]hurches, their integrated auxiliaries, and conventions or associations of churches,' as well as 'the exclusively religious activities of any religious order,'" are exempt from the contraceptive-coverage requirement under a regulation that incorporates a longstanding definition from the Internal Revenue Code. *Hobby Lobby*, 134 S. Ct. at 2763 (quoting 26 U.S.C. 6033(a)(3)(A) and citing 45 C.F.R. 147.131(a)). In addition, recognizing that some other employers have religious objections to providing contraceptive coverage, the Departments developed "a system that

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[3] Under the Act's grandfathering provision, health plans that have not made specified changes since the Act's enactment are exempt from many of the Act's reforms, including the requirement to cover preventive services. *Hobby Lobby*, 134 S. Ct. at 2763-2764; see 42 U.S.C. 18011. The percentage of employees in grandfathered plans has dropped from 56% in 2011 to 25% in 2015. *Health Benefits Survey* 8, 217.

seeks to respect the religious liberty" of such employers "while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives" as other women. *Id.* at 2759; see 77 Fed. Reg. 16,503 (Mar. 21, 2012). That regulatory accommodation is available to any nonprofit organization that holds itself out as a religious organization and that opposes covering some or all of the required contraceptive services on religious grounds. 45 C.F.R. 147.131(b). In light of this Court's decision in *Hobby Lobby*, the Departments have also extended the same accommodation to closely held for-profit entities that object to providing contraceptive coverage based on their owners' religious beliefs. 80 Fed. Reg. 41,324-41,330, 41,346 (July 14, 2015) (to be codified at 45 C.F.R. 147.131(b)(2)(ii)).

a. The accommodation allows objecting employers to opt out of any obligation to provide contraceptive coverage and instead requires third parties to make separate payments for contraceptive services on behalf of employees (and their covered dependents) who choose to use those services. 78 Fed. Reg. at 39,875-39,880.

If the employer invoking the accommodation has an insured plan—that is, if it purchases coverage from a health insurance issuer such as BlueCross BlueShield—then the obligation to provide separate coverage falls on the insurer. The insurer must "exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries."

Hobby Lobby, 134 S. Ct. at 2763; see 45 C.F.R. 147.131(c).

Rather than purchasing coverage from an insurer, some employers "self-insure" by paying employee health claims themselves. Self-insured employers typically hire an insurance company or other outside entity to serve as a third-party administrator (TPA) responsible for processing claims and performing other administrative tasks. 78 Fed. Reg. at 39,879-39,880 & n.40. If a self-insured employer invokes the accommodation, its TPA "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). The TPA may then obtain compensation for providing the required coverage through a reduction in fees paid by insurers to participate in the federally-facilitated insurance exchanges created under the Affordable Care Act. *Hobby Lobby*, 134 S. Ct. at 2763 n.8.

The accommodation operates differently if a self-insured organization has a "church plan" as defined in 29 U.S.C. 1002(33). Church plans are generally exempt from regulation under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* See 29 U.S.C. 1003(b)(2). The government's authority to require a TPA to provide coverage under the accommodation derives from ERISA. See 29 C.F.R. 2510.3-16(b); 80 Fed. Reg. at 41,323. Accordingly, if an eligible organization with a self-insured church plan invokes the accommodation, its TPA is not legally required to provide separate contraceptive

coverage to the organization's employees, but the government will reimburse the TPA if it provides coverage voluntarily. 79 Fed. Reg. 51,095 n.8 (Aug. 27, 2014).

In all cases, an employer that opts out under the accommodation has no obligation "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874. The employer also need not inform plan participants of the separate coverage provided by third parties. Instead, insurers and TPAs must provide such notice themselves, must do so "separate from" materials distributed in connection with the employer's group health coverage, and must make clear that the objecting employer plays no role in covering contraceptive services. 29 C.F.R. 2590.715-2713A(d); 45 C.F.R. 147.131(d).[4] The accommodation thus "effectively exempt[s]" objecting employers from the contraceptive-coverage requirement. *Hobby Lobby*, 134 S. Ct. at 2763.

b. The original accommodation regulations provided that an eligible employer could invoke the accommodation, and thereby opt out of the contraceptive-coverage requirement, by "self-certify[ing]" its eligibility using a form provided by the Department of Labor and transmitting that form to its insurer or TPA. *Hobby Lobby*, 134 S. Ct. at 2782; see 29 C.F.R.

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[4] A model notice informs employees that their employer "will not contract, arrange, pay, or refer for contraceptive coverage" and that the issuer or TPA "will provide separate payments for contraceptive services." HHS, *Notice of Availability of Separate Payments for Contraceptive Services*, https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/Downloads/cms-10459-enrollee-notice.pdf (last visited Dec. 14, 2015).

2590.715-2713A(b)(1)(ii)(A); 45 C.F.R. 147.131(c)(1)(i). In light of this Court's interim order in *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014) (*Wheaton*), the Departments have also made available an alternative procedure for invoking the accommodation.

In *Wheaton*, the Court granted an injunction pending appeal to Wheaton College, which had challenged the accommodation under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* As a condition for injunctive relief, the Court required Wheaton to inform HHS in writing that it satisfied the requirements for the accommodation. *Wheaton*, 134 S. Ct. at 2807. The Court provided that Wheaton "need not use the form prescribed by the Government" and "need not send copies to health insurance issuers or [TPAs]." *Ibid.* At the same time, the Court specified that "[n]othing in [its] order preclude[d] the Government from relying on" Wheaton's written notice "to facilitate the provision of full contraceptive coverage under the Act" by requiring Wheaton's insurers and TPAs to provide that coverage separately. *Ibid.* The government was able to do so because, as the Court was aware, Wheaton had identified its insurers and TPAs in the course of the litigation. *Id.* at 2815 (Sotomayor, J., dissenting).

In light of this Court's interim order in *Wheaton*, the Departments augmented the accommodation to provide all eligible employers with an option essentially equivalent to the one made available to Wheaton. The regulations allow an eligible employer to opt out by notifying HHS of its objection rather than by sending the self-certification form to its insurer or TPA. 79 Fed. Reg. at 51,092. The employer need not use any particular form and need only indicate the basis

on which it qualifies for the accommodation, as well as the type of plan it offers and contact information for the plan's insurers and TPAs. *Id.* at 51,094-51,095; see 29 C.F.R. 2590.715-2713A(b)(1)(ii)(B) and (c)(1); 45 C.F.R. 147.131(c)(1)(ii). If an employer opts out using this alternative procedure, HHS or the Department of Labor will notify its issuers or TPAs of their obligation to provide separate contraceptive coverage. *Ibid.*

3. Respondents are two nonprofit religious organizations that offer health coverage to their employees through a self-insured plan, but that object to covering certain contraceptive services. Respondents are eligible to opt out of the contraceptive-coverage requirement under the accommodation. App., *infra*, 4a-5a, 11a-12a.

4. Respondents filed this suit challenging the accommodation under RFRA, which provides that the government may not "substantially burden a person's exercise of religion" unless that burden is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1. Respondents asserted that the accommodation substantially burdens their religious exercise because the government will arrange for their TPA to provide employees with separate contraceptive coverage if respondents themselves opt out. The district court granted respondents' motion for a preliminary injunction. App., *infra*, 36a-43a.

5. The court of appeals affirmed. App., *infra*, 1a-35a. The court acknowledged that every other court of appeals to consider RFRA challenges to the accommodation—seven courts in all—had held that the accommodation does not impose a substantial burden on the exercise of religion because it relieves object-

ing organizations of any involvement in the provision of contraceptive coverage and instead shifts the obligation to provide that coverage to third parties. *Id.* at 19a-23a & n.11. But the court disagreed with those decisions, holding that it was required to "accept [respondents'] assertion that self-certification under the accommodation * * * would violate their sincerely held religious beliefs" and that nothing more was necessary to establish that the accommodation substantially burdens respondents' exercise of religion. *Id.* at 23a; see *id.* at 23a-28a.

The court of appeals further held that the accommodation is not the least restrictive means of furthering compelling government interests. App., *infra*, 28a-35a. The court assumed without deciding that the contraceptive-coverage requirement advances "compelling interests in safeguarding public health and in ensuring that women have equal access to health care." *Id.* at 28a-29a. But it held that, at least on the preliminary-injunction record before it, the government had not shown that the accommodation is the least-restrictive means of furthering those interests. *Id.* at 29a-35a.

DISCUSSION

The court of appeals held that RFRA entitles objecting employers not only to opt out of providing contraceptive coverage themselves, but also to prevent the government from eliminating the resulting harm to their female employees and beneficiaries by arranging for third parties to provide those women with separate coverage under the accommodation.

That conclusion was erroneous, as the other courts of appeals to consider the question have uniformly held.[5]

Parallel RFRA challenges to the accommodation are currently pending before this Court in *Zubik* v. *Burwell*, cert. granted, No. 14-1418 (Nov. 6, 2015), and six consolidated cases. See *Priests for Life* v. *HHS*, cert. granted, No. 14-1453 (Nov. 6, 2015); *Roman Catholic Archbishop of Washington* v. *Burwell*, cert. granted, No. 14-1505 (Nov. 6, 2015); *East Tex. Baptist Univ.* v. *Burwell*, cert. granted, No. 15-35 (Nov. 6, 2015); *Little Sisters of the Poor Home for the Aged* v. *Burwell*, cert. granted, No. 15-105 (Nov. 6, 2015); *Southern Nazarene Univ.* v. *Burwell*, cert. granted, No. 15-119 (Nov. 6, 2015); *Geneva College* v. *Burwell*, cert. granted, No. 15-191 (Nov. 6, 2015). The government therefore respectfully requests that the Court hold this petition for a writ of certiorari pending the Court's decision in *Zubik* and the consolidated cases,

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[5] See *Michigan Catholic Conference & Catholic Family Servs.* v. *Burwell*, No. 13-2723, 2015 WL 4979692, at *12 (6th Cir. Aug. 21, 2015); *Grace Schools* v. *Burwell*, 801 F.3d 788, 807-808 (7th Cir. 2015); *Catholic Health Care Sys.* v. *Burwell*, 796 F.3d 207, 226 (2d Cir. 2015); *Little Sisters of the Poor Home for the Aged* v. *Burwell*, 794 F.3d 1151, 1195 (10th Cir.), cert. granted, Nos. 15-105 and 15-119 (Nov. 6, 2015); *East Tex. Baptist Univ.* v. *Burwell*, 793 F.3d 449, 463 (5th Cir.), cert. granted, No. 15-35 (Nov. 6, 2015); *Wheaton College* v. *Burwell*, 791 F.3d 792, 799-801 (7th Cir. 2015); *University of Notre Dame* v. *Burwell*, 786 F.3d 606, 618-619 (7th Cir. 2015); *Geneva College* v. *Secretary HHS*, 778 F.3d 422, 439-440 (3d Cir.), cert. granted, Nos. 14-1418 and 15-191 (Nov. 6, 2015); *Priests for Life* v. *HHS*, 772 F.3d 229, 246 (D.C. Cir. 2014), cert. granted, Nos. 14-1453 and 14-1505 (Nov. 6, 2015).

and then dispose of the petition as appropriate in light of the Court's decision in those cases.[6]

CONCLUSION

This Court should hold the petition for a writ of certiorari in this case pending the Court's decision in *Zubik* v. *Burwell*, cert. granted, No. 14-1418 (Nov. 6, 2015), and the consolidated cases, and then dispose of the petition as appropriate in light of the Court's decision in those cases.

Respectfully submitted.

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DECEMBER 2015

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[6] On the same day that it issued the decision below, the Eighth Circuit issued a decision upholding a preliminary injunction in a separate RFRA challenge to the accommodation. See *Dordt College* v. *Burwell*, 801 F.3d 946 (2015). The government is filing a petition for a writ of certiorari seeking review of that decision concurrently with the filing of this petition. See *Burwell* v. *Dordt College*, No. 15-___ (filed Dec. 15, 2015).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14-1507

SHARPE HOLDINGS, INC. A MISSOURI CORPORATION; RITA JOANNE WILSON, A MISSOURI RESIDENT; JUDI DIANE SCHAEFER, A MISSOURI RESIDENT; CHARLES N. SHARPE, A MISSOURI RESIDENT; CNS CORPORATION, A MISSOURI CORPORATION; OZARK NATIONAL LIFE INSURANCE COMPANY, A MISSOURI CORPORATION; N.I.S. FINANCIAL SERVICES, INC. A MISSOURI CORPORATION; CNS INTERNATIONAL MINISTRIES, A MISSOURI NON-PROFIT CORPORATION; HEARTLAND CHRISTIAN COLLEGE, A MISSOURI NON-PROFIT CORPORATION, PLAINTIFFS-APPELLEES

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SYLVIA MATHEWS BURWELL, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY; THOMAS E. PEREZ, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR,[1] DEFENDANTS-APPELLANTS

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[1] Secretary of Health and Human Services Sylvia Mathews Burwell is substituted for her predecessor, Kathleen Sebelius. *See* Fed. R. App. P. 43(c)(2).

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF MISSOURI; JULIAN BOND; NATIONAL WOMEN'S LAW CENTER; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES; BLACK WOMEN'S HEALTH IMPERATIVE; FEMINIST MAJORITY FOUNDATION; IBIS REPRODUCTIVE HEALTH; LEGAL MOMENTUM; MERGERWATCH; NARAL PRO-CHOICE AMERICA; NARAL PRO-CHOICE MINNESOTA; NARAL PRO-CHOICE MISSOURI; NARAL PRO-CHOICE SOUTH DAKOTA; NATIONAL ORGANIZATION FOR WOMEN FOUNDATION; NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; PLANNED PARENTHOOD OF THE HEARTLAND; PLANNED PARENTHOOD OF KANSAS & MID-MISSOURI; PLANNED PARENTHOOD MINNESOTA, NORTH DAKOTA, SOUTH DAKOTA; PLANNED PARENTHOOD OF THE ST. LOUIS REGION AND SOUTHWEST MISSOURI; POPULATION CONNECTION; RAISING WOMEN'S VOICES FOR THE HEALTH CARE WE NEED; SERVICE EMPLOYEES' INTERNATIONAL UNION; NATIONAL HEALTH LAW PROGRAM; AMERICAN PUBLIC HEALTH ASSOCIATION; NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION; NATIONAL WOMEN'S HEALTH NETWORK; NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; ASIAN AMERICANS ADVANCING JUSTICE; ASIAN AMERICANS ADVANCING JUSTICE - LOS ANGELES; ASIAN & PACIFIC ISLANDER AMERICAN HEALTH FORUM; FORWARD TOGETHER; IPAS; SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE U.S.; HIV LAW PROJECT; 30 FOR 30 CAMPAIGN; CALIFORNIA WOMEN'S LAW CENTER, AMICI ON BEHALF OF APPELLANT(S)

LIBERTY, LIFE, AND LAW FOUNDATION; ASSOCIATION OF GOSPEL RESCUE MISSIONS; PRISON FELLOWSHIP MINISTRIES; ASSOCIATION OF CHRISTIAN SCHOOLS

INTERNATIONAL; NATIONAL ASSOCIATION OF EVANGELICALS; ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; AMERICAN BIBLE SOCIETY; THE LUTHERAN CHURCH-MISSOURI SYNOD; INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE; CHRISTIAN LEGAL SOCIETY, AMICI ON BEHALF OF APPELLEE(S)

Submitted: Dec. 10, 2014
Filed: Sept. 17, 2015

Appeal from the United States District Court
for the Eastern District of Missouri - Hannibal

Before: WOLLMAN, COLLOTON, and BENTON, Circuit Judges.

WOLLMAN, Circuit Judge.

Contending that the district court[2] abused its discretion, the Departments of Health and Human Services (HHS), Labor (DOL), and Treasury, as well as their respective Secretaries, (collectively, the government) appeal from the entry of a preliminary injunction enjoining the government from enforcing certain provisions of the Patient Protection and Affordable

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[2] The Honorable David D. Noce, United States Magistrate Judge for the Eastern District of Missouri (hereinafter the district court), to whom the case was assigned by consent of the parties under 28 U.S.C. § 636(c).

Care Act (ACA), 42 U.S.C. § 300gg-13, against CNS International Ministries, Inc. (CNS) and Heartland Christian College (HCC), each of which is a nonprofit religious organization that offers healthcare coverage to employees through a self-insured plan.[3] We affirm the order granting the preliminary injunction.

CNS, a Missouri nonprofit corporation with more than fifty employees, provides full-time residential services to men, women, and children with behavioral problems or who suffer from alcohol or drug dependencies, and it operates a school that serves the children of individuals in its recovery program, as well as its employees' children. HCC, also a Missouri nonprofit corporation but with fewer than fifty employees, provides post-secondary higher education to employees and residents of CNS and their dependents. Christian belief and practice are integral to the identities of both CNS and HCC, and they strive "to promote certain moral and ethical standards in their employees, including . . . a belief in the sanctity of life which precludes abortion on demand." As part of their religious mission to promote the well-being and health of their employees, both CNS and HCC offer healthcare coverage to employees through self-insured

[3] In separate orders that are not at issue in this appeal, the district court granted (1) a temporary restraining order for Appellants Sharpe Holdings, Inc.; Charles N. Sharpe; Rita Joanne Wilson; and Judi Diane Schaefer and (2) a preliminary injunction for Appellants CNS Corporation; Ozark National Life Insurance Company; and N.I.S. Financial Services, Inc.

group health plans, although HCC, with fewer than fifty employees, is not required by the ACA to offer healthcare coverage.

Under authority granted by the ACA, HHS promulgated regulations requiring "group health plan[s]" and "health insurance issuer[s] offering group or individual health insurance coverage" to cover, "[w]ith respect to women, . . . preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration." 45 C.F.R. § 147.130(a)(1)(iv). At the recommendation of the Institute of Medicine, HHS adopted guidelines providing that nonexempt employers generally must provide "coverage, without cost sharing, for '[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity'" (the contraceptive mandate). 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012); *see* 29 C.F.R. § 2590.715-2713(a). [4] Contraceptive methods approved by the FDA include intrauterine devices (IUDs), levonorgestrel (Plan B), and ulipristal acetate (ella), each of which "may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus." *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2762-63 (2014). In

[4] Treasury and HHS regulations were similarly revised, but we cite only to DOL regulations unless otherwise indicated.

general, any employer that offers employees a group health plan must comply with the contraceptive mandate or face penalties of $100 per day per affected "individual." 26 U.S.C. § 4980D(b). An employer with more than fifty employees that fails to provide employees with a group health plan is generally subject to penalties of $2,000 per year per full-time employee. *Id.* § 4980H(a), (c).

The ACA provides an exemption from the contraceptive mandate for "grandfathered" health plans, *i.e.*, those in existence at the time of the ACA's adoption. 42 U.S.C. § 18011; 29 C.F.R. § 2590.715-1251. The ACA also provides an exemption from the contraceptive mandate for group health plans sponsored by religious employers. 45 C.F.R. § 147.131(a) (HHS). The term "religious employer" is defined narrowly by reference to the Internal Revenue Code to include "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order." *Id.* (citing the Internal Revenue Code, 26 U.S.C. § 6033(a)(3)(A)(i), (iii)). Under these exemptions, employers with grandfathered plans and religious employers may continue to offer their employees healthcare coverage that does not include contraceptives.

The regulations also provide an "accommodation" for certain religious organizations that have religious objections to the contraceptive mandate but do not

qualify for the religious-employer exemption.[5] 78 Fed. Reg. 39,870, 39,871 (July 2, 2013); see also 29 C.F.R. § 2590.715-2713A. The accommodation is intended to protect religious organizations "from having to contract, arrange, pay, or refer for" contraceptive coverage. 78 Fed. Reg. at 39,872. It is available for a religious organization that (1) has religious objections to providing healthcare coverage for some or all contraceptive services, (2) "is organized and operates as a nonprofit entity," (3) "holds itself out as a religious organization," and (4) complies with a self-certification process. 29 C.F.R. § 2590.715-2713A(a). A self-insured[6] religious organization, after "contract[ing] with one or more third party administrators," 29 C.F.R. § 2590.715-2713A(b)(1)(i), complies with the self-certification process in one of two ways.

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[5] After the Supreme Court's decision in *Hobby Lobby*, the government revised the relevant regulations effective September 14, 2015, to extend this accommodation to certain closely held for-profit entities that have a religious objection to providing coverage for some or all of the FDA-approved contraceptive methods. *See* 80 Fed. Reg. 41,318 (July 14, 2015).

[6] A self-insured employer bears the financial risk of paying its employees' health-insurance claims rather than contracting with a separate insurance company to provide the coverage and bear the financial risk. A self-insured employer often hires a third-party administrator to manage administrative functions like processing claims. *See, e.g.*, 1A Steven Plitt, et al., Couch on Insurance § 10:1 n.1 (3d ed. 2013). Because CNS and HCC offer self-insured plans, we focus our discussion on regulations applicable to those plans.

The organization may self-certify by completing and submitting directly to its third-party administrator (TPA) an EBSA Form 700—Certification (Form 700), certifying that it is a religious nonprofit entity that has religious objections to providing coverage for some or all of the contraceptives required by the mandate. 29 C.F.R. § 2590.715-2713A(a)-(b). The organization may also self-certify by providing notice to HHS stating the organization's name; the basis on which it qualifies for an accommodation; its religious objections to providing coverage for some or all contraceptives, including the specific contraceptives to which it objects; its insurance plan name and type; and its TPA's name and contact information (HHS Notice).[7] See 79 Fed.

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[7] This self-certification method was added to the regulations after the Supreme Court's order in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014). Wheaton College, a religious organization, challenged the accommodation process, arguing that completing Form 700 and forwarding the Form to its insurance issuer made it complicit in the provision of contraceptive coverage in violation of its religious beliefs. The Supreme Court granted injunctive relief, enjoining the government from enforcing the contraceptive mandate while the college's challenge to the accommodation process was pending, provided that the college inform HHS "in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services." *Id.* at 2807. The college was not required to self-certify using Form 700. *Id.* The Court also stated, "Nothing in this order precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the" ACA to Wheaton College's employees and students. *Id.*

Reg. 51,092, 51,094-95 (Aug. 27, 2014); 80 Fed. Reg. 41,318, 41,323 (July 14, 2015); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B). The religious organization must also update its HHS Notice "[i]f there is a change in any of the information required to be included." 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B). According to the government, this information is "the minimum information necessary . . . to determine which entities are covered by the accommodation, to administer the accommodation, and to implement" government policy. 79 Fed. Reg. 51,092, 51,095 (Aug. 27, 2014); 80 Fed. Reg. 41,318, 41,323 (July 14, 2015). After HHS receives the Notice, it provides the information to DOL, which sends a separate notification to the religious organization's TPA. *See id.*

Once a TPA receives Form 700 from the religious organization or the separate notification from DOL "and agrees to enter into or remain in a contractual relationship with" the religious organization, the TPA must "provide or arrange payments for contraceptive services" for beneficiaries of the organization's group health plan either by providing those payments itself or by arranging for another party to do so. 29 C.F.R. § 2590.715-2713A(b)(2). The TPA is also "designat-[ed] . . . plan administrator and claims administrator for contraceptive benefits" for the religious organization. 78 Fed. Reg. at 39,879. If a self-insured religious organization uses Form 700, the form becomes "an instrument under which the plan is operated [and is] treated as a designation of the [TPA] as the

plan administrator under section 3(16) of ERISA[, 29 U.S.C. § 1002(33),] for any contraceptive services required to be covered." 29 C.F.R. § 2510.3-16(b). Form 700 authorizes the TPA to "provide or arrange payments for contraceptive services" and requires the TPA to provide separate notice regarding those services to participants and beneficiaries enrolled in the religious organization's group health plan. 29 C.F.R. § 2590.715-2713A(b)(2). If the self-insured religious organization instead self-certifies by HHS Notice, DOL's ensuing notification to the TPA also operates to "designate" the TPA "as plan administrator" under ERISA for contraceptive benefits. 79 Fed. Reg. at 51,095; *see also* 29 C.F.R. § 2510.3-16(b). Once the TPA receives Form 700 or notification from DOL, it also becomes eligible to be reimbursed for the full cost of contraceptive coverage, plus an additional allowance of "no less than 10 percent." 45 C.F.R. § 156.50 (HHS); 79 Fed. Reg. 13,744, 13,809 (Mar. 11, 2014) (noting that HHS specifies the amount of the yearly allowance and setting that amount at fifteen percent for 2015). The TPA must provide or arrange for separate payments for contraceptive coverage for a religious organization's plan beneficiaries "so long as [the beneficiaries] are enrolled in [the organization's] group health plan." 29 C.F.R. § 2590.715-2713A(d); see 45 C.F.R. § 147.131(c)(2)(i)(B) (HHS).[8]

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[8] It is not clear whether the ACA's implementing regulations impose a separate legal obligation on a TPA to provide contraceptive coverage to a religious organization's employees and plan ben-

CNS and HCC, in accordance with their sincerely held religious beliefs, oppose the use, funding, provision, or support of abortion on demand, and they believe that certain contraceptives required under the contraceptive mandate—Plan B, ella, and copper IUDs—are functionally equivalent to abortion on demand. As have a number of other religious organizations that do not qualify for the religious-employer exemption from the contraceptive mandate, CNS and HCC brought suit against the government, arguing that both the contraceptive mandate and the accommodation process impose a substantial burden on their exercise of religion in violation of the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4, and the Free Exercise Clause of the First Amendment to the U.S. Constitution.

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eficiaries or whether that obligation arises only after the TPA receives a copy of the organization's Form 700 or DOL notification and is thereby designated as a plan administrator for purposes of ERISA. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368, slip op. at 12 n.3 (D.C. Cir. May 20, 2015) (Brown, J., dissenting from denial of rehearing en banc); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1208 (10th Cir. 2015) (Baldock, J., dissenting in part) (discussing effect of accommodation regulations in context of self-insured nonprofit religious organizations), *petition for cert. filed*, 84 U.S.L.W. 3056 (U.S. July 23, 2015) (No. 15-105); *see also Wheaton College v. Burwell*, 134 S. Ct. 2806, 2814 n.6 (2014) (Sotomayor, J., dissenting) (explaining that a TPA does not have an independent obligation to provide contraceptive coverage but "bears the legal obligation to provide contraceptive coverage only upon receipt of a valid self-certification").

CNS and HCC contend that the government is coercing them to violate their religious beliefs by threatening to impose severe monetary penalties unless they either directly provide coverage for objectionable contraceptives through their group health plans or indirectly provide, trigger, and facilitate that objectionable coverage through the Form 700/HHS Notice accommodation process. They accordingly moved for a temporary restraining order and a preliminary injunction to enjoin enforcement of the contraceptive mandate and the accommodation regulations against them. The district court granted injunctive relief,[9] relying on an earlier order enjoining enforcement of "the ACA Mandate regulations regarding abortifacient devices and related counseling" against the for-profit plaintiffs, D. Ct. Order of Dec. 31, 2012, at 9, and reasoning that "the arguments for those plaintiffs are substantially similar to the arguments" raised by the nonprofit religious organizations, D. Ct. Order of Dec. 30, 2013, at 5.

After the notice of appeal was filed, the Supreme Court issued its order in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), and the government revised the accommodation regulations to permit religious organizations to self-certify using HHS Notice, as well as Form 700. We granted the parties' joint motion for

[9] The district court did not specify whether its ruling was based on the RFRA or the Free Exercise claim. Because we conclude that CNS and HCC were entitled to relief based on their RFRA claim, we decline to address their Free Exercise claim.

permission to file supplemental briefs regarding the impact of the revised regulations on the issues presented in this appeal. CNS and HCC assert that the addition of HHS Notice as an alternative method to apply for accommodation does not alleviate the substantial burden imposed on their religious exercise, because it does "nothing more than coerce [them] into another avenue that violates their religion." They argue that they "must still submit a document that they believe wrongfully facilitates the delivery of such coverage."

The government asserts—as it did with respect to Form 700—that HHS Notice does not substantially burden CNS and HCC's exercise of religion, because the Notice does not facilitate the provision of contraceptive coverage by CNS and HCC's TPAs, which have a separate and independent legal obligation under the ACA to provide contraceptive coverage to CNS and HCC's employees. The government also argues that even if there were a substantial burden on the exercise of religion, it has employed the least restrictive means to accomplish its compelling interest in ensuring access to no-cost contraceptive coverage.

"A district court has broad discretion when ruling on [a] request[] for [a] preliminary injunction[], and we will reverse only for clearly erroneous factual determinations, an error of law, or an abuse of that discretion." *Med. Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 803 (8th Cir. 2003) (quoting *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir.

1998)). In determining whether to grant injunctive relief, a district court generally considers "(1) the threat of irreparable harm to the movant; (2) the balance between the potential harm and any harm that granting the injunction will cause to other parties to the litigation; (3) the probability that the movant will succeed on the merits; and (4) the public interest." *Id.* (citations omitted); *see also Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir.1981)). Although "no single factor is determinative," *Dataphase*, 640 F.2d at 113, the probability-of-success factor is the most significant, *see Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013).

RFRA provides that a federal law may not "substantially burden a person's exercise of religion" unless the government "demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.[10] To state a claim under RFRA, a religious objector must show that the government substantially burdens a sincere religious exercise or belief. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006). The burden then shifts to the government to show that it has a "compelling interest" in applying

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[10] "RFRA expressly adopted the compelling interest test 'as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).'" *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

"the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 429-30 (quoting 42 U.S.C. § 2000bb-1(b)). To satisfy the compelling-interest requirement, the government must do more than identify "broadly formulated interests justifying the general applicability of government mandates." *Id.* at 431. The government also bears the burden of showing that "application of the burden to the person . . . is the least restrictive means of furthering" its compelling interest. *Id.* at 424. This burden-shifting approach applies even at the preliminary-injunction stage. *Id.* at 429-30.

Under RFRA, the government substantially burdens the exercise of religion when it "conditions receipt of an important benefit upon conduct proscribed by a religious faith" or "denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981). In other words, governmental action substantially burdens the exercise of religion when it coerces private individuals into violating their religious beliefs or penalizes them for those beliefs by denying them the "rights, benefits, and privileges enjoyed by other citizens." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988).

Here, the substantial burden imposed by the government on CNS and HCC's exercise of religion is the

imposition of significant monetary penalties should CNS and HCC adhere to their religious beliefs and refuse to comply with the contraceptive mandate or the accommodation regulations. This burden mirrors the substantial burden recognized by the Supreme Court in *Hobby Lobby*. CNS and HCC face the same consequences for noncompliance as did the plaintiffs in *Hobby Lobby*, 134 S. Ct. at 2759, 2775-76. Like the plaintiffs in *Hobby Lobby*, if CNS and HCC fail to comply with the challenged regulations, they will be subject to substantial monetary penalties. *See id.* at 2775-76 (citing 26 U.S.C. §§ 4980D, 4980H). When the government imposes a direct monetary penalty to coerce conduct that violates religious belief, "[t]here has never been a question" that the government "imposes a substantial burden on the exercise of religion." *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368, slip op. at 6 n.3 (D.C. Cir. May 20, 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc); *see also Hobby Lobby*, 134 S. Ct. at 2759 (imposing penalty for refusal to provide contraceptive coverage); *Wisconsin v. Yoder*, 406 U.S. 205, 208, 218 (1972) (imposing penalty for refusal to send children to high school); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (equating denial of benefits with imposition of penalty for Saturday worship); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 628 n.1 (7th Cir. 2015) (Flaum, J., dissenting) ("[O]nce we determine a religious belief is burdened, substantiality is measured by the severity of the penalties for non-compliance."). As noted by the Court in *Hobby Lobby*, "[i]f these con-

sequences do not amount to a substantial burden, it is hard to see what would." 134 S. Ct. at 2759.

The "exercise of religion" protected under RFRA "involves not only belief and profession but the performance of (or abstention from) physical acts that are engaged in [or forborne] for religious reasons." *Hobby Lobby*, 134 S. Ct. at 2770 (internal quotation and citation omitted). "RFRA was designed to provide very broad protection for religious liberty," indeed, protection "far beyond what [the Supreme] Court has held is constitutionally required." *Id.* at 2767. Significantly, RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" and "mandate[s] that this concept be construed in favor of a broad protection of religious exercise." *Id.* at 2762 (internal quotation and citation omitted).

CNS and HCC submit that their religious beliefs prohibit them from providing healthcare coverage for certain contraceptives. They further assert that the government's purported accommodation of their religious beliefs—the requirement that they submit Form 700 or HHS Notice so that their TPA can provide the objectionable contraceptives—is no accommodation at all because it, too, substantially burdens their exercise of religion. The government does not dispute the sincerity of CNS and HCC's religious beliefs. When sincerity is not in dispute, we must consider the religious belief or exercise at issue and determine whether the government has placed substantial pressure, *i.e.*, a

substantial burden, on the religious objector to engage in conduct that violates the religious belief or to abstain from engaging in conduct that is required by that belief. *See Hobby Lobby*, 134 S. Ct. at 2775-76 (concluding that substantial burden arises when the government "demands" that a religious objector either "engage in conduct that seriously violates [his] religious beliefs" or suffer "substantial" "consequences"); *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (suggesting that substantial burden may exist when the government compels a religious objector "by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that [he] find[s] objectionable for religious reasons") (footnote omitted).

Our inquiry in this regard is necessarily constrained because "it is not within the judicial function" to determine whether a religious belief or practice comports with the tenets of a particular religion. *Thomas*, 450 U.S. at 716 ("Courts are not arbiters of scriptural interpretation."). Instead, we must accept a religious objector's description of his religious beliefs, regardless of whether we consider those beliefs "acceptable, logical, consistent, or comprehensible." *Id.* at 714. In other words, a religious objector is entitled to "dr[a]w a line" regarding the conduct that his religion deems permissible, and once that line is drawn, "it is not for [a court] to say that the line . . . was . . . unreasonable." *Id.* at 715. "[O]ur 'narrow function . . . in this context,'" therefore, "'is to determine' whether the line drawn reflects 'an honest

conviction.'" *Hobby Lobby*, 134 S. Ct. at 2779 (quoting *Thomas*, 450 U.S. at 716).

CNS and HCC assert that their religious beliefs dictate that they abstain from conduct that furthers the government's regulatory scheme to provide their employees and plan beneficiaries with coverage for objectionable contraceptives. They argue that the accommodation provided via the Form 700/HHS Notice procedure does not eliminate the substantial burden imposed on their religious beliefs because the accommodation process itself triggers the provision of objectionable coverage by their TPAs, making them complicit in conduct that violates their religious beliefs.

The government argues that the accommodation process cannot substantially burden CNS and HCC's exercise of religion because, as a matter of law, it does not trigger, facilitate, or make CNS and HCC complicit in the provision of that coverage. This is true, the government says, because the ACA already imposes an obligation on TPAs to provide contraceptive coverage to their employees and plan beneficiaries.

The government's argument has prevailed in several cases, in each of which the courts concluded as a matter of law that because the accommodation process does not trigger contraceptive coverage or make the religious objector complicit in the provision of that coverage, the accommodation process cannot impose a

substantial burden on the exercise of religion.[11] *See Catholic Health Care Sys. v. Burwell*, No. 14-427, 2015

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[11] In reaching this conclusion, the courts have reasoned that "[i]t is federal law, rather than the religious organization's signing and mailing [Form 700 or HHS Notice], that requires health-care insurers, along with [TPAs] of self-insured health plans, to cover contraceptive services. By refusing to fill out the form [the religious objector] would subject itself to penalties, but [its insurer and TPA] would still be required to provide [contraceptive] services to" employees and plan beneficiaries. *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 614 (7th Cir. 2015); *see also Catholic Health Care Sys. v. Burwell*, No. 14-427, 2015 WL 4665049, at *12-13 (2d Cir. Aug. 7, 2015); *Little Sisters of the Poor*, 794 F.3d 1151, 1180-81; *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 458-62 (5th Cir. 2015), petition for cert. filed, 84 U.S.L.W. 3050 (U.S. July 8, 2015) (No. 15-35); *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 441-42 (3d Cir. 2015), petition for cert. filed sub nom. *Zubik v. Burwell*, 83 U.S.L.W. 3894 (U.S. May 29, 2015) (Nos. 14-1418, 14A1065), and petition for cert. filed, 84 U.S.L.W. 3096 (U.S. Aug. 11, 2015) (Nos. 15-191, 15A1); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 256 (D.C. Cir. 2014) *petition for cert. filed*, 83 U.S.L.W. 3918 (U.S. June 9, 2015) (No. 14-1453), *and petition for cert. filed sub nom. Roman Catholic Archbishop of Wash. v. Burwell*, 83 U.S.L.W. 3936 (U.S. June 19, 2015) (No. 14-1505); *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 387-88 (6th Cir. 2014), *cert. granted and judgment vacated*, 135 S. Ct. 1914 (2015) (vacating and remanding for further consideration in light of *Hobby Lobby*), *and reissued and reaffirmed on remand*, Nos. 13-2723, 13-6640, 2015 WL 4979692 (6th Cir. Aug. 21, 2015); *but see Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1347 (11th Cir. 2014) (Pryor, J., specially concurring in order granting injunction pending appeal) (disagreeing with conclusion of Sixth and Seventh Circuits that "mandate imposes an

WL 4665049, at *7 (2d Cir. Aug. 7, 2015) (noting that while the court will accept the sincerity of an objector's religious beliefs, "it must assess the nature of a claimed burden on religious exercise to determine whether, as an objective legal matter, that burden is 'substantial' under RFRA"); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1176 (10th Cir. 2015) (noting that "courts—not plaintiffs—must determine if a law or policy substantially burdens religious exercise"), *petition for cert. filed*, 84 U.S.L.W. 3056 (U.S. July 23, 2015) (No. 15-105); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 457-59 (5th Cir. 2015) (citing *Bowen*, 476 U.S. 693, and *Lyng*, 485 U.S. 439, as binding authority to "decid[e], as a question of law, whether the challenged law pressures the objector to modify his religious exercise), *petition for cert. filed*, 84 U.S.L.W. 3050 (U.S. July 8, 2015) (No. 15-35); *Univ. of Notre Dame*, 786 F.3d at 612 ("Although Notre Dame is the final arbiter of its religious beliefs, it is for the courts to determine whether the law actually forces Notre Dame to act in a way that would violate those beliefs."); *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 435 (3d Cir. 2015) ("Without testing the appellees' religious beliefs, we must nonetheless objectively assess whether the appellees' compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contracep-

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independent obligation on" TPAs that "does not constitute a substantial burden").

tive coverage."), *petition for cert. filed sub nom. Zubik v. Burwell*, 83 U.S.L.W. 3894 (U.S. May 29, 2015) (Nos. 14-1418, 14A1065), *and petition for cert. filed*, 84 U.S.L.W. 3096 (U.S. Aug. 11, 2015) (Nos. 15-191, 15A1); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 247 (D.C. Cir. 2014) ("Accepting the sincerity of Plaintiffs' beliefs, however, does not relieve this Court of its responsibility to evaluate the substantiality of any burden on Plaintiffs' religious exercise . . . . Whether a law substantially burdens religious exercise under RFRA is a question of law for courts to decide, not a question of fact."), *petition for cert. filed*, 83 U.S.L.W. 3918 (U.S. June 9, 2015) (No. 14-1453), *and petition for cert. filed sub nom. Roman Catholic Archbishop of Wash. v. Burwell*, 83 U.S.L.W. 3936 (U.S. June 19, 2015) (No. 14-1505); *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 385 (6th Cir. 2014) ("[A]lthough we acknowledge that the appellants believe that the regulatory framework makes them complicit in the provision of contraception, we will independently determine what the regulatory provisions require and whether they impose a substantial burden on appellants' exercise of religion."), *cert. granted and judgment vacated*, 135 S. Ct. 1914 (2015) (vacating and remanding for further consideration in light of *Hobby Lobby*) *and reissued and reaffirmed on remand*, Nos. 13-2723, 13-6640, 2015 WL 4979692 (6th Cir. Aug. 21, 2015); *but cf. Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340 (11th Cir. 2014) (granting motion for injunc-

tion pending appeal against enforcement of contraceptive mandate in light of *Hobby Lobby*).

As *Hobby Lobby* instructs, however, we must accept CNS and HCC's assertion that self-certification under the accommodation process—using either Form 700 or HHS Notice—would violate their sincerely held religious beliefs. *See Hobby Lobby*, 134 S. Ct. at 2778; *see also Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."). It is not our role to second-guess CNS and HCC's honest assessment of a "difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Hobby Lobby*, 134 S. Ct. at 2778. As discussed above, Form 700 or HHS Notice will inform CNS and HCC's TPA of its obligations to facilitate contraceptive coverage for CNS and HCC's employees and plan beneficiaries and thus will play a part in providing the objectionable contraceptives. As in *Hobby Lobby*, CNS and HCC sincerely believe that the actions "demanded by the . . . regulations [are] connected to" illicit conduct "in a way that is sufficient to make it immoral for them to" take those actions. *Id.* CNS and HCC have drawn a line between actions they find "to be consistent with [their] religious beliefs" and actions they consider

"morally objectionable." *Id.* (citing *Thomas*, 450 U.S. at 715). And it is not for us "'to say that the line [they] drew was an unreasonable one.'" *Id.* (quoting *Thomas*, 450 U.S. at 715); *see also Priests for Life*, slip op. at 12 (Kavanaugh, J., dissenting from denial of rehearing en banc) ("Judicially second-guessing the correctness or reasonableness (as opposed to the sincerity) of plaintiffs' religious beliefs is exactly what the Supreme Court in *Hobby Lobby* told us not to do.").

The government insists that because the ACA's requirement that insurance issuers and group health plans include contraceptive coverage is wholly independent of CNS and HCC's self-certification, their exercise of religion cannot be substantially burdened by the accommodation process. Even if the ACA requires that insurance issuers and group health plans include contraceptive coverage regardless of whether CNS and HCC self-certify, it also compels CNS and HCC to act in a manner that they sincerely believe would make them complicit in a grave moral wrong as the price of avoiding a ruinous financial penalty. If one equates the self-certification process with, say, that of obtaining a parade permit, then indeed the burden might well be considered light. But if one sincerely believes that completing Form 700 or HHS Notice will result in conscience-violating consequences, what some might consider an otherwise neutral act is a burden too heavy to bear. "The Supreme Court has emphasized that judges in RFRA cases may question only the sincerity of a plaintiff's religious belief, not

the correctness or reasonableness of that religious belief." *Priests for Life*, slip op. at 8 (Kavanaugh, J., dissenting from denial of rehearing en banc); *see also Eternal Word*, 756 F.3d at 1347 (Pryor, J., specially concurring in order granting injunction pending appeal) (noting that religious objector's "legal interpretation is beside the point" because "[w]hat matters is whether the [objector's] participation in the contraception scheme—however minimal—violates its religious beliefs"); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, Nos. 13-1540, 14-6026, 14-6028, 2015 WL 5166807, at *2 (10th Cir. Sept. 3, 2015) (Hartz, J., dissenting from denial of rehearing en banc) ("I am aware of no precedent holding that a person's free exercise was not substantially burdened when a significant penalty was imposed for refusing to do something prohibited by the person's sincere religious beliefs (however strange, or even silly, the court may consider those beliefs)."); *Grace Schs. v. Burwell*, Nos. 14-1430, 14-1431, 2015 WL 5167841, at *18 (7th Cir. Sept. 4, 2015) (Manion, J., dissenting). Religious beliefs need not be "acceptable, logical, consistent, or comprehensible to others" to deserve protection. *Thomas*, 450 U.S. at 714. The question here is not whether CNS and HCC have correctly interpreted the law, but whether they have a sincere religious belief that their participation in the accommodation process makes them morally and spiritually complicit in providing abortifacient coverage. Their affirmative answer to that question is not for us to dispute.

As it did in Hobby Lobby, the government argues here that CNS and HCC's objection to the contraceptive mandate is really an objection to the conduct of third parties and that "the connection between what [CNS and HCC] must do . . . and the end that they find to be morally wrong . . . is simply too attenuated." *See Hobby Lobby*, 134 S. Ct. at 2777. In *Hobby Lobby*, the third parties were the plaintiffs' employees who would use the contraceptive benefits provided in the group health plan. Here, the third parties are TPAs, who will provide the objectionable coverage to CNS and HCC's employees through the group health plan. The Supreme Court rejected this argument in *Hobby Lobby*, characterizing it as tantamount to "tell[ing] the [religious objectors] that their beliefs" about complicity in the provision of contraceptive coverage were "flawed," "mistaken[,] or insubstantial"—moral and philosophical judgments that are not for the courts to make. *Id.* at 2778-79. Instead, when a religious objector deems the required conduct to cross the line of morally and religiously acceptable behavior, "it is not for us to say that their religious beliefs are mistaken or insubstantial." *Id.* at 2779.

The government also argues that the self-certification process cannot substantially burden CNS and HCC's exercise of religion because they were already instructing their TPA not to provide contraceptive coverage and thus had already declared their religious objection to such devices and products. What this argument fails to appreciate, however, is

that self-certification under the accommodation process accomplishes what CNS and HCC's prior instructions had specifically prevented: the provision of objectionable coverage through their group health plans. We need look no further than to the government's own litigation behavior to gauge the importance of self-certification in the regulatory scheme. If TPAs had a wholly independent obligation to provide contraceptive coverage to religious objectors' employees and plan beneficiaries, there would be no need to insist on CNS and HCC's compliance with the accommodation process.

In light of CNS and HCC's sincerely held religious beliefs, we conclude that compelling their participation in the accommodation process by threat of severe monetary penalty is a substantial burden on their exercise of religion. *See Hobby Lobby*, 134 S. Ct. at 2778 ("Arrogating the authority to provide a binding national answer to this religious and philosophical question, [the government] in effect tell[s] the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step."). That they themselves do not have to arrange or pay for objectionable contraceptive coverage is not determinative of whether the required or forbidden act is or is not religiously offensive. *See id.* at 2778; *Thomas*, 450 U.S. at 715. We thus conclude that CNS and HCC have shown a substantial likelihood of success on the merits of their claim that the contraceptive mandate and ac-

commodation process impose a substantial burden on their religious beliefs.

The question remains whether the government has established a compelling interest which it has used the least restrictive means to further. As noted above, under RFRA, the "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The government must "demonstrate that the compelling interest test is satisfied through application of the challenged law to . . . the particular claimant whose sincere exercise of religion is being substantially burdened." *Hobby Lobby*, 134 S. Ct. at 2779 (quoting *O Centro*, 546 U.S. at 430-31). "[B]roadly formulated," *O Centro*, 546 U.S. at 431, or "sweeping" governmental interests are inadequate, *Yoder*, 406 U.S. at 221. Rather, the government must show with "particularity how [even] admittedly strong interest[s] . . . would be adversely affected by granting an exemption" to a particular claimant. *Id.* at 236.

The government has asserted that its compelling interests in safeguarding public health and in ensuring that women have equal access to health care are furthered by the contraceptive mandate and the accommodation process. *See* 78 Fed. Reg. at 39,872. In *Hobby Lobby*, Justice Alito, writing for the Court, "assume[d] that the interest in guaranteeing cost-free

access to the four challenged contraceptive methods is compelling within the meaning of RFRA." 134 S. Ct. at 2780. As did the Supreme Court, we will entertain the same assumption and proceed to consider whether the government has shown that the contraceptive mandate and accommodation process are the least restrictive means of furthering the government's compelling interests. *See Hobby Lobby*, 134 S. Ct. at 2780.

Under the "exceptionally demanding" least-restrictive-means test, *Hobby Lobby*, 134 S. Ct. at 2780, "if there are other, reasonable ways to achieve those [interests] with a lesser burden on . . . protected activity, [the government] may not choose the way of greater interference," *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). Thus, a regulation may constitute the least restrictive means of furthering the government's compelling interests if "no alternative forms of regulation" would accomplish those interests without infringing on a claimant's religious-exercise rights. *See Sherbert*, 374 U.S. at 407.

We first reiterate that the government bears the burden of proof on this issue, which requires it to come forward with evidence that the contraceptive mandate and the accommodation process are the only feasible means to distribute cost-free contraceptives to women employed by religious organizations and that no alternative means would suffice to achieve its compelling interest. It must show "that it lacks other means of achieving its desired goal without imposing a substan-

tial burden on the exercise of religion by" CNS and HCC. *Hobby Lobby*, 134 S. Ct. at 2780.

In *Hobby Lobby*, the Supreme Court determined that the accommodation process was "less restrictive than requiring employers to [directly] fund contraceptive methods that violate their religious beliefs." *Id.* at 2782. But the Court also emphasized that it was specifically "not decid[ing] . . . whether an approach of this type complies with RFRA for purposes of all religious claims." *Id.* It simply suggested that the accommodation process would be an acceptable alternative for organizations that did not assert a religious objection to the accommodation process itself. *See id.* at 2782 & n.40 ("The less restrictive approach we describe accommodates the religious beliefs *asserted in these cases*, and that is the only question we are permitted to address." (emphasis added)); *id.* at 2786 (Kennedy, J., concurring) (noting that "the plaintiffs have not criticized [the accommodation process] with a specific objection that has been considered in detail").

Any suggestion that the Court in *Hobby Lobby* sanctioned the existing accommodation process for all purposes was dispelled only days later when the Court issued its order in *Wheaton College* and enjoined enforcement of the contraceptive mandate and the Form 700 accommodation regulations as long as Wheaton College directly notified HHS of its religious objection. 134 S. Ct. at 2807. The college was not required to self-certify by Form 700 to obtain an accommodation,

and it was not required to provide the detailed information and updates demanded under the revised accommodation regulations establishing HHS Notice. *See Wheaton College*, 134 S. Ct. at 2807; *see also Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, 134 S. Ct. 1022 (2014) (enjoining government from enforcing contraceptive mandate if written notice is provided to HHS stating that objectors "are nonprofit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services"). And on June 29, 2015, the Supreme Court granted injunctive relief for the third time in another case involving a nonprofit religious organization. *Zubik v. Burwell*, 135 S. Ct. 2924 (2015) (order enjoining enforcement of the "challenged provisions" of the ACA pending final disposition of their petition for certiorari, provided that *Wheaton College* notice is submitted to HHS). Thus, in *Wheaton College, Little Sisters of the Poor*, and *Zubik*, the Supreme Court approved a method of notice to HHS that is arguably less onerous than either Form 700 or HHS Notice yet permits the government to further its interests. Although the Court's orders were not final rulings on the merits, they at the very least collectively constitute a signal that less restrictive means exist by which the government may further its interests. *See Priests for Life*, slip op. at 23 (Kavanaugh, J., dissenting from denial of rehearing en banc) ("[R]egardless of whether we as a lower court are *formally* bound by the Supreme Court stay orders in *Wheaton College* and *Little Sisters of the Poor*, the

notice identified by the Supreme Court in those two cases is undoubtedly a less restrictive way for the Government to further its interest than [Form 700 or HHS Notice]."). If the employer's TPA is known to the government, then there should be no cost to allowing the less onerous notice. Even if the TPAs are not known, the government has not shown at this stage of the proceedings that the inconvenience of identifying the TPAs likely would create an administrative problem of sufficient magnitude to make the entire scheme unworkable. *See Sherbert*, 374 U.S. at 408-09; *Bowen*, 476 U.S. at 731 (O'Connor, J., concurring in part and dissenting in part).

In addition, notice similar to that sanctioned by the Supreme Court in *Wheaton College* and *Zubik* will not affect the ability of CNS and HCC's employees and plan beneficiaries to obtain contraceptive coverage or "preclude the Government from relying on th[e] notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the" ACA. *Wheaton College*, 134 S. Ct. at 2807; *Zubik*, 135 S. Ct. at 2924 (same). The impact a religious accommodation may have on third parties is an important factor, because it "will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest." *Hobby Lobby*, 134 S. Ct. at 2781 n.37; *see also id.* at 2760 (observing that "the effect of the . . . accommodation on the women employed by Hobby Lobby . . . would be precisely zero" because they "would

still be entitled to all FDA-approved contraceptives without cost sharing").

CNS and HCC also suggest other less restrictive means that could accomplish the government's objectives and relieve the substantial burden on their exercise of religion. These include what the Court in *Hobby Lobby* characterized as "[t]he most straightforward way of doing this," namely, "for the Government to assume the cost of providing the . . . contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." 134 S. Ct. at 2780. "[C]ost may be an important factor in the least-restrictive means analysis, but both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs." *Id.* at 2781. CNS and HCC urge that the government could provide subsidies, reimbursements, tax credits, or tax deductions to employees, or that the government could pay for the distribution of contraceptives at community health centers, public clinics, and hospitals with income-based support. On the minimal record thus far developed, the government has not shown that these alternatives are infeasible. *See Korte v. Sebelius*, 735 F.3d 654, 686-87 (7th Cir. 2013); *Univ. of Notre Dame*, 786 F.3d at 630 (Flaum, J., dissenting); *E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743, 770 (S.D. Tex. 2013), *rev'd on other grounds*, 793 F.3d 449.

CNS and HCC also propose that the government could make contraceptives available to employees through its own healthcare exchanges. Under this approach, the government "could treat employees whose employers do not provide complete coverage for religious reasons the same as it does employees whose employers provide no coverage at all." *Priests for Life*, slip op. at 17 (Brown, J., dissenting from denial of rehearing en banc). "[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015). As the government must prove that its proposed mandate is the only feasible and effective means of achieving the asserted compelling interests, we cannot say on this limited record that the government has eliminated the use of healthcare exchanges as a viable option.

Applying the substantial-burden test set forth in *Hobby Lobby*, we conclude that CNS and HCC have established that they are likely to succeed on the merits of their RFRA challenge to the contraceptive mandate and the accommodation regulations—the most significant factor in determining whether a preliminary injunction should issue. *See Home Instead, Inc.*, 721 F.3d at 497. They have also established that in the absence of an injunction they will be forced to violate their sincerely held religious beliefs by complying with either the contraceptive mandate or the accommodation process or to incur severe monetary penalties for refusing to comply. Keeping in mind the def-

erence we owe the district court in reviewing a decision to grant injunctive relief, we conclude that it did not abuse its discretion in finding that CNS and HCC were substantially likely to succeed on the merits of their claim that the contraceptive mandate and the accommodation process substantially burden their exercise of religion in violation of RFRA and that the current accommodation process is not the least restrictive means of furthering the government's interests. We therefore affirm the district court's order granting injunctive relief.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

No. 2:12 CV 92 DDN

SHARPE HOLDINGS, INC., ET AL., PLAINTIFFS

v.

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

Dec. 30, 2013

MEMORANDUM AND ORDER

This action is before the court on the motion of plaintiffs CNS International Ministries, Inc. and Heartland Christian College for a temporary restraining order and preliminary injunction. (Doc. 62.) The parties have consented to the exercise of plenary authority by the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). (Doc. 69.)

On December 20, 2012, plaintiffs Sharpe Holdings, Inc., Rita Joanne Wilson, Judi Dianne Schaefer, and Charles N. Sharpe commenced this action against defendants United States Department of Health and Human Services, United States Department of the Treasury,

United States Department of Labor, and Kathleen Sebelius, Timothy Geitner, and Hilda Solis in their official capacities as the respective secretaries of the defendant departments. (Doc 1.) Collectively, defendants are the departments and officials responsible for adopting, administering, and enforcing the regulations at issue.

The Patient Protection and Affordable Care Act, Pub. L. 111-148, and the Health Care and Education Reconciliation Act, Pub. L. 111-152, (the Act) both enacted in March 2010, regulates the national health insurance market by directly regulating group health plans and health insurance issuers. The Act contains a preventive services coverage provision which provides:

> "A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for[,] with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph."

42 U.S.C. § 300gg-13(a)(4).

The Health Resources and Services Administration has issued guidelines requiring coverage for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *Women's Preventive Services: Required Health Plan*

Coverage Guidelines, Health Resources and Services Administration, http://www.hrsa.gov/womensguidelines/ (last visited Dec. 31, 2012). The FDA has approved several contraceptive methods, including Plan B, Ella, and copper intrauterine devices (IUDs).[1] *Birth Control Guide*, FDA Office of Women's Health, www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM282014.pdf.

The government issued a regulation (contraceptive mandate) that adopted the Health Resources and Service Administration guidelines as final. 77 Fed. Reg. 8725. Group health plans and health insurance issuers are required to provide coverage consistent with the guidelines, without cost sharing, in plan or policy years beginning on or after August 1, 2012. *Id.* at 8725-26.

Employers failing to meet the requirements of the Act and contraceptive mandates subject themselves to a number of liabilities. First, failure to provide an employee health insurance plan is penalized with a fine in the amount equal to one-twelfth of $2000 multiplied by the number of full-time employees on a monthly basis. 26 U.S.C. § 4980H. Further, failure to meet the group plan health requirements is penalized in the amount of $100 per day for each affected employee. 26 U.S.C. § 4980D. However, employers with fewer than fifty full-time employees are not subject to penalties and fines for failure to provide their employees with health insurance, but if they

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[1] Plaintiffs refer to these particular contraceptive methods as abortifacients.

choose to provide employees with insurance, they must provide the minimum essential coverage. *See* 26 U.S.C. §§ 4980D, 4980H. Moreover, the fines and penalties do not apply until January 1, 2015. U.S. Dept. of the Treasury, Continuing to Implement the ACA in a Careful, Thoughtful Manner, http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx (last visited December 12, 2013). Additionally, 29 U.S.C. § 1132 authorizes private enforcement suits for failure to meet the requirements of the Act.

On December 31, 2012, the court issued a temporary restraining order, prohibiting the enforcement of the ACA Mandate regulations regarding abortifacient devices and related counseling. (Doc. 20.) On January 14, 2013, the temporary restraining order was continued until the court's determination regarding additional injunctive relief. (Doc. 31.) On June 14, 2013, plaintiffs filed a first amended complaint to add Ozark National Life Insurance Company, N.I.S. Financial Services, Inc., and CNS Corporation as plaintiffs. (Doc. 52.) On June 28, 2013, the court sustained plaintiffs' request for a preliminary injunction. (Doc. 56.) On September 30, 2013, the court left the preliminary injunction in effect and stayed the proceedings pending the resolution of "the appeal in *O'Brien v. HHS*, No. 12-3357, or in *Annex Medical, Inc. v. Sebelius*, No. 13-1118, whichever occurs first, including the time any proper applications for relief is before the Supreme Court." (Doc. 57.)

On December 11, 2013, plaintiffs filed a second amended complaint to add CNS International Ministries, Inc. and Heartland Christian College as plaintiffs. (Doc. 61.) Plaintiff CNS International Ministries is a Missouri non-profit corporation that provides full-time residential services to men, women, and children who suffer from alcohol or drug dependencies and behavioral problems. (*Id.* at ¶ 6.) It employs more than fifty people and offers health insurance to its employees through its own self-insured program. (*Id.*) Plaintiff Heartland Christian College is a Missouri non-profit corporation that provides post-secondary higher education to employees and residents of CNS International Ministries and their dependents. (*Id.* at ¶ 7.) It offers health insurance to its employees through its own self-insured program. (*Id.*) Their plans expire on December 31, 2014. (*Id.* at ¶ 126.) In accordance with their sincerely held religious beliefs and practices, plaintiffs oppose the use, funding, provision, or support of abortion on demand and believe that use of Plan B, Ella, and copper IUDs constitute abortion on demand. (*Id.* at ¶¶ 48-58.) Further, adherence to these tenets is integral to them. (*Id.* at ¶ 47.)

In their complaint, plaintiffs allege violation of the Religious Freedom Restoration Act (RFRA), violations of the First Amendment Free Exercise Clause, Establishment Clause, the right against compelled speech, and the right of expressive association, as well as violation of the Administrative Procedure Act. (*Id.*) Plaintiffs seek declarations that the contraceptive mandate and defendants' enforcement thereof violate the First and Fifth

Amendments, RFRA, and the Administrative Procedure Act; an order prohibiting defendants' enforcement of the contraceptive mandate with respect to Plan B, ella, copper IUDs, and related education and counseling; and costs and reasonable attorney and expert fees under 42 U.S.C. 1988. (*Id.*)

Plaintiffs CNS International Ministries, Inc. and Heartland Christian College allege that they do not qualify for the religious employer exemption from the contraceptive mandate. (*Id.* at ¶¶ 109-11.); *see* 45 C.F.R. § 147.130(a)(iv)(B). However, they allege that they are eligible for the religious employer accommodation. (Doc. 61 at ¶ 123.) The regulations provide an accommodation for an organization that: (1) "opposes providing coverage for some or all of the contraceptive services required"; (2) "is organized and operates as a nonprofit entity"; (3) "holds itself out as a religious organization"; and (4) "self-certifies that it satisfies the first three criteria." 45 C.F.R. § 147.131(b). Organizations seeking this accommodation must self-certify prior to the beginning of the first plan year and deliver it to the insurer or, in the case of the selfinsured, the third party administrator. *Id.* § 147.131(c)(1). The third party administrator must then exclude contraceptive coverage from the group health insurance coverage and provide separate payments for contraceptive services for the plan beneficiaries. *Id.* § 147.131(c)(2). The third party administrator must also notify the plan beneficiaries of this contraceptive payment benefit. *Id.* § 147.131(d).

In essence, plaintiffs CNS International Ministries, Inc. and Heartland Christian College argue that although the accommodation alters the means, they continue to be required to take affirmative steps to facilitate access to abortifacient services in violation of their First Amendment rights. The court has already granted injunctive relief to the other plaintiffs in this case, and the arguments for those plaintiffs are substantially similar to the arguments now before the court. The resolution of the *O'Brien* or *Annex Medical* appeals will also likely facilitate the resolution of the arguments of plaintiffs CNS International Ministries, Inc. and Heartland Christian College. Thus, the court extends the preliminary injunction and stay currently in effect to plaintiffs CNS International Ministries, Inc. and Heartland Christian College. *See Zubik v. Sebelius*, 2013 WL 6118696 (W.D. Pa. 2013).

For the reasons stated above,

IT IS HEREBY ORDERED that the motion of plaintiffs CNS International Ministries, Inc. and Heartland Christian College for leave to file an overlength memorandum in support of their pending motion (Doc. 63) is sustained.

IT IS FURTHER ORDERED that the motion of plaintiffs CNS International Ministries, Inc. and Heartland Christian College a temporary restraining order and preliminary injunction (Doc. 64) is sustained. The preliminary injunction and stay currently in effect (Docs. 56, 57) are extended to plaintiffs CNS International Ministries, Inc. and Heartland Christian College.

/s/ DAVID D. NOCE
DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed on Dec. 30, 2013.

APPENDIX C

1. 42 U.S.C. 300gg-13 provides:

Coverage of preventive health services

(a) In general

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

(1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force;

(2) immunization that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and[1]

(3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration.[2]

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[1] So in original. The word "and" probably should not appear.

[2] So in original. The period probably should be a semicolon.

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph[2]

(5) for the purposes of this chapter, and for the purposes of any other provision of law, the current recommendations of the United States Preventive Service Task Force regarding breast cancer screening, mammography, and prevention shall be considered the most current other than those issued in or around November 2009.

Nothing in this subsection shall be construed to prohibit a plan or issuer from providing coverage for services in addition to those recommended by United States Preventive Services Task Force or to deny coverage for services that are not recommended by such Task Force.

(b) Interval

(1) In general

The Secretary shall establish a minimum interval between the date on which a recommendation described in subsection (a)(1) or (a)(2) or a guideline under subsection (a)(3) is issued and the plan year with respect to which the requirement described in subsection (a) is effective with respect to the service described in such recommendation or guideline.

(2) Minimum

The interval described in paragraph (1) shall not be less than 1 year.

(c) Value-based insurance design

The Secretary may develop guidelines to permit a group health plan and a health insurance issuer offering group or individual health insurance coverage to utilize value-based insurance designs.

2. 42 U.S.C. 2000bb provides:

Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify bur-

dens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of the chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by the government.

3. 42 U.S.C. 2000bb-1 provides:

Free exercise of religion protected provides

(a) In general

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

(b) Exception

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

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

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

(c) Judicial relief

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

4. 42 U.S.C. 2000bb-2 provides:

Definitions

As used in this chapter—

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

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

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

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

5. 42 U.S.C. 2000bb-3 provides:

Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

6. 42 U.S.C. 2000bb-4 provides:

Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits or exemptions.

7. 26 C.F.R. 54.9815-2713 provides:

Coverage of preventive health services

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

(i)-(iii) [Reserved]

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section,

evidence-in-formed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) *Office visits.* [Reserved]

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

(4) *Reasonable medical management.* [Reserved]

(5) *Services not described.* [Reserved]

(b) *Timing.* [Reserved]

(c) *Recommendations not current.* [Reserved]

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

8. 26 C.F.R. 54.9815-2713A provides:

Accommodations in connection with coverage of preventive health services

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

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

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretaries of Health and Human Services and Labor, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

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

(c) *Contraceptive coverage—insured group health plans.* (1) [Reserved]. For further guidance, see §54.9815-2713AT(c)(1).

(2) *Payments for contraceptive services.* (i) [Reserved]. For further guidance, see §54.9815-2713AT(c)(2)(i) introductory text.

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

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

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

(d) *Notice of availability of separate payments for contraceptive services—self-insured and insured group health plans.* For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to pro-

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

plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) *Reliance—insured group health plans.* (1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under §54.9815-2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

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

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

9. 29 C.F.R. 2510.3-16 provides:

Definition of "plan administrator"

(a) *In general.* The term "plan administrator" or "administrator" means the person specifically so designated by the terms of the instrument under which

the plan is operated. If an administrator is not so designated, the plan administrator is the plan sponser, as defined in section 3(16)(B) of ERISA.

(b) In the case of a self-insured group health plan established or maintained by an eligible organization, as defined in § 2590.715-2713A(a) of this chapter, the copy of the self-certification provided by the eligible organization to a third party administrator (including notice of the eligible organization's refusal to administer or fund contraceptive benefits) in accordance with § 2590.715-2713A(b)(1)(ii) of this chapter shall be an instrument under which the plan is operated, shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, and shall supersede any earlier designation. A third party administrator that becomes a plan administrator pursuant to this section shall be responsible for—

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

providing contraceptive coverage that complies with section 2713 of the Public Health Service Act (as incorporated into section 715 of ERISA) and § 2590.715-2713 of this chapter with respect to the classification or classifications of benefits subject to its contract.

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

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

10. 29 C.F.R. 2590.715-2713 provides:

Coverage of preventive health services.

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

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

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

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

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

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

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

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

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

Example 1. (i) *Facts.* An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

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

rately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2. (i) *Facts.* Same facts as *Example 1.* As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

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

Example 3. (i) *Facts.* An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

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

Example 4. (i) *Facts.* A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the compre-

hensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

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

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

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

(5) *Services not described.* Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

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

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

60 days advance notice to an enrollee before any material modification will become effective.

(c) *Recommendations not current.* For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

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

11. 29 C.F.R. 2590.715-2713A provide:

Accommodations in connection with coverage of preventive health services.

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

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

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

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

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

(ii) The eligible organization provides each third party administrator that will process claims for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) with a copy of the self-

certification described in paragraph (a)(4) of this section, which shall include notice that—

(A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(B) Obligations of the third party administrator are set forth in § 2510.3-16 of this chapter and § 2590.715-2713A.

(iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

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

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

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

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

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

(4) A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(c) *Contraceptive coverage—insured group health plans*—(1) *General rule.* A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (a)(4) of this section

to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) *Payments for contraceptive services*—(i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (a)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 2590.715-2713(a)(1)(iv) must—

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

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

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contracep-

tive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 715 of ERISA. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) *Notice of availability of separate payments for contraceptive services—self-insured and insured group health plans.* For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for

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

(e) *Reliance—insured group health plans*—(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to pro-

vide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

12. 45 C.F.R. 147.130 provides:

Coverage of preventive health services.

(a) *Services*—(1) *In general.* Beginning at the time described in paragraph (b) of this section and subject to § 147.131, a group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

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

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

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

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

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

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

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

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as

individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

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

Example 1. (i) *Facts.* An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

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

Example 2. (i) *Facts.* Same facts as *Example 1.* As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) *Conclusion.* In this *Example 2,* because the treatment is not included in the recommendations under

paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3. (i) *Facts.* An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

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

Example 4. (i) *Facts.* A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) *Conclusion.* In this *Example 4,* the service was not billed as a separate charge and was billed as part of an

office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement for the office visit charge.

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

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

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

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

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

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

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

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

(d) *Applicability date.* The provisions of this section apply for plan years (in the individual market, for policy years) beginning on or after September 23, 2010. *See* § 147.140 of this part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

13. 45 C.F.R. 147.131 provides:

Exemption and accommodations in connection with coverage of preventive health services.

(a) *Religious employers.* In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

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

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

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

(c) *Contraceptive coverage—insured group health plans*—(1) *General rule.* A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 147.130(a)(1)(iv) to provide

contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 147.130. An issuer may not require any further documentation from the eligible organization regarding its status as such.

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

the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section.

(2) *Payments for contraceptive services*—(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 147.130(a)(1)(iv) must—

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

(B) Provide separate payments for any contraceptive services required to be covered under § 147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contracep-

tive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 147.130(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) *Notice of availability of separate payments for contraceptive services—insured group health plans and student health insurance coverage.* For each plan year to which the accommodation in paragraph (c) of this section is to apply, an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d):

"Your [employer/institution of higher education] has certified that your [group health plan/student health insurance coverage] qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your [employer/institution of higher education] will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of health insurance issuer] will provide separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your [group health plan/student health insurance coverage]. Your [employer/institution of higher education] will not administer or fund these payments. If you have any questions about this notice, contact [contact information for health insurance issuer]."

(e) *Reliance*—(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard

to whether the issuer complies with the obligations under this section applicable to such issuer.

(f) *Application to student health insurance coverage*. The provisions of this section apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education in a manner comparable to that in which they apply to group health insurance coverage provided in connection with a group health plan established or maintained by an eligible organization that is an employer. In applying this section in the case of student health insurance coverage, a reference to "plan participants and beneficiaries" is a reference to student enrollees and their covered dependents.