UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

IRISH 4 REPRODUCTIVE HEALTH, *et al.*, Plaintiffs v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants.	Case No. 3:18-cv-491-PPS-MGG Judge Philip Simon

REPLY IN SUPPORT OF
DEFENDANT UNIVERSITY OF NOTRE DAME'S
MOTION TO DISMISS

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INTRODUCTION

As Notre Dame explained in its opening brief, Plaintiffs' only claim against the University must be dismissed as an impermissible attack on the enforcement discretion of the Executive Branch. Courts cannot second-guess the government's enforcement decisions in any particular case, and this case is no exception. The settlement agreement does nothing more than promise not to enforce any form of the contraceptive-coverage requirements enacted pursuant to the Affordable Care Act (the "Mandate") against Notre Dame and a few of its fellow litigants. It does not establish any general policy, nor does it implicate any statutory rule that could even arguably require enforcement of the Mandate against the University. Thus, quite apart from whether Plaintiffs have any substantive entitlement under the Mandate, they certainly have no right to conscript the government to *enforce* it on demand.

Even if the settlement were somehow reviewable, Plaintiffs do not explain how it is unlawful. They claim that the Supreme Court has required the government to enforce the Mandate against Notre Dame, but the decisions they cite actually *preclude* enforcement. They assert that the settlement violates the Affordable Care Act ("ACA", but that statute both fails to mention contraception and incorporates the sweeping protections of the Religious Freedom Restoration Act ("RFRA"). They attempt to transform the government's non-enforcement decision into a constitutional violation, but they cannot escape the basic point that the Constitution does not give them a right to free contraceptive benefits, much less to demand those benefits be provided in connection with the health plans of religious objectors.

The Supreme Court has made clear that there is "play in the joints" for the government to wield its enforcement powers to avoid even *potential* conflicts with religious exercise. By

declining to enforce the Mandate against a limited subset of religious objectors, that is precisely what it has done here.

ARGUMENT

I. THE CHALLENGE TO THE SETTLEMENT IS NOT RIPE WHILE THE REGULATORY EXEMPTION IS BEING LITIGATED

As Notre Dame explained, this Court should exercise its discretion to defer Plaintiffs' challenge to the settlement until after the validity of the regulatory exemption is fully litigated. If the regulations exempt Notre Dame, the legality of the settlement is a moot point. Accordingly, the Court should first resolve the challenge to the exemption, certify an interlocutory appeal if necessary, and return to the settlement issue only after that process is complete. ND Br. 7-10. For their part, Plaintiffs admit that this Court may defer decision on the settlement based on "discretionary prudential considerations." Pls. Br. 15 (quoting *Wisc. Right to Life PAC v. Barland*, 664 F.3d 139, 148 (7th Cir. 2011)). They assert a series of reasons why this Court should decline to do so, but none is persuasive.

First, Plaintiffs claim that the relevance of the settlement does not depend on any "uncertain future contingencies." Pls. Br. 15. But in fact, the validity of the regulatory exemption is currently being litigated in two different courts of appeals, and it is entirely speculative whether it ultimately will be struck down.[1] ND Br. 8-9. Plaintiffs do not seriously contend otherwise, but suggest that the settlement has some "independent" importance because it is the "basis" for Notre Dame "refusing to provide coverage." Pls. Br. 16. But Notre Dame's refusal to provide coverage is based on *both* the regulatory exemption *and* the settlement. If the exemption

[1] The Third Circuit has scheduled oral argument on this issue for May 21, 2019, and briefing in the Ninth Circuit will be complete on May 6.

is upheld, the University will not provide access to the objectionable coverage regardless of how the settlement challenge is resolved.

Second, Plaintiffs argue that the validity of the settlement and the regulatory exemption must be litigated quickly because Plaintiffs are currently paying certain contraception costs "out-of-pocket." Pls. Br. 16. But this monetary expense is not the type of irreparable injury that would justify immediate injunctive relief, which is no doubt why Plaintiffs have not sought a preliminary injunction. *See, e.g., Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 892 (7th Cir. 2011). Given that Plaintiffs themselves have not claimed any irreparable injury or sought any urgent relief, they cannot claim that deferring decision until the settlement issue becomes ripe would cause them any significant hardship.

In addition, an immediate decision on the settlement would not result in immediate coverage. Under the Supreme Court's order, Notre Dame cannot be forced to comply with the Mandate—via the old "accommodation" or otherwise—unless either the regulations are modified to ease the burden on religious exercise, or Notre Dame's RFRA claim is fully resolved. *See Zubik v. Burwell*, 136 S. Ct. 1557, 1560-61 (2016); *Univ. of Notre Dame v. Burwell*, 136 S. Ct. 2007 (2016) (mem.). Either path would take a substantial amount of time, likely far longer than it will take for the courts to definitively resolve whether the current regulatory exemption should be upheld. At the least, Notre Dame would immediately seek a stay pending appeal before complying with the Mandate, and that stay would almost certainly be granted given the Supreme Court's prior orders.

Third, there is nothing "absurd[]" about delaying decision on the settlement issue in light of the government's argument that Plaintiffs lack standing. Pls. Br. 17. These are simply alternative arguments. If this Court believes that Plaintiffs have standing to challenge the Final

Rules, it should resolve that challenge first before addressing the potentially moot settlement issue. If Plaintiffs lack standing, then all of their claims should be dismissed for that reason.

II. THE GOVERNMENT'S DECISION NOT TO ENFORCE THE MANDATE AGAINST NOTRE DAME IS NOT JUDICIALLY REVIEWABLE

In its opening brief, Notre Dame explained that the settlement agreement is not judicially reviewable because it is an exercise of the government's enforcement discretion. If, for example, Notre Dame simply declined to include the objectionable coverage in its health plans, and the government—for whatever reason—failed to enforce the Mandate against the University, no one would seriously contend that Plaintiffs could compel the government to prosecute Notre Dame. *Cf. Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). Such decisions lie at the core of the government's traditional enforcement discretion.

The settlement agreement is no different. It states that the government will not enforce the Mandate against Notre Dame (and a few dozen other named employers), but it says nothing about the millions of other employers throughout the country. It applies only to the "entities and individuals" identified in the agreement. Dkt. # 1-1, Settlement Agreement ("Settlement") at 1. Under binding precedent, this type of individualized enforcement decision is "committed to [the government's] absolute discretion," and is thus "presumed immune from judicial review." *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). Indeed, Plaintiffs do not cite a single case that has *ever* allowed judicial review in a situation like this one, where the government has settled litigation by agreeing not to enforce regulations against a particular group of named parties.

As Plaintiffs do not dispute, the presumption of non-reviewability can be overcome in only three circumstances: (1) where the agency "has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities"; (2) where "the substantive statute has provided guidelines for the agency to follow in exercising

its enforcement powers"; and (3) where the agency refuses "to institute proceedings based solely on the belief that it lacks jurisdiction." *Id*. at 833 & n.4 (citation omitted).

In their brief, Plaintiffs rely solely on the first two factors. First, they argue the settlement is a "general enforcement policy" that is so extreme that it "abdicates" the government's enforcement responsibilities. Pls. Br. 18-21. And second, although they do not point to any statutory enforcement guidelines, they nevertheless insist that the government's non-enforcement decision somehow "[v]iolate[s] the law." Pls. Br. 21-23. They are wrong on both points.

A. The Settlement Agreement Is Not a "General Enforcement Policy"

Under *Heckler*'s first prong, an agency's non-enforcement decision is not reviewable unless it is "'a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4 (citation omitted). Here, Plaintiffs cannot show that the non-enforcement agreement is a "general" policy at all, much less an "extreme" one. It applies only to a discrete group of entities, many of which had already obtained some form of relief (temporary or permanent) on their RFRA claims against the Mandate. The non-enforcement agreement is thus neither "general" nor "extreme," but particularized and reasonable.

1. The cases Plaintiffs cite demonstrate that a "general" policy is one that sets forth a categorical rule that applies across the board. *See* Pls. Br. 19. For example, in *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808 (D.C. Cir. 1998), the government had "adopt[ed] a general rule" that applied uniformly to all similarly situated vessels in the shipping industry. *Id*. at 816 n.15. Likewise, in *Edison Electrical Institute v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993), the government had published a general "Enforcement Policy Statement" that applied uniformly to the storage of nuclear waste throughout the entire regulated industry. *Id*. at 333.

Here, by contrast, the settlement agreement applies only to the named "entities and individuals" that are "listed in" the agreement. Settlement at 1. In exchange for those entities

dropping their individual claims, the settlement provides that the government will not enforce the Mandate against *them* (and a small number of affiliates and related groups that share their health plans). The settlement thus does not set forth any "general" policy at all. It says nothing about the millions of *other* employers in the country. Nor does it establish any "general" enforcement policy for religious employers, or even the subset of religious employers that object to the Mandate. Quite to the contrary, it makes no promises about non-enforcement for *any* other religious objectors, even if they are similarly situated to those named in the settlement. Dozens of other entities that had similarly challenged the Mandate—for example, the Little Sisters of the Poor—are *not* covered by the agreement.

The individualized nature of the settlement explains why the government had to promulgate an entirely *separate* regulation to grant a generalized religious exemption. Everyone agrees that this separate regulation is a "general" policy that is subject to judicial review (at least in an appropriate case, where the plaintiffs have standing). But what is *not* subject to judicial review is the individualized non-enforcement agreement at issue here: It does not create any policy of general applicability, but rather embodies the government's discretionary decision not to enforce the Mandate against a discrete group of entities, including Notre Dame.

Plaintiffs try to portray the settlement as a "general policy" by distorting its contents. They suggest that by entering the settlement, the government has "categorically refuse[d] to enforce *all* . . . violations" of the Mandate. Pls. Br. 18. They also attempt to liken the settlement to a pre-*Heckler* case involving the "wholesale failure to enforce Title VI of the Civil Rights Act." *Id*. (citing *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973)). In fact, the settlement here involves no such thing. It applies only to a discrete group of employers

representing a tiny fraction of the regulated field. It has no effect on the overwhelming majority of entities subject to the Mandate. That is a far cry from "wholesale" non-enforcement.

Plaintiffs counter that the non-enforcement agreement is still a "general policy" because, along with the named parties, it also includes their "subsidiaries, affiliates, and successors; and related entities that offer coverage through [their] health plan[s]." Pls. Br. 20-21. But the inclusion of this small defined group does not affect the analysis. It simply recognizes that some of the parties have affiliates and related entities that share the same health plan. For example, some of the named Catholic dioceses have related religious schools or charities that offer health coverage through the diocesan plan. The government's decision not to enforce the Mandate against these particular related entities does not somehow create a "general" enforcement policy.

2. Plaintiffs next contend that the non-enforcement agreement is a "general policy" because it is "prospective[]" and "permanent," rather than "retrospective[]" and temporary. Pls. Br. 18-19. But this distinction has no support in the case law—and for good reason. The *timing* of an enforcement decision has nothing to do with whether it is "general" or particularized. Indeed, this point is well illustrated by the cases that Plaintiffs themselves cite. In *Heckler*, for example, the plaintiffs were "several" death-row inmates who sought to compel the FDA to enforce federal law to prevent "the use of [certain] drugs for capital punishment" *in the future*. 470 U.S. at 823. The prospective refusal to enforce did not make the claims reviewable. Likewise, in *Crowley Caribbean Transportation, Inc. v. Pena*, 37 F.3d 671, 672 (D.C. Cir. 1994), the government prospectively determined that a maritime law did not prohibit certain foreign-flagged vessels from operating on a particular shipping route. The court assumed that the government had made "a definitive judgment that [it] will not enforce" the law against the foreign vessels' *future* operations, but still denied review because the "relief sought" was an

"enforcement action." *Id*. at 674. The dispositive principle was that courts cannot second-guess the Executive's decision not to enforce the law against particular parties. *Id*. It made no difference that the non-enforcement decision was prospective and lacked any expiration date.

The decision not to enforce the Mandate against Notre Dame does not become reviewable because it takes the form of a "binding" settlement. Pls. Br. 20. The same is true of virtually *every* unreviewable settlement where the government agrees to forgo enforcement. *See* ND Br. 11 n.1; *Ass'n of Irritated Residents v. E.P.A.*, 494 F.3d 1027, 1029 (D.C. Cir. 2007) (*Heckler* precludes review of non-enforcement agreement "enforceable against EPA"). Of course, if the Executive ever *broke* the agreement and sought enforcement, *then* a court could review whether the settlement is binding. But that is no reason to allow review *now*.

3. There is also no merit to Plaintiffs' argument that the non-enforcement agreement is reviewable because it involves "abstract" issues of law and does not involve a "mingled assessment[] of fact, policy, and law." Pls. Br. 19 (quoting *Crowley*, 37 F.3d at 676-77). Plaintiffs' argument once again contradicts *Crowley*, where no judicial review was available even though the government "base[d] its refusal to enforce . . . solely on a legal interpretation." *Crowley*, 37 F.3d at 675. But in any event, the decision not to enforce against Notre Dame also involved a mix of practical factors. As noted in the non-enforcement agreement, the government had already expended significant resources during "years of litigation" against Notre Dame, and it had to decide whether continuing its enforcement efforts was worth the cost. If it continued to litigate, it faced a highly uncertain chance of success: the Supreme Court had unanimously precluded the government from enforcing the "accommodation" against Notre Dame and its fellow litigants, and multiple lower courts had also ruled against it on the merits. *See* Settlement

at 3 & Exhibit B. Deciding to reach a non-enforcement agreement with Notre Dame was thus a prudential judgment call, which courts cannot second-guess.

4. Plaintiffs are similarly mistaken to claim that the non-enforcement agreement is a "general policy" because the government has separately "refused . . . to defend" *other* lawsuits challenging the Mandate. Pls. Br. 21. Those separate cases have no bearing on whether the particular settlement agreement at issue here is a general enforcement policy. If anything, they show the *absence* of any general policy, because the government has approached those cases very differently. It did not include those other parties in the settlement agreement, but merely recognized they are no longer subject to the Mandate under current regulations, which establish a general religious exemption. That makes the *regulations* subject to judicial review in the appropriate case. But it does not authorize judicial review of the government's decision not to enforce the Mandate against Notre Dame.

5. Finally, Plaintiffs are wrong to claim that declining review here would "nullify congressional directives" and "violat[e] separation-of-powers principles." Pls. Br. 20. In fact, there is no "congressional directive" at issue because Congress left it entirely up to the Executive to determine what "preventive care" the Mandate requires. The ACA says nothing about free contraceptives or abortifacients, much less whether the health plans of religious objectors must provide them. *See* 42 U.S.C. § 300gg-13(a)(4) (requiring coverage for "preventive care and screenings" "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration"). But more importantly, Congress also left it up to the Executive to decide whether and how to *enforce* the Mandate in particular cases. *Infra* Part II.B. The question of what the law requires is distinct from whether the Executive will enforce it in any particular case. And if a court were to *order* the Executive to enforce the Mandate against Notre Dame,

then *that* would violate the separation of powers by intruding on the realm of enforcement discretion, which is "the special province of the Executive Branch." *Heckler*, 470 U.S. at 832.

B. The ACA Does Not Impose Statutory Guidelines for Enforcing the Mandate

Under *Heckler*'s second prong, a non-enforcement decision is reviewable only if "the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." 470 U.S. at 833 & n.4. Here, however, the ACA does not provide any statutory guidelines that constrain the Executive's discretion in enforcing the Mandate. Put differently, the statues and regulations cited by Plaintiffs do not impose any requirements on the government. They tell private entities what to include in their health plans; they do not purport to tell the government how (or whether) to enforce those requirements. Thus, even if the ACA creates a substantive "right" to contraceptive coverage (which, again, the statute does not even mention), it does not create a *right to government enforcement* in any particular case. Plaintiffs may be able to assert a private cause of action against Notre Dame, Gov't Br. 17, but they cannot commandeer the Executive Branch to enforce the Mandate at their beck and call.

Plaintiffs cite a number of cases where government settlements were held judicially reviewable, but they all involve statutes regulating *government* conduct. None address discretionary decisions to enforce (or not enforce) laws governing *private* conduct. For example, Plaintiffs rely primarily on *Executive Business Media v. U.S. Department of Defense*, 3 F.3d 759 (4th Cir. 1993), but that case had nothing to do with non-enforcement, Pls. Br. 22. The statute there contained "a congressional directive that government contracts be procured by competitive bidding," and the question was whether the agency violated that directive by awarding a no-bid contract through a settlement. 3 F.3d at 763. The court held that the settlement was reviewable, but only because there was a "law[] governing [the] agency conduct" at issue, i.e., the awarding of government contracts. *Id*. at 762. Here, by contrast, there is no law governing enforcement of

the Mandate. There is no statute that "provide[s] guidelines for the agency to follow in exercising its enforcement powers." *Heckler*, 470 U.S. at 833 & n.4. For that reason, *Heckler* does not allow judicial review of the government's agreement not to enforce the Mandate against Notre Dame.

Plaintiffs next rely on *United States v. Carpenter*, 526 F.3d 1237 (9th Cir. 2008), but that case also did not involve any non-enforcement decision. There, the government allegedly violated the Federal Land Policy and Management Act ("FLPMA") by failing to follow the "procedural mechanisms" that the statute required "for relinquishing title or issuing rights-of-way" in federal land. *Id*. at 1242. Instead of following the statutory procedures, the government entered a settlement that unlawfully granted a disputed property interest. Once again, the settlement could be reviewed, but only because there were clear statutory rules that determined whether the underlying agency conduct—i.e., the grant of the property interest—was "legally authorized." *Id*. That is different from here, where there are no statutory rules that constrain the government's discretion of whether or how to enforce the Mandate in any particular case.

Plaintiffs' remaining cases are of a similar piece. For example, in *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941 (7th Cir. 2000), a statute required the government to follow detailed procedural requirements when considering applications for Indian casinos. *Id*. at 944-45. In light of those clear requirements, the court could review whether a government settlement violated the statute by unlawfully favoring a certain casino applicant. Likewise, in *NAACP v. HUD*, 817 F.2d 149 (1st Cir. 1987), the statute stated that the government "shall . . . administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [the Fair Housing Act]." 42 U.S.C. § 3608(e)(5). That express "statutory instruction" created an "affirmative" duty to "administer" the statute in a particular way, thereby authorizing judicial review of whether the government had committed "a clear failure to live up

to" its statutory duty. *NAACP*, 817 F.2d at 158. Here, by contrast, there is no statutory duty that constrains the government's discretion to enforce the Mandate.

Finally, Plaintiffs drop a footnote citing a string of cases for the truism that "settlement agreements entered into by government entities must be lawful and may not exceed lawful government authority." Pls. Br. 22 n.13. Setting aside the fact that the settlement here is lawful, *see infra* Part III, once again, the settlements in those cases were not non-enforcement agreements; they involved underlying agency conduct that was reviewable. Here, by contrast, the settlement *is* a non-enforcement agreement, and thus is it not reviewable because no "statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Heckler*, 470 U.S. at 833 & n.4. Indeed, no statute even *arguably* does so.[2]

III. THE SETTLEMENT AGREEMENT IS NOT ILLEGAL

Plaintiffs offer a variety of theories for why the government's agreement not to enforce the Mandate against Notre Dame is supposedly unlawful, but none can withstand scrutiny. The settlement does not depart from any internal Executive Branch policy. Pls. Br. 45-47. It does not contravene any Supreme Court order. Pls. Br. 44-45. And it does not violate any statutory or constitutional provision. Pls. Br. 48-58.

A. The Settlement Does Not Unlawfully Limit Future Executive Discretion

Although they did not raise it in their complaint, Plaintiffs now argue that the settlement agreement is illegal because it "binds federal agencies" not to enforce the Mandate against Notre Dame in the future. Pls. Br. 46. According to Plaintiffs, this commonplace settlement feature—promising not to enforce a law against particular parties, in exchange for them dropping their

[2] The cases cited by Plaintiffs in footnote 13 are also inapposite because they involved consent decrees, which are very different from the type of out-of-court settlement at issue here. Because consent decrees ask the court to enter a formal judgment with independent legal effect, they must be approved by the court, and they are *always* judicially reviewable.

challenge—is "prohibited by the Department of Justice's own binding interpretations of its settlement authority." Pls. Br. 46. This argument is both wrong and unripe.

As an initial matter, it would be premature to decide whether the settlement agreement validly binds *future* administrations, because the *current* administration is standing by its non-enforcement decision. If a future administration ever seeks enforcement against Notre Dame, *that* will be the time to decide whether the settlement is binding.

In any event, Plaintiffs are mistaken to claim that the government has maintained "a long-standing and binding formal policy" against settlement agreements that restrict the government's enforcement discretion. Pls. Br. 46. In fact, the OLC opinion Plaintiffs cite explains the exact opposite: "In general, the Attorney General is free to enter into settlements that would limit the future exercise of executive branch discretion that has been conferred pursuant to statute," as long as the settlement is "consistent" with statutory and constitutional limits. *Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 1999 WL 1262049, at *37 (O.L.C. June 15, 1999) ("OLC Opinion").

Plaintiffs point to the "Meese Memo" from 1986, but that document is consistent with the later OLC opinion. *See* Mem. from Edwin Meese III, Att'y Gen., to All Assistant Attorneys General & U.S. Attorneys (Mar. 13, 1986). It expressly contemplates that the government may enter "settlement agreement[s]" in which it "agrees to exercise [its] discretion in a particular way." *See id.* § II.B.2. To be sure, the Memo suggests that the "remedy" for the breach of a non-enforcement agreement typically should be the "revival of the suit" by the private parties affected. *Id*. But that is irrelevant here, because the remedy for a potential breach of the settlement is not at issue. Nor does the Memo set forth any absolute policy on this point, much less a judicially enforceable one: it makes clear that it does not eliminate the government's

"necessary discretion to deal with the realities of any given case," and that enforceable settlements may be approved by DOJ leadership if "circumstances require." *Id*. § II.C.

Finally, while the government's settlement authority may be "constrained by the APA," Pls. Br. 46, that is not a concern here because the settlement does not violate any APA provision. Most notably, the settlement does not "commit [the government] to promulgate substantive rules." OLC Opinion, 1999 WL 1262049, at *31. The settlement promises only not to *enforce* the Mandate against Notre Dame and the other named entities, which is separate from the general regulatory exemption contained in the Final Rules. And even if the non-enforcement agreement were somehow reviewable under *Heckler*, it was not "arbitrary and capricious" because the government had good reason to settle the litigation. *See supra* Part II.A.3; ND Br. 12-13.

B. The Settlement Does Not Violate Any Supreme Court Order

As the University has explained, ND Br. 16-17, *Zubik* and *Notre Dame* did not oblige the government to enforce the Mandate (including the "accommodation") against the University, or otherwise to guarantee provision of free contraceptive benefits to its students or employees. To the contrary, those orders enjoined the enforcement of the Mandate and the "accommodation" against the University, and merely gave the parties "an opportunity" to devise an alternative solution that would provide contraceptive benefits without requiring religious objectors to violate their religious beliefs. *Zubik*, 136 S. Ct. at 1559; *Notre Dame*, 136 S. Ct. at 2007. Providing an "opportunity" is not the same as imposing an obligation.

Plaintiffs have no response to this point. Instead they assert that the Supreme Court somehow "required" the government to "ensure that women receive" free contraceptive benefits. Pls. Br. 45. But that is not what the Court said. And in any event, Plaintiffs offer no reason why this alleged obligation would impose any duties on *Notre Dame*. Even assuming the Court compelled the *government* to ensure provision of contraceptive benefits—something it has, in

fact, taken steps to do, *infra* p. 19 (extending Title X funding to beneficiaries of religious objectors)—there is no reason the University should be forced to participate in that process.

C. The Settlement Does Not Violate the Affordable Care Act, Especially in Light of RFRA

Likewise, nothing in the ACA prohibits the government from entering into a non-enforcement agreement with opposing litigants and their affiliates. ND Br. 14. Again, Plaintiffs conflate the *substantive* question of whether the ACA requires private health plans to include contraceptive coverage with the *procedural* question of whether the government must enforce that requirement (if it exists) in any particular case. As explained above, that distinction is critical because the ACA does not impose any enforcement duty. *Supra* pp. 10-12.

In any event, the ACA contains no substantive contraceptive-coverage requirement either. Despite Plaintiffs' repeated references to the government's "statutory" obligations, *e.g.*, Pls. Br. 1, 2, 18, 19, 20, the ACA itself does not refer to contraception. *See* 42 U.S.C. § 300gg-13(a)(4) (requiring coverage for "preventive care and screenings"). As Plaintiffs acknowledge, contraceptive coverage was subsequently mandated by an agency determination. Pls. Br. 26. And what an agency grants, it may rescind. Plaintiffs are thus left with the assertion that the decision not to enforce a contraceptive-coverage mandate against a limited subset of regulated entities violates a statute that, by its own terms, contains no contraceptive-coverage mandate.

RFRA makes this dubious position even more untenable. While Plaintiffs would have the government single-mindedly apply the ACA's preventive-care provisions, that statute cannot be read in isolation. Absent express language to the contrary, RFRA "applies to all Federal law, *and the implementation of that law*, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a) (emphasis added). Thus, even assuming the ACA mandates contraceptive coverage, it must viewed through the lens of RFRA's "very broad protection for religious liberty." *Burwell v.*

Hobby Lobby Stores, Inc., 573 U.S. 682, 693 (2014). And as the University has explained, RFRA not only authorizes but requires an exemption for religious objectors like Notre Dame. ND Br. 14-16, 22-25.

1. In *Hobby Lobby*, the Supreme Court held that RFRA requires a religious exemption from any "contraceptive mandate" contained in the ACA. 573 U.S. at 736. Specifically, the Court concluded that such a mandate "imposes a substantial burden" on religious objectors. *Id.* at 726. That burden was not necessary to achieve any compelling governmental interest, because the government could provide free contraceptive benefits through several "less restrictive alternative[s]" without burdening religious exercise. *Id*. at 728-31. "The most straightforward way of doing this would be for the Government to assume the cost of providing [contraception] to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Id*. at 728. Or, alternatively, the government could rely on the so-called "accommodation"—although the Court pointedly "d[id] not decide" whether the accommodation would itself "compl[y] with RFRA" if Plaintiffs objected to it. *Id*. at 731 & n.39; *id*. at 699 n.9 (noting that the Court had granted temporary injunctive relief to the Little Sisters of the Poor, who objected to the accommodation).

In holding that RFRA requires an exemption from the Mandate, *Hobby Lobby* did not require the government to create an alternative mechanism (i.e., the accommodation) to provide contraceptive benefits. 573 U.S. at 736. That is because the only remedy mandated by RFRA is the grant of an exemption to relieve the substantial burden on religious exercise. *See* 42 U.S.C. § 2000bb-1. To be sure, in determining whether an exemption is required, courts must assess whether the government *could* achieve its regulatory goals by less-restrictive means. *Id*.

§ 2000bb-1(a). But RFRA does not affirmatively oblige the government to adopt any of the less-restrictive means that may be available.

Thus, after *Hobby Lobby*, the government was left with wide discretion to decide how to implement the required RFRA exemption. It could have chosen to exempt all religious objectors (as it did for churches), or it could have entered non-enforcement agreements (as it has done here). It was not required to adopt any of the possible less-restrictive means mentioned in *Hobby Lobby*. Just as it had no obligation to "assume the cost" of paying for free contraceptive benefits, it had no obligation to enforce the accommodation against religious objectors. 573 U.S. at 728. That the government first chose to craft an accommodation before offering discrete exemptions does not mean that it was thereby bound to that course of action in perpetuity. This was particularly true in light of *Hobby Lobby*'s pointed refusal to rule on whether the accommodation *itself* "complies with RFRA." *Id*. at 731. And it became even more true after the Supreme Court enjoined the enforcement of the accommodation against Notre Dame. *See Notre Dame*, 136 S. Ct. at 2007. In light of those decisions, the government was free to enter a non-enforcement agreement with the University to avoid a potential conflict with RFRA.

That being the case, there is no need to decide here whether enforcing the accommodation against Notre Dame would *actually* violate RFRA. As the Supreme Court has remarked in a related context, there is often "'room for play in the joints between'" what is mandated by one legal provision and what is prohibited by another. *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (citation omitted). Thus, in implementing and enforcing the ACA, the government may "take into account [the] equally important Congressional objective" embodied in RFRA, and act to mitigate any "*potential* conflict." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984) (emphasis added); *cf. Ricci v. DeStefano*, 557 U.S. 557, 585 (2009). By agreeing not to

enforce the Mandate in any form against a limited subset of religious objectors, that is precisely what the government did when entering into the settlement agreement.[3]

2. Echoing the argument rejected in *Hobby Lobby*, Plaintiffs suggest that RFRA cannot authorize an "exemption from a legal obligation requiring the [claimant] to confer benefits on third parties." 573 U.S. at 729 n.37; Pls. Br. 32-34. But as the Supreme Court explained, "[n]othing in the text of RFRA or its basic purposes supports" this argument. *Hobby Lobby*, 573 U.S. at 729 n.37. To hold otherwise would "render[] RFRA meaningless." *Id.* After all, virtually "any Government regulation" can be described as "benefiting a third party"—which, by Plaintiffs' logic, would transform those regulations "into entitlements to which nobody could object on religious grounds." *Id.* For example, "the Government could decide that all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets)," or it could mandate "that all restaurants must remain open on Saturdays to give employees an opportunity to earn tips (and thereby exclude Jews with religious objections from owning restaurants)." *Id.* That is not the law.

To be sure, "in applying RFRA," due consideration must be given for "'the burdens a requested accommodation may impose on nonbeneficiaries.'" *Id.* (quoting *Cutter*, 544 U.S. at 720). But as the Supreme Court explained, those considerations do not create a blanket prohibition on RFRA exemptions that might "burden" third parties. Rather, they "inform the analysis" of the compelling interest test, *id.*, a standard Plaintiffs make no effort to satisfy here.

[3] Plaintiffs are also wrong to suggest that RFRA contemplates an exemption only if a court first orders it. Pls. Br. 30. "A statutory directive binds *both* the executive officials who administer the statute and the judges who apply it in particular cases." *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 439 (1992). And here, RFRA applies to every "branch, department, agency, instrumentality, and official . . . of the United States." 42 U.S.C. § 2000bb-2(1). The executive thus has the same duty to administer RFRA as the judiciary. It is not required to sit on its hands and wait for the inevitable lawsuit before it can take steps to comply with RFRA.

Even if they did, RFRA requires courts to "'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants' and 'to look to the marginal interest in enforcing' the challenged government action in that particular context." *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015) (quoting *Hobby Lobby*, 573 U.S. at 726-27). Here, while Plaintiffs describe the "burden" as having to pay for certain contraceptives instead of getting entirely free benefits through their Notre Dame health plan, Pls. Br. 34, even that monetary burden is overstated. The government recently finalized regulations making women eligible for free contraceptive benefits under Title X if they are enrolled in a health plan "that does not provide the contraceptive services sought by the woman because the employer has a sincerely held religious or moral objection to providing such coverage." 84 Fed. Reg. 7714, 7787 (Mar. 4, 2019). And as the prior administration admitted, women who do not receive desired health coverage through their primary health plan can "ordinarily" get it from "a family member's employer," an ACA "Exchange," or "another government program." Resp'ts Br. at 65, *Zubik*, 136 S. Ct. 1557 (No. 14-1418). Given the availability of these "alternative means," it cannot "reasonably be maintained" that the settlement impermissibly "burdens" third parties. 573 U.S. at 729 n.37.[4]

3. In any event, it was not only permissible but necessary for the government to exempt Notre Dame under RFRA. ND Br. 22-25. Plaintiffs' claim to the contrary rests entirely on the argument that the "accommodation" does not impose a substantial burden on the University's religious exercise. Pls. Br. 30-32. They are mistaken.

While it is certainly true that "whether an alleged burden is substantial" presents a "legal question," Pls. Br. 30, Plaintiffs fundamentally misunderstand the nature of that test. As the

[4] Plaintiffs' argument also rests on the claim that they are "entitled" to free contraceptive coverage under the ACA. Pls. Br. 34. But that assumes the very question in dispute. Because the ACA incorporates RFRA, 42 U.S.C. § 2000bb-3(a), it cannot "entitle" Plaintiffs to any coverage RFRA precludes the government from requiring Notre Dame to facilitate.

Supreme Court has repeatedly made clear, the substantial burden inquiry does not and cannot turn on the "substantiality" of the compelled conduct, or the "substantiality" of the plaintiff's religious practice. *Hobby Lobby*, 573 U.S. at 726-27. RFRA expressly protects "'*any* exercise of religion,'" *id.* at 696 (emphasis added) (quoting 42 U.S.C. § 2000cc-5(7)(A)), and even if it did not, federal courts would have "no business" sorting through the various ways religious believers exercise their faith, picking and choosing those they deem worthy of protection, *id.* at 724. That being the case, the substantial burden inquiry is limited to the substantiality of the *pressure* placed on the claimant to act in violation of his religious beliefs—i.e., the "sever[ity]" of the "consequences" of noncompliance. *Id*. at 720-21; *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (holding that a substantial burden involves "substantial pressure on an adherent to modify his behavior and to violate his beliefs"). As Plaintiffs note, one way to answer that question is to evaluate whether the penalties for noncompliance are sufficient to "'forc[e claimants] to engage in conduct that their religion forbids.'" Pls. Br. 32.

Applying that test to this case is straightforward. There is no dispute that compliance with the accommodation requires the University to act in violation of its religious beliefs, ND Br. 23, and non-compliance would subject Notre Dame to the same penalties deemed "substantial" in *Hobby Lobby*, 573 U.S. at 726-27. Accordingly, this is a textbook case of a substantial burden.

Plaintiffs cite several decisions that reached contrary conclusions, but as they admit, those decisions have since been vacated. Pls. Br. 31. Those cases also rested on assumptions regarding the operation of the accommodation that have been undermined by subsequent developments. For example, in the Supreme Court, the government acknowledged what Notre Dame and its fellow litigants had been saying all along: The notice required by the accommodation is not a simple "opt out"; it amends the University's health plan and authorizes

payments used to provide objectionable coverage. Resp'ts Br. at 16 n.4, 35 n.13, *Zubik*, 136 S. Ct. 1557 (No. 14-1418). And the resulting coverage is not provided apart from the University's health plan; it is "part of the same 'plan' as the coverage provided by the employer." *Id.* at 38. In short, as both Chief Justice Roberts and Justice Kennedy remarked, for the accommodation to work, it is "necessary to hijack" the objectors' "process, their insurance company, [and] their third-party administrator." Oral Arg. Tr. at 49, 58, 76, *Zubik*, 136 S. Ct. 1557 (No. 14-1418).[5]

These realities should dispel any notion that the accommodation operates independently of Notre Dame. Rather, it is entirely *dependent* on the University's actions. Unless Notre Dame offers health plans and contracts with insurance providers, no objectionable coverage flows. Even then, unless Notre Dame signs and submits the required documents, no objectionable coverage flows. The accommodation is thus not asking the University to raise its hand to opt out. It is forcing Notre Dame to hand over the keys to the health plans it must offer and maintain.

D. The Settlement Does Not Violate the Constitution

1. Plaintiffs' Establishment Clause claim must likewise be dismissed. As both Notre Dame and the government explained, ND Br. 18-20; Gov't Br. 38-42, the settlement easily survives scrutiny under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Plaintiffs do not even attempt to engage this argument, returning instead to their theme of third-party burdens and going so far as to maintain that the settlement amounts to a naked religious preference. Pls. Br. 48-53.

As an initial matter, Plaintiffs' argument rests on a category error. Granting Notre Dame an exemption from the Mandate—which plainly burdens the University's religious exercise,

[5] Plaintiffs are doubly wrong when they claim that "[h]aving to give notice of an exemption . . . is the bare minimum needed" in order to receive one. Pls. Br. 31. They are demonstrably wrong in that the Mandate's original (and unduly narrow) exemption did not require so-called "religious employers" to provide notice to qualify—they were automatically exempt. *See* 45 C.F.R. § 147.131(a) (2016). They are descriptively wrong in that, for the reasons described above, the "accommodation" is *not* an exemption. *See supra* pp. 20-21.

supra pp. 19-21—does not impose any *burden* on Plaintiffs: it simply denies them free *benefits*. Because Plaintiffs have no constitutional entitlement to free contraceptives in the first place, denying them that benefit under RFRA cannot violate their constitutional rights. *See Hobby Lobby*, 573 U.S. at 729 n.37.

Moreover, the Supreme Court has *never* held that excusing objectors from a generally applicable law somehow "establishes" religion. To the contrary, exemptions of that nature—which litter the U.S. Code—have been repeatedly upheld, notwithstanding "burdens" they might impose on third parties. *E.g.*, *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330 (1987) (Title VII exemption allowing religious employers to discriminate against employees on the basis of religion); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (property-tax exemption for churches, increasing costs for other taxpayers); *Gillette v. United States*, 401 U.S. 437 (1971) (draft exemption for conscientious objectors, requiring others to fight in their place).[6]

Plaintiffs confuse religious *exemptions* with unyielding religious *preferences* like the one struck down in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). To distinguish between the two, courts must look to the baseline of rights *before the government regulated*. In *Amos*, for example, the "baseline" was a pre–Title VII world in which employers could hire and fire on the basis of religion. Thus, in allowing religiously discriminatory hiring, the statutory exemption

[6] Plaintiffs' citations to the contrary are unavailing. As they admit, none of the free-exercise cases they cite were decided on Establishment Clause grounds. Pls. Br. 49; *e.g.*, *United States v. Lee*, 455 U.S. 252, 260 n.11 (1982). Nor can they wave away the import of *Amos* or *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), by claiming those cases only protect the rights of institutional churches. For one thing, they make no effort to explain why a Lutheran elementary school is worthy of special solicitude, while a Catholic university is not. And in any event, *Hobby Lobby* rejected similar efforts to cabin free-exercise rights based on the *type* of organization at issue. *See* 573 U.S. at 707-17 & n.37 (holding that for-profit corporations can exercise religion, despite potential third-party burdens).

from Title VII "lift[ed] a regulation that burden[ed] the exercise of religion," 483 U.S. at 338, restoring both the employer and the employee to the position they were in prior to government action. In contrast, the pre-regulatory "baseline" in *Caldor* allowed employers to decide whether to honor an employee's Sabbath obligations. The Supreme Court struck down the statute at issue there because it did not return the parties to the pre-regulation status quo, but rather imposed a new and "unyielding" obligation on employers to accommodate Sabbatarians. 472 U.S. at 709-10. The latter scenario violates the Establishment Clause; the former does not.

There is an obvious reason for this distinction: religious preferences involve state action, while exemptions do not. In the case of an exemption, the *government* is not burdening third parties—it is allowing private parties to act without government constraint. *See Amos*, 483 U.S. at 337 n.15 ("Undoubtedly, the [third-party's] freedom of choice . . . was impinged upon, but it was the Church . . . and not the Government, who put him to the choice of changing his religious practices or losing his job."). Nor does an exemption "promote" religion—it simply leaves religious objectors free to act according to their beliefs. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999) ("As we have said before, our cases will not tolerate 'the imposition of [constitutional] restraints on private action by the simple device of characterizing the State's inaction as authorization or encouragement.'"). In short, "[t]here is no genuine nexus between [regulatory] exemption[s] and establishment of religion." *Walz*, 397 U.S. at 675.

Here, the settlement plainly constitutes an exemption, not a preference. Prior to the enactment of the ACA, Notre Dame had no obligation to provide or facilitate access to contraceptive benefits in connection with its health plans, and Plaintiffs had no right to such benefits. The settlement thus restores the pre-regulatory status quo. It leaves Notre Dame free to exercise its religious beliefs, and it leaves Plaintiffs with "the same range of [insurance]

choice[s] . . . as [they] would have had if Congress had chosen to subsidize no health care costs at all." *Harris v. McRae*, 448 U.S. 297, 315-17 (1980).

2. For similar reasons, Plaintiffs' due process claims must be dismissed. Plaintiffs have no fundamental right to subsidized contraceptive benefits, nor can they show the purposeful discrimination required to establish an equal-protection violation. ND Br. 20-22.

Citing *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), Plaintiffs respond that the government may not "indirectly" interfere with the right to contraception, such as by "prohibit[ing] the distribution of contracepti[ves]." Pls. Br. 54-55. But that principle is irrelevant here. "Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Harris*, 448 U.S. at 317-18; *Rust v. Sullivan*, 500 U.S. 173, 201 (1991) ("The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected . . . ."). To hold otherwise would "translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation," requiring subsidized coverage even in the absence of a larger statutory scheme. *Harris*, 448 U.S. at 318. "Nothing in the Due Process Clause supports such an extraordinary result." *Id.*

Despite Plaintiffs' claims, therefore, the settlement does not "interfere" with any right to contraception. The government is merely declining, in limited circumstances, to subsidize (or require others to subsidize) the exercise of that right. Such funding decisions "leave[women] in no different position than [they] would have been if the Government had not enacted [the ACA]," *Rust*, 500 U.S. at 202, and thus "place[] no *governmental* obstacle in the path of" those seeking access to contraception, *Harris*, 448 U.S. at 315 (emphasis added). Ultimately, if the

government can exempt medically necessary abortions from Medicaid or Title X without running afoul of due process principles, it can allow Notre Dame to decline to provide or facilitate access to free contraceptive benefits via its health plans. *Id.* at 312-18; *Rust*, 500 U.S. at 201-03.

The same principles demonstrate the deficiency of Plaintiffs' equal protection claim. Plaintiffs claim that by declining to require the subsidy of certain services that uniquely benefit women, the government has necessarily discriminated against a suspect class. Pls. Br. 56-57. But the Medicaid exemption at issue in *Harris* likewise applied to a service uniquely available to women (abortion), and that did not prevent the Supreme Court from concluding that there was no equal-protection violation. *See Harris*, 448 U.S. at 321-26. In any event, Plaintiffs still cannot show how the *government itself* is engaging in purposeful discrimination by allowing *Notre Dame* to act in accordance with its religious beliefs. ND Br. 21-22; *supra* p. 23.[7]

Moreover, Plaintiffs fail to explain why, even if they did have a right to free contraceptive benefits, Notre Dame's health plans would be the appropriate vehicle for providing such benefits. As the Supreme Court has stated, "the most straightforward way" to provide free contraception would be for "the Government to assume the cost of providing [it] to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Hobby Lobby*, 573 U.S. at 728. There is no need to involve Notre Dame.

CONCLUSION

For the foregoing reasons, Plaintiffs' claim against Notre Dame should be dismissed.

[7] To avoid the application of rational basis review, ND Br. 20-21, Plaintiffs again attempt to distinguish *Amos*, arguing that it did not involve discrimination against a fundamental right or a suspect classification. Pls. Br. 58 n.41. For the reasons described above, this case likewise does not implicate any fundamental rights. *Supra* pp. 24-25. And even assuming it involves a suspect classification, *Amos* did as well. *E.g.*, *Hassan v. City of New York*, 804 F.3d 277, 299-301 (2d Cir. 2015) (describing distinctions based on religious affiliation as suspect).

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served to the Plaintiffs' counsel and to the government defendants using the Court's CM/ECF system on the 23rd day of April, 2019:

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