IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

REACHING SOULS INTERNATIONAL, INC., TRUETT-MCCONNELL COLLEGE, INC., GUIDESTONE FINANCIAL RESOURCES OF THE SOUTHERN BAPTIST CONVENTION,	)	
Plaintiffs,	)	
-vs-	)	Case No. CIV-13-1092-D
KATHLEEN SEBELIUS, SECRETARY OF U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, THOMAS E. PEREZ, SECRETARY OF U.S. DEPARTMENT OF LABOR, U.S. DEPARTMENT OF LABOR, JACOB J. LEW, SECRETARY OF THE TREASURY, SECRETARY OF THE TREASURY,	)	
Defendants.	)	

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TRANSCRIPT OF PROCEEDINGS

HAD ON DECEMBER 16, 2013

BEFORE THE HONORABLE TIMOTHY D. DEGIUSTI

U.S. DISTRICT JUDGE, PRESIDING

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A P P E A R A N C E S

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P R O C E E D I N G S

(The following proceedings were had December 16, 2013, with Court and counsel present:)

THE COURT: Good morning. This is the case of Reaching Souls International, Inc., Truett-McConnell College, Inc., GuideStone Financial Resources of the Southern Baptist Convention vs. Kathleen Sebelius, Secretary of U.S. Department of Human -- of Health and Human Services, et al., Case No. CIV-13-1092-D.

Appearances, please.

MR. RIENZI: Mark Rienzi for Plaintiff Reaching Souls International, Truett-McConnell College, and GuideStone. With me at counsel table I have Dillon Curran from Conner and Winters, our local counsel; from Locke Lord, we have Carl Scherz and Seth Roberts; I have my colleagues from The Becket Fund, Adèle Keim and Daniel Blomberg.

THE COURT: All right. Thank you.

MR. BERWICK: Good morning, your Honor. Ben Berwick for the government.

THE COURT: All right. Thank you.

I know that with respect to, for instance, the question of subject matter jurisdiction, the burden falls on the party asserting jurisdiction, but in order to just kind of deal with the motions in a logical way, I think I'll ask the government to go ahead and present --

MR. BERWICK: Sure.

THE COURT: -- or the defendant, I should say, to go ahead and present that motion first.

MR. BERWICK: Good morning, your Honor.

THE COURT: Good morning.

MR. BERWICK: Preventive services coverage regulations that are at issue in this case require employers to provide coverage of, among other things, FDA-approved contraceptive services without cost sharing as part of their employee health plan. When these regulations were first issued, a number of religious organizations raised religious objections to this requirement. In response, the government undertook an extensive rule-making to address those religious concerns.

The result of that rule-making is that organizations, like plaintiffs here, need not pay for such coverage, they need not contract for such coverage, they need not arrange such coverage, and they can continue to vocally object to the use of contraception and to encourage their employees not to use contraception.

The only thing that such an organization must do is self-certify that it is a religious nonprofit with a religious objection to providing contraceptive coverage and provide a copy of that certification to their third-party administrator. I'll use the term TPA going forward, if that's okay.

THE COURT: Certainly.

MR. BERWICK: Of course, plaintiffs don't dispute the statement contained in the self-certification. That is, that they object -- they have a religious objection to the provision of contraceptive coverage. In fact, they have proclaimed that religious objection in this case and elsewhere repeatedly and vociferously. And government, by the way, does not dispute that objection in any way. We don't question their religious beliefs.

Nonetheless, plaintiffs contend that this minimal requirement imposes a substantial burden on their religious exercise because, they allege, they object to the fact that the consequences of providing that self-certification to their third-party administrator is that their third-party administrator will then provide separate payments for contraceptive coverage on behalf of the employer plaintiffs or Reaching Souls and Truett-McConnell -- their employees.

But this is a misunderstanding of the law, your Honor. Because GuideStone is a self-insured church plan, as that term is defined under ERISA, they don't fall within the ambit of ERISA. And it is ERISA that is the only enforcement authority for the government to require, in the general case, third-party administrators to provide contraceptive coverage.

Because Guidestone's third-party administrator is not subject to ERISA, there is no authority for the government to

require them to provide this coverage.

So the government understands plaintiffs' alleged injury in this case to be that, again, when they provide self-certification that sort of triggers the responsibility of Guidestone's TPA to provide coverage. But that is not true here. So the injury which they allege does not, in fact, exist. And, for that reason, plaintiffs lack standing.

Your Honor, I could continue to discuss why this is also not a substantial burden. That's the thrust of our standing argument. But I don't want to continue on unless you want to discuss standing. Um -- sorry. Go ahead.

THE COURT: Well, I think you should go ahead and make all the arguments --

MR. BERWICK: Sure.

THE COURT: -- that you want to make that are relevant to the jurisdictional issue. And then what we're going to do, after the plaintiffs get an opportunity to address this as well, is we're just going to go forward with the rest of the hearing addressing the motion for preliminary injunction. And for purposes of that hearing, we're just going to assume that there is jurisdiction --

MR. BERWICK: Okay.

THE COURT: -- but I haven't decided that issue yet.

MR. BERWICK: Understood.

THE COURT: But because we have everyone here --

MR. BERWICK: Yes.

THE COURT: -- it's just better to get it all done.

MR. BERWICK: Understood.

THE COURT: All right.

MR. BERWICK: So I'm not -- what I -- at this time I'm not going to go ahead and address the substantial burden issue. I will just say that for the same reasons they lack standing, there is no substantial burden on them.

I will say that even if we were to assume that they do have standing, even assuming that their description of the way the regulations work was correct, we still -- we would still take the position that they have not alleged a substantial burden and, thus, cannot satisfy their burden under the Religious Freedom Restoration Act.

THE COURT: Okay. And you will have an opportunity to visit -- to address that more.

MR. BERWICK: Understood. I just put that on the table for now.

THE COURT: Let me ask you this.

MR. BERWICK: Sure.

THE COURT: Let's say that the deadline comes around and that the plaintiffs just refuse to self-certify.

MR. BERWICK: Yes.

THE COURT: We're not doing it.

MR. BERWICK: Okay.

THE COURT: Then what happens to them?

MR. BERWICK: So in that case they would be, essentially, subject to penalties -- assessable payments of -- I believe the language is $100 per day per -- I can't remember the precise language but per employee who is affected by the failure to provide that coverage.

THE COURT: Now --

MR. BERWICK: So they would essentially -- if they don't self-certify, they would be treated like any other employer. They would be then required to provide this coverage. And because they would, presumably, fail to do so, they would then be subject to those penalties.

THE COURT: I noticed in the briefing that with respect to this current lack of authority to enforce --

MR. BERWICK: Yes.

THE COURT: -- the regulations, vis-a-vis a self-insured church plan, there was some equivocal language -- at least that's how I read it -- which one could interpret to say that, you know, we're going to get there, we just might not be there right now.

MR. BERWICK: I don't -- that language is not intended to be equivocal. No, there is no question that there is no authority under the current regulations to require their third-party administrator to provide coverage.

THE COURT: What about that language in the brief --

in your brief that said something to the effect of the government is still --

MR. BERWICK: Yes.

THE COURT: -- looking at ways to --

MR. BERWICK: I understand -- I understand the language you're referring to that might be equivocal. What -- again, it wasn't intended to be equivocal. The government, when it enacted this regulation, was aware of the lack of authority with regard to self-insured church plans because, you know, Labor routinely issues regulations under ERISA. Those regulations -- because self-insured church plans are excepted from ERISA, Labor knows well that whenever it issues a regulation pursuant to ERISA, it does not apply to self-insured church plans.

I think what that language means, your Honor, is that, you know, the government is continuing to look for ways to ensure that the employees of entities such as Truett-McConnell and Reaching Souls have access to contraceptive coverage. But there is no question that under the current regulations there is no way for the government to do that.

So to the extent there is some fear that the government is going to go back on its commitment that they can't enforce it, that is not -- not accurate. The government fully understands it cannot enforce under the current regulations.

In order to extend the benefit to the employees of these

organizations, presumably the government would have to go through another rule-making of some kind. And, frankly, I'm not even sure where the government would find the authority to provide the benefit to their -- those employees.

THE COURT: All right. Thank you.

Plaintiffs.

MR. RIENZI: Thank you, your Honor.

What I would like to do to address the standing issue is briefly tell you about the plaintiffs and tell you about the regulatory structure that the government has set up, by which I mean the one that is actually reflected in the rules and not merely in the government's briefs and litigation. And then explain why, under the governing law under *Clapper*, under *Cressman*, under *Lujan*, it's actually a fairly easy standing inquiry here and that the plaintiffs do, in fact, have standing.

The shortest answer to why does the plaintiffs have standing comes from the question your Honor asked a moment ago. What happens on January 1st when they won't sign the form? So the plaintiffs are looking at a regulation that says you must act and you must act within 15 days. And if you fail to act, we will punish you with fines. There is no case anywhere that says there is a lack of standing in that type of circumstance.

It doesn't make any sense at all to say that the

government has the authority to order citizens to act and to threaten them with fines if they fail to act, but that those citizens do not even have standing to ask an Article III judge, Was that legal? Are they allowed to do that?

So, big picture, that's the simplest answer is we must act; therefore, we have standing.

The plaintiffs here are two Christian employers and the Christian health benefits provider that they work with to provide benefits to their employees. So Reaching Souls International is an Oklahoma nonprofit. It was founded by a Southern Baptist minister. It exists -- it is a truly evangelical organization. Reaching Souls, as the name suggests, exists to spread the gospel, to spread religious beliefs. It is as religious as any church. Its principal officers are all Southern Baptist ministers.

Truett-McConnell College is another expressly religious organization. It also exists to spread its religious faith, to teach college students from a Biblically-centered point of view.

GuideStone Financial is a branch of the Southern Baptist Convention. The Southern Baptist Convention has been around since 1845. It is essentially an organization of Baptist churches that affiliate for the purpose of spreading their religious beliefs. And for about a hundred years, GuideStone has been the religious benefits provider of the Southern

Baptist Convention.

So for about a hundred years, GuideStone has provided health benefits. This is its religious ministry. They provide health benefits to churches and pastors and ministry employees who are members of the Southern Baptist Convention or share religious beliefs with the Southern Baptist Convention.

And there is evidence in the record that the plaintiffs, Reaching Souls and Truett-McConnell, specifically affiliate and associate with GuideStone for this purpose. This is somebody who lets them get benefits that fit with their religious beliefs.

And, as Mr. Berwick pointed out, in the 1970s, when Congress enacted ERISA, Congress specifically said church plans can stand to the side of ERISA. So we don't disagree that that's what ERISA says. ERISA says that. So Congress recognized that there are these plans out there that are run by churches and that are for people who share the same religious beliefs and that those will sit outside of ERISA.

And when Congress did that, it did not distinguish between religious organizations that qualify under the tax code as churches themselves versus other religious nonprofits. It simply said if you're part of that plan and you share the religious beliefs, ERISA doesn't -- doesn't reach you.

The mandate that we're dealing with here, the

self-certification form that the government refers to, the contraceptive mandate that the defendants issued in terms of a regulation, all derive from the Affordable Care Act passed in 2010.

In the Affordable Care Act, Congress said that all group health plans must provide coverage for, without imposing cost-sharing requirements, among other things, preventive services for women. That term, "preventive care for women" was not defined in the statute but instead was given to the agencies to define. It said that the -- a branch of HHS would be allowed to define what counts as preventive health services. They have decided that many things fall under that basket, most of which GuideStone and Reaching Souls and Truett-McConnell have no issue with at all.

They don't object to, for example, paying for mammograms or well visits and things like that. But it also includes all FDA-approved contraceptives. Now, most FDA-approved contraceptives these plaintiffs don't have any issue with either. So these groups have no objection to standard contraception, the pill.

This is essentially the same religious objection that was at issue in *Hobby Lobby*, where the Court pointed out was only four of the 20. So they have an objection to anything that can act after fertilization of an egg. Their religious belief is that if it's pre-fertilization, it's okay, and if it's

post-fertilization, it's not okay, because they believe, as a religious matter, life begins at conception. They cannot be involved with or be seen to be involved with anything that would relate to terminating that life after it's begun.

And just to be clear, there is no factual dispute, there is no scientific dispute -- at least I don't think -- about the mechanism of action of the drugs at issue or the fact that that's the religious belief here.

There is a little bit of a terminology dispute that comes up in the APA area over is it an abortion? The government says it is -- it is not. We say it is. So there are some terminology disputes, but there is no dispute about that's how these drugs may work. That's in government's documents, and that's what these folks object to.

So, ultimately, of the preventive care mandate, there is really only a small slice, a small sliver of the drugs and devices there that these plaintiffs cannot provide.

But under federal law, under the Affordable Care Act, our policies must provide them. So the statute says that Reaching Souls and Truett-McConnell and GuideStone must provide the items that the defendants define as preventive care for women and, therefore, they must provide these drugs and devices. And that's what they cannot provide.

If they fail to comply with that statute -- and I recognize the government has offered a different way to

comply, which we will get to in a second -- but if they don't comply with that statute, they face enormous fines: A hundred dollars a day per affected individual.

If the government interprets that as just per employee, then for Reaching Souls, which is a small group, they only have about ten employees, it's a thousand dollars a day. It's $365,000 a year. It's a pretty sizable fine.

For Truett-McConnell, they have 78 full-time employees. So that's $7,800 a day starting January 1st, which is just shy of $3 million a year.

For GuideStone, if Guidestone's -- Guidestone's nonexempt participants in their plan face these fines, they are talking about fines -- I'm sorry -- GuideStone will face losses on the order of approximately $39 million a year.

In other words, if the government's regulations hold and GuideStone can't provide these groups with the kind of insurance it wants to provide them with and that they want to have and they have to leave the plan, that's going to subtract $39 million out of that plan each year, which, of course, then means costs for everybody else who is in that group plan are spread among a smaller group and the plan has to become more expensive and so forth. So everybody faces significant pressure from this mandate.

The preventive care requirement does not apply universally. The Affordable Care Act is quite clear about

that. So, for example, the biggest example, Congress exempted what are called grandfathered plans. And this is the president's famous "If you like your plan, you can keep it" line that, you know, received a lot more play in the past few weeks.

But what the statute says to make good on that promise is that if your plan was in existence at the time the Affordable Care Act was passed and it has not made certain changes, we will let you keep that plan. And, particularly, the preventive care mandate doesn't apply to that plan. And when Congress did that, it thought that certain things were important enough to impose right away.

So covering your kids until they're 26 was something that Congress said, Well, that gets imposed right away, grandfathered or not. Guaranteed issue. Congress said that gets imposed right away whether you're grandfathered or not. But not preventive care. Preventive care, they said if you're grandfathered, you can keep the plan the way it is so long as you don't make changes.

As the *Hobby Lobby* Court found -- and I don't think there is any dispute -- that means tens of -- plans covering tens of millions of people are exempt from this mandate this year.

Even among the non-grandfathered, there are other exemptions. And Mr. Berwick referred briefly to this, but this is part of both the substantive argument and the standing

argument. The government has given exemptions to other religious objectors. And those religious objectors are people who -- organizations that qualify as churches or integrated auxiliary. A church, I think it's fairly self-explanatory what a church is. An integrated auxiliary is -- you know, I'm shrinking it a little bit, but it's essentially an organization that is controlled and funded by a church.

So if your -- if the Archdiocese of Washington opens up an organization and the archdiocese controls and funds that organization, that can count as an integrated auxiliary. And as far as the defendants are concerned, that can be completely exempt from the mandate, including the certification requirements dealing with the TPA, all the stuff we are talking about today. Exempt religious organizations don't have to do any of that. Totally exempt.

The government says that the reason it can draw that line is that it has made predictions about what are the likely religious beliefs of people at -- who work for churches and integrated auxiliaries. And they have said that, well, as long as it's somebody who works for that type of organization, then our interest is not threatened by exempting you. And they have said we believe -- and they don't cite any authority for this claim, but we believe that employees who work at churches and integrated auxiliaries are likely to share the religious beliefs of the organization. And so those groups

get exempted because they are likely to share the religious beliefs.

Groups like Reaching Souls and Truett-McConnell, which I would suggest are every bit, if not more, likely to have employees who share their religious beliefs, do not qualify for that simply because they are not operated and controlled by a church.

As Mr. Berwick said, the government is providing what it calls an accommodation. And if you look at the regulatory language --

Can you get the fed reg on the screen, please.

If you look at the regulatory languages, it is described as just a different way to comply with the statute. So the statute says you must provide "X" and the statute requires you to provide it, and the regulation says, We'll give you a different way to comply. And that's the accommodation.

I would like to point out several things about the accommodation that we're being asked to comply with by January 1st. First, in the Federal Register document that announced the accommodation -- and this is at 78 Fed Reg 39874, which is appendix page six of the appendix the government submitted -- it says that when someone gives the form, the beneficiaries, quote, will still benefit from separate payments for contraceptive services. Right? The regulation says when you go through with this accommodation, people will still benefit.

And if you read the regulation, it's very clear. The government is trying to balance two things. Right? They are saying, Well, we've got the religious objection over here, but we've got our belief that people really ought to get the drugs over here. And the accommodation is something that's theoretically -- and I think it's flawed -- but theoretically says it's supposed to do both. The accommodation says people will still get the drugs.

There is no language in the accommodation that refers to the lack of authority that the government decided to assert now that there was this suit brought. So the claim that there is no authority to reach self-insured church plans does not appear in the regulation at all. There is no discussion in the regulation of this possibility that you can -- you can fill out the accommodation form and you can give it to the TPA but people don't get the drugs. That's not described any place in that regulation.

In fact, the regulation says -- the Federal Register says that if the TPA gets the form, they, quote, must provide the drugs. Not they can. So they have a choice about whether to stay as your TPA or not; that's true. But as long as they stay in the game, they must provide it, according to the regulation.

The government's current argument that there is no injury here because of ERISA ignores the fact that the regulation was

not issued solely under ERISA. Nor was it issued solely by the Department of Labor. It was also issued by the Treasury -- Department of Treasury under the Internal Revenue Code.

So, for example, 26 C.F.R. Section 54.9815-2713A, that's the regulation issued by Department of Treasury. And that regulation says that if the TPA receives the form, they, quote, shall provide the payments. It doesn't say they don't have to because -- or they don't have to if it's a church plan. It just says if they receive it, they shall provide it. And that document at 26 C.F.R. doesn't say there is any exception for church plans. And, most importantly --

Can I get -- do we have copies of 26 C.F.R.?

Most importantly, your Honor -- actually, you know what? I'm sorry. This is in the exhibit book. This is the easiest way to do it. I apologize, your Honor.

So if you would look at tab two of the exhibit binder, that's the existing and currently operative regulation issued under 26 C.F.R. And if you look on page two of that in the first column, the paragraph that's labeled No. 2 -- so toward the top -- at the end of that paragraph.

So the paragraph begins: "If a third-party administrator receives a copy of the self-certification" and decides to remain in the relationship, then the last clause, "the third-party administrator shall provide or arrange payments

for contraceptive services using one of the following methods."

And if you look at the back of this document -- look at page four, if you will, your Honor. There is a section where the defendants list what's the authority on which this regulation was issued. And I'm not an expert in ERISA, but I know it's in 29 U.S.C. I know the Internal Revenue Code is 26 U.S.C. And if you look at that long list of authority cited for this currently-binding regulation, it doesn't say a word about ERISA. It's all under 26 U.S.C.

So there is a currently-binding regulation that tells the TPA, If you receive this form, you must make the payments. And it says on its face that the authority for that is not ERISA but the Internal Revenue Code. And while church plans are exempt from ERISA, I, at least, have never heard anybody argue that they are exempt from other provisions of the Internal Revenue Code or, more specifically, that someone like Highmark, one of the -- one of the third-party administrators and a for-profit company, could possibly be viewed as exempt from the Internal Revenue Code. They're not.

That language in the regulation is entirely consistent with the language from the Federal Register, which says if the form is given out, the employees will still benefit from getting the drugs. Right? That's the whole setup here. They will still benefit.

And if you look at the regulation and see, Who is it who is supposed to benefit; who gets these drugs? It is the plan participants and beneficiaries; in other words, the people who work for Reaching Souls and who are signed up on Guidestone's plan. The plan participants and beneficiaries will get the payment. If you put somebody on the plan, they will get paid -- their contraceptives paid for. If you don't, they won't. It's entirely tied to the plan.

And how long do they get it for? They get it for so long as they are on the plan. So as long as you are on it, you get it. The day you switch jobs or leave or don't put somebody on the plan, they don't get it. It's entirely tied to Guidestone's plan, according to the regulations.

If your Honor would take a look at tab one of the exhibit binder, this is the form that the government wants the plaintiffs to fill out. It's EBSA Form 700-Certification, tab one of the binder.

Several things that I would like to flag about this form, your Honor. First, this form exists pursuant to a regulation that says it's designed to make sure people do get the drugs, not that they don't get the drugs. But this form was created under a regulation designed to get the drugs to people. That's why this form came into existence. That's the only reason the government has ever given for this form even existing.

If you look at the second page of the form -- so page two at tab one -- it says several things. One, it says this is a notice to third-party administrators that your obligations are set forth in certain parts of the C.F.R., including the one I just cited to the Court, the 26 C.F.R. section, and the similar section under 29 C.F.R.

So, to be clear, the Department of Labor issued the same regulation in 29 C.F.R. But Treasury also issued it pursuant to its own authority. And there is no argument that the Treasury doesn't have the authority -- or at least they haven't made one yet.

So, first, plaintiffs would have to fill out a form that, at least as I understand the government's current view, may be a lie. If the truth -- if the government's view is the third-party administrators don't have to follow those rules, that these are not their obligations, it is very bizarre to say that the government has the authority to force the plaintiffs to sign that form and instruct the TPAs that they do have those obligations. But that's what the form says.

The form says, Here, third-party administrator, here are your obligations. Go look over there. Tag, you're it; you have to do it. And the plaintiffs have religious objections to doing that, which I will get to in a moment.

It also says, if you look at the very bottom of the box that's listed there, "This certification is an instrument

under which the plan is operated." The certification is an instrument under which the plan is operated. Which plan? The GuideStone plan. Reaching Souls' plan.

So the plaintiffs are being asked to fill out a form not simply that says we have religious objections. As Mr. Berwick correctly pointed out, we are perfectly fine saying we have religious objections. We do. The problem is having to do it in this particular way, give it to somebody else who the regulations, on their face, say shall provide the stuff we can't be involved in, tells them they have to do it, and makes that form an instrument of our plan. In other words, we're being required to write a new term in our contract.

When GuideStone is allowed to negotiate these things with its TPAs without the government telling it what to do, it takes great effort to keep this stuff out of its plan. That's why all these religious ministries trust GuideStone, is that they perform that service. So when GuideStone is allowed to do it itself, they send the exact opposite message to their TPAs. They say, You are not allowed, under our plan, to give these things out. They are deliberately excluded.

But the form the government is making us fill out and give to the TPA says the exact opposite. At bare minimum, they are forcing us to tell a lie. At bare minimum. But it's worse than that because they are asking us to tell somebody, You need to comply. And, in fact, as a factual matter, we

know one of them, the largest one, is planning to comply if they receive those pieces of paper, which I will get to in a moment.

The form also requires the plaintiffs to form a new relationship which does not previously exist. So GuideStone has a relationship with Highmark, who is its biggest TPA. GuideStone negotiates that relationship, they deal with it, they have people who manage that relationship.

Reaching Souls International has no relationship with Highmark. They don't contract with Highmark. They don't have people at Highmark they deal with. They are being forced to essentially create a relationship that, according to the existing and binding federal regulations, is being done solely to make sure people get these drugs, which is exactly what Reaching Souls can't do and what they can't be seen to be doing, because either one would violate their religion.

The form is also a part of the government's plans for reimbursing the TPA if and when it decides to make payments, which is what Highmark has informed us it will do. So you can think of it as essentially a carrot and stick approach. All right? The government wants the TPA to pay for people's contraceptive drugs that their employers can't pay for. And, here again, it's just the -- it's just the small groups. Just the four. The government wants the TPAs to do that.

So the government has the carrot and a stick. The stick

is the law which says you must do it. And, presumably, if you violate the law, the government will come punish you for that. And, again, that's not simply under ERISA. It's also under the Internal Revenue Code. So the stick is you must do it as the law. And if you don't, we will punish it.

There is a carrot too. And the carrot is also based on the certification form. The carrot is, And if you make these payments, TPA, we will pay you back. And that is referenced in the Federal Register cite. The 78 Fed Reg 39885 talks about that payback. And it cites to a particular section of the C.F.R., 45 C.F.R. 156.50.

And this is one, your Honor, that is not in the exhibits binder, although, again, the regulation is referenced -- is referenced in the Fed Reg. If I can pass up a copy.

THE COURT: Certainly.

(Mr. Rienzi handed document to the Court.)

MR. RIENZI: So, again, the Federal Register cite, when they issued the rule, cross-references this particular section of the C.F.R. And if you look at this particular section of the C.F.R., this is where the government describes its payback system for how it's going to pay back the TPAs for making these payments.

And if you look at the regulation, it's very clear the payback system is wholly dependent on the TPA having our form. In other words, the TPA can't go get reimbursed unless it's

holding our form. So Reaching Souls knows if it gives Highmark this form, it's giving Highmark the incentive and it's giving them the way to cash in on that incentive to go get paid back by the federal government.

Well, Reaching Souls doesn't want anything to do with that. GuideStone doesn't want anything to do with that. Truett-McConnell doesn't want anything to do with that.

But if you take a look at -- it's on the right-hand side of page one of that document, your Honor, under little ii, it makes clear that if they're seeking the reimbursement, it must be following receipt of a copy of a self-certification referenced in 26 C.F.R. And further on in the same document it makes clear that the time frame for the TPA to make the request triggers from when they receive this form.

So the form is not simply the stick. It gives the government a way to beat the TPA into doing what they want them to do. It's also the carrot. It's also the thing that's necessary for the TPA to hold to go collect.

And if you look at page three of that, I will just point out it says the government is not only going to pay them back their costs but it will add an allowance for administrative costs and margin. The allowance will be no less than 10 percent of the total dollar amount of the payments for contraceptive services.

So giving the form also helps the carrot system work.

Right? Without that form, Highmark has no way to come back to the government to get paid. But if we give that form, then Highmark can go ahead and collect.

I would like to talk for a couple of minutes about basic standing law and the cases -- the cases that the parties have cited -- the *Clapper* case that your Honor referenced in your order and explain why I think this is a very easy standing question. It's actually an odd case to assert there is no standing. Virtually all interesting standing cases concern a situation where the party coming into court is not directly regulated by the government.

So most of the interesting standing cases, *Clapper* itself, relate to situations where the party seeking standing isn't directly regulated. That's, quite obviously, not the case here. All right? The government is here. They are very serious about their regulation. We are here.

The government is saying while they can't make step two of the system work just yet -- and, again, I'm not sure they're right about that -- but they are saying, While we can't make step two of the system work yet, we still want you to do step one. We still want you to fill out the form. We still want you to do the permission slip to your TPA. We're going to keep thinking about it.

I mean, there again, I understand -- and I think it's, frankly, at least a half a step of a backup in the hearing

this morning. Their litigation briefs say quite clearly they are still looking for ways to make this work. And while they're doing that, they want us to fill out the first step of the paperwork. They want us to do the permission slip. And they're going to punish us if we won't do that while they still think about ways to make that work.

The *Lujan* case, which is widely used as at least one of the core cases on standing, the *Lujan* case says the following: "When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred at the summary judgment stage or proved at the trial stage in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action or foregone action at issue."

That's us. We are the object of the action. We're here because the government says, Do what I say or I'll punish you. And do it in the next 15 days or I will punish you. We are very much the object of the action we're complaining about.

The *Lujan* Court continued: "If he is, there is ordinarily little question that the action or inaction has caused him injury and that a judgment preventing or requiring the action will redress it."

That's where we are. That's what *Lujan* explains is the easy case. We are the people who have to act under this rule. The government is saying, Sign the form or we'll fine you

large amounts of fines.

I think it would be useful to compare this case to the *Clapper* case, which the government relies on and which your Honor cited in your order. And, of course, it is the Supreme Court's most recent standing question -- standing case. In the *Clapper* case the plaintiffs were not directly regulated by the statute at issue. Right? The statute was something that authorized the government to conduct surveillance of other people, not of the plaintiffs.

And the plaintiffs said, Well, I experienced some subjective chill because I worry that at some point in your surveillance of other people you might catch some of my conversations and, therefore, I might have to take more precautions and I can't talk on the phone and so forth.

But there was no dispute in *Clapper* that the regulation at issue, the statute at issue did not directly regulate the conduct of the plaintiffs. And so the Court actually, in several places in the opinion, particularly on page 1153 of the *Clapper* opinion, distinguishes the plaintiffs' case from situations where somebody actually was the direct object of the law.

And so in explaining that other cases that the plaintiffs had cited were different, the Court said that they had not offered any cases that resulted from a governmental policy that does not regulate, constrain, or compel any action on

their part. Well, this one does regulate, constrain, and compel action on our part. We're like what *Clapper* was distinguishing. We are not like *Clapper*.

The Court also distinguished the *Keene* case, K-E-E-N-E, and said: "Unlike the present case, *Keene* involved more than a subjective chill based on speculation about potential governmental action. The plaintiff in that case was unquestionably regulated by the relevant statute."

And, again, I would say here we are unquestionably regulated by the governing statute.

You know, it may have made a lot of sense for the government to say we can't make this system work on the GuideStone plan because we can't force the TPAs to do it; therefore, we're going to back off our requirement that you fill out this certification. And they could have said that. If they actually say that, then I would agree the case goes away. Right? If they stop trying to regulate our behavior, stop telling us to give the certification and stop trying to control our speech about it, which I will get to in a moment, then, I agree, we would have nothing to complain about.

But the fact of the matter is they are not backing off those requirements. They are saying, We are going to control your pen. We are going to make you fill out the form. We are going to control who you give it to. We are going to make you give it to the TPA. We are going to control what you can say

to them. And so, because we're directly regulated, we are just not like *Clapper* at all.

The closest Tenth Circuit case, your Honor, is the recent *Cressman* case that Judge Matheson decided for the Court earlier -- earlier in 2013. That was the one about Mr. Cressman objected to having his license plate have the picture of the Native American shooting an arrow toward the sky. And he said that violated his speech rights and his religious rights.

And the Court said that Cressman had standing. And the Court -- they got three reasons why Cressman had standing, every one of which applies perfectly well here. All right. They said if Cressman did what he wanted to do, quote, he faces the threat of prosecution and criminal penalties. Well, our penalties aren't criminal, but they are pretty severe civil penalties. Right? If we don't do what they tell us to do, if we don't fill out the form, we face prosecution and penalties. And in *Cressman*, the Court said that is injury; that is enough for standing.

The Court also said Mr. Cressman could cave. Mr. Cressman could just give up the fight and do what they're telling him to do even though Cressman says it violates my speech rights and my religious rights. Well, theoretically, we could cave too. We're not going to. We don't want to. But the fact that we have the ability to fill out the form

that we're saying our religion tells us not to sign that permission slip, that's also is enough for standing. That's the pressure on us to violate our religious beliefs. It's the pressure on us to speak or not speak in ways they want to control our speech or force us into silence in certain things.

And, third, the Court also said that the mere cost of paying the $16 renewal fee for the specialized plates that Mr. Cressman had been paying is itself sufficient monetary injury for standing.

And here these regulations point out that filling out this form is estimated to cost something on the order of $40 and 50 minutes of time. And we're not at all resting our standing argument on 40 bucks and 50 minutes, but as a constitutional matter we could.

As a constitutional matter, if they are forcing us to do 40 bucks' worth of work and spend an hour of our time, that's standing. Maybe you could argue if that was the only injury, you know, you could argue about how it plays out in the rest of the place, but that is an injury for standing purposes.

So that's *Cressman*. Ours is more than *Cressman*. And under *Cressman*, we have -- we easily have standing.

The government argues that the plaintiffs shouldn't worry about filling out the form. This really shouldn't bother us because at least they don't have the ERISA stick with which to make the TPA -- the TPA comply. At the end of the day, the

question of whether -- whether the fact that they claim they don't have the ERISA stick is enough to make the plaintiffs no longer have the religious objection is fundamentally a religious question, not a question for the government to determine.

The Court in *Hobby Lobby* said religious beliefs don't have to be logical, rational, or comprehensible to others to get protection. And I think that's a true statement of the law, but I don't think we need to go anywhere near there because I think, as a practical matter, it is very logical, very rational, and very comprehensible why plaintiffs in this position wouldn't fill out the form. All right?

The form exists to make sure people get the drugs. On its face it tells people to give out those drugs. On its face it says it's an instrument of the plan. According to the rules, it's designed to get the drugs to people who are on the plan for so long as they are on the plan. It forces the TPAs to regulations that on their face say you shall provide. And on their face are not issued under ERISA at all.

There are plenty of reasons why it's very rational to say, My God tells me I can't do that. All right? I understand the government wants me to take it on faith that after they make me do step one they are never going to come back with step two. And I understand they want me to take it on faith that that's not going to trigger anything. But as a

religious matter and as a matter of pure reason, it's utterly rational for them to say, You know what? My religion tells me I can't sign abortion permission slips any time. I just can't do it. I can't authorize somebody to do that under my plan ever.

And, in fact, the GuideStone plan has, you know, for a hundred years been operating consistently with its religious beliefs. The idea that they should be comfortable designating somebody else to do this because the government says we haven't yet figured out how the rest of the system works, I don't think it makes a whole lot of sense.

If there was any doubt about that -- and I don't think there should be. As a constitutional matter, again I think it's a very easy standing case. But if there's any doubt about how reasonable and rational it is to have that fear, the position of Highmark should resolve that doubt very, very easily.

So you have the Ormont declaration in front of you. It was submitted in response to this new argument from the government that they lacked the authority. The upshot of that declaration is that Highmark has told GuideStone, If we get those certifications, we will send out the notices to women and girls as young as ten years old advising them of the availability of these payments for contraceptive services that you won't provide. That's Highmark's -- that's Highmark's

statement of position. Again, that's the document attached to the Ormont declaration.

And what it shows is the utterly rational thing that a lawyer at an insurance company -- all right -- a lawyer at an insurance company faced with regulations that say you shall provide and you must provide is going to provide. It would be a shock if a big insurance company like Highmark, which is part of Blue Cross, were to do anything different. Why? Because the regulations themselves tell them they have to do it.

And if you're Highmark, of course you're going to follow that. They have no incentive to say, Oh, well, the government said in some litigation against some religious people that they can't enforce it against me. All right. Highmark has no incentive at all to essentially run naked and take the risk and hope that they don't get in trouble with the government for disobeying the clear language in what's actually the law. All right? They have no incentive to do that.

And, in fact, the government still gives them an incentive to go ahead and provide the payments. Why? Well, because of the carrot. All right? The carrot is still there. They say if you get the form and you make the payments, we will pay you back. We will give you a 10 percent bonus too. All right? It's very, very reasonable and rational for Reaching Souls, Truett-McConnell, and GuideStone to say I

can't hand over a form in that situation.

And, to be clear, their religious objection does not depend on Highmark's position. In other words, if Highmark comes in tomorrow and says, We changed our mind, GuideStone and the plaintiffs still have the same religious objection. But if you needed anything to make it clear that this is not -- the government calls it invisible dragons. All right. This is not invisible dragons. This is very real. It's that Highmark is sending -- is saying that the 11- and 10-year-old daughters of employees of these places will get letters telling them about the availability of IUDs to be paid for by Highmark starting January 1. That is not invisible dragons at all. It is very, very real and it's very rational for the plaintiffs to have religious reasons why they can't -- they can't trigger that system.

I guess the last thing I would point out on the standing point, your Honor, is just that if you look at the *Hobby Lobby* opinion, we think -- you can tell from the briefs, *Hobby Lobby* controls a lot of this case. *Hobby Lobby* also tells you something on standing.

On the bottom of page 1126 of the *Hobby Lobby* case, the Court -- there was a standing issue in *Hobby Lobby*. It was briefed, it was argued before the en banc court.

And the Court dispenses with standing in about 30 seconds, about three lines. It says: Hobby Lobby faces an

imminent loss of money traceable to the contraceptive-coverage requirement, and a ruling for them would redress it.

It's exactly the same thing here. We face an imminent loss of money if we don't sign the form and comply with their speech requirements. And it's obviously traceable to the government's actions. If they would just give up and stop trying to force us or if the Court orders us -- orders them to leave us alone, then we're fine. So it's redressable and it's traceable.

And I apologize. One last thing. On the speech -- the speech point, the regulations both compel our speech, they require us to say something we don't want to say. We don't want to say to the TPA, Hey, go look at these rules; the rules set out your obligations. We don't want to say that. We think those are bad obligations. And at least as the government is saying to you today, it's a lie. We don't want to tell them to do that. We don't want to make it part of our plans. We don't want to designate.

And once we designate, if we're forced to do it, we don't want to not be able to speak to them. And the government sort of draws a line. If you look at their briefs, they -- what the gag rule says -- what the actual regulation -- the law actually says is that we cannot seek indirectly or directly to influence their decision to make the payments.

In any other context that would be a really, really easy

First Amendment case. Right? That's the government saying there are certain things you're not allowed to talk about. That would be a content-based regulation and it would get strict scrutiny right away. It's almost impossible for those to survive. It would be a simple First Amendment case. But that's basically what they've put in this rule is a requirement that says you can't directly or indirectly seek to influence their decision to cover.

Now, what the government says is, Well, no, you can tell anyone else you want to about your objection, and that's great and we appreciate that, but we don't need the government to give us special rights to do that. That's our right. And they say, And you can tell them that our position is we can't force them. And that's good. And, actually, we have told them that.

For Highmark, it doesn't make any difference. Highmark says, We are going to provide anyway. But I appreciate the fact that we're allowed to tell them that the government says they can't force them.

But what we would really like to do is what we've always done, which is say, Hey, Highmark, you're being hired to work on a religious benefits plan and you're here to do the things that we contract with you to do. And we're not hiring you and we're not asking you to use our information and use our system and use our employers to spread the flow of these

abortion-inducing drugs. That's what we would like to say to them. We would like to tell them, Don't do it. We have a contract with you. You want to keep having a contract with us, you have to follow our rules. That's the way it always has been. That's the way it should be between freely-contracting parties.

And the idea that the government is coming in and saying we will punish you if you say that particular message is a clear and obvious speech violation and for both the speech violation and the religious discrimination issue, which we will get to later in the argument, for both the speech and religious discrimination, there is no substantiality of the burden in question.

In other words, that's a particular aspect of the RFRA claim, that it has to be a substantial burden. And later on we can go through why we think we satisfy it. But for both the religious discrimination claim and the speech claims, the burden is simply religious discrimination. They are treating somebody else -- they are letting some other religious objectors go and we can't go. Right? And they don't have to do some things we have to do.

They have discriminated against us based on their guesswork as to how religious we are. That's enough to state the religious discrimination objection.

And on the speech, they're trying to control our speech.

There is stuff we would like to say that they say we can't say. That's enough for speech violation. So on any of these things, again, to circle back to the main point, we need to comply. If we don't comply, we get crushed with fines. There is no case in the world that says there is no standing in that circumstance.

THE COURT: All right. Thank you, counsel.

MR. RIENZI: Thank you, your Honor.

THE COURT: Mr. Berwick.

MR. BERWICK: So there is quite a few things I would like to address there, your Honor. Let me start with this. This is a bit of a bizarre case because we are telling plaintiffs we can't enforce this against your TPA and they're arguing that we can, which is -- obviously, the roles are sort of reversed here.

The -- I don't think plaintiffs would dispute that they have to show an injury to satisfy the Article III standing. Now, of course, if plaintiffs were subject to the fines that they would be subject to if they refused to sign the self-certification, I don't think there would be any dispute that that would be sufficient for standing purposes.

But there is another question here, which is there is a route for plaintiffs to comply with this law; that is, signing the self-certification that does not -- that does not come with any fines. As long as they sign the self-certification,

they won't be subject to fines.

So they have to articulate an injury just because there is one -- there is one possible injury if they take a particular course. There is another course, which it complies with the law, and they have to explain why they would be injured by taking that course of action. So the -- in other words, they have to explain why signing the self-certification would injure them for Article III purposes.

Plaintiffs' articulation of that injury depends, it seems to me, almost entirely on the government's interpretation of the regulations being wrong. I would argue that this Court has to assess whether there is an injury based on the law as it actually exists, not based on the law as plaintiffs claim it exists.

So let's talk about what the law actually does, what the law actually means. The preamble to the regulations make perfectly clear that the authority at issue here, the authority for requiring TPAs to provide coverage is ERISA. The preamble mentions ERISA over and over and over again.

Furthermore, the operative regulations in this case, which are the Labor regulations, those regulations are promulgated pursuant to ERISA. Plaintiffs agree that ERISA does not apply to self-insured church plans.

So it seems to me that what plaintiffs are saying is that the ERISA regulations -- sorry -- the Labor regulations

don't -- because they don't say explicitly, oh, by the way, this doesn't apply to self-insured church plans, they're somehow ultra vires. They somehow -- they somehow don't -- or they somehow require -- they require what they can't require. That is, they require the third-party administrators of self-insured church plans to provide coverage.

But that would suggest -- that argument would suggest that every time Labor issues a regulation they would have to include language saying, by the way, this doesn't apply to self-insured church plans because self-insured church plans don't fall within the ambit of ERISA. I think if you go and look at any ERISA Labor regulation, that -- they -- that's not what they say. It is assumed that the people know that ERISA does not cover self-insured church plans.

So plaintiffs' argument that the law on its face requires their TPA to provide this coverage, even though the government says it doesn't, is just mistaken.

Furthermore, the government's statements in this case and elsewhere, by the way, that the regulations don't require TPA to provide this coverage is entitled to a presumption of good faith, and is entitled to deference under *Auer v. Robbins*. I would point the Court to the Supreme Court's *Chase Bank* case, which basically said that an agency's interpretation of regulations articulated in the legal briefs are still entitled to deference.

Plaintiffs also mentioned the Treasury regulations, and I want to address that briefly.

So it is accurate that Treasury issued regulations that are identical in language to the Labor regulations. And I think what plaintiffs are arguing is, well, then those regulations that require the TPAs to provide if coverage, plaintiff may be conceding that because the labor regulations are issued under -- pursuant to ERISA they are -- they don't actually require this coverage to be provided but somehow the IRS regulations do.

So when Treasury promulgated these regulations they essentially incorporate -- they treated the accommodation as a whole and incorporated that language into the Treasury regulations. But it is clear -- again, I would point the Court to the preamble of the regulations that the only authority is ERISA.

So the Treasury regulations don't change the fact that ERISA is the source of enforcement authority and ERISA does not apply to self-insured church plans.

I think, your Honor -- so -- so -- I think it's still quite reasonable for a TPA to understand that the government simply does not have enforcement authority to require them to provide this coverage.

I will say, your Honor, although I certainly don't encourage this course, to the extent the Court disagrees with

that, the only remedy there would be to strike that portion of the Treasury regulations. That would do -- it would not be to strike down the entire regulation. Striking that portion, I would point specifically to 26 C.F.R. Section 54.9815-2713A(b)(2), (3), and (4). But, again, the government doesn't think that's necessary.

These -- again, the regulations are promulgated pursuant to ERISA. It is ERISA that provides the only enforcement authority to require the third-party administrators of self-insured church plans to provide this coverage. And because self-insured church plans are not subject to ERISA, it just does not apply to them.

THE COURT: If it's obvious that ERISA provides no way of enforcing this scheme against -- this regulatory scheme against self-insured church plans, then why was it necessary to treat churches as an exempted party under the law?

MR. BERWICK: So a self-insured church plan is a term of art, your Honor. And, frankly, I am not entirely familiar with what makes something a self-insured church plan, but I think it's defined within ERISA. Not all churches have self-insured church plans. Well, first of all, not all churches have self-insured church plans at all. Some have third-party insured plans, so they're insured by Blue Cross or something.

THE COURT: So that part of the exemption was -- or

that exemption was necessary to capture these churches that might fall outside of that self-insured church plan definition?

MR. BERWICK: That's right, your Honor. That's exactly right.

THE COURT: Proceed.

MR. BERWICK: So -- sorry, your Honor. I just want to make sure I am hitting all the points that Mr. Rienzi raised.

Oh, let me -- so let me talk about the certification. I think Mr. Rienzi focused on that quite a bit. I want to explain why his understanding of that form is not quite correct.

So the form states -- so Mr. Rienzi pointed to the language on the second page of the form that is a notice to third-party administrators of self-insured health plans. Mr. Rienzi described that form as if it says, Third-party administrators, you are required to provide contraceptive coverage. That is not what it says. It says the obligations of third-party administrators are set forth in -- and then it cites the relevant regulations.

But the point is the relevant regulations do not require -- again, I'm repeating myself over and over again, but the relevant regulations do not require those TPAs to provide contraceptive coverage.

So the TPA of a self-in- --

THE COURT: But if they don't provide it, then don't they have to arrange for some other party to provide it?

MR. BERWICK: No.

THE COURT: They do not?

MR. BERWICK: No, they do not.

THE COURT: Under any circumstance?

MR. BERWICK: Under any circumstances.

So that TPA -- basically, what happens is the plaintiffs sign the self-certification form, they give it to their TPA. The TPA looks at those regulations and says, Well, we are the TPA of a self-insured church plan; therefore, these regulations don't apply to us. We are not required to provide the coverage.

And I say that as if the TPA has to sort of figure this out by themselves. They don't have to. Plaintiffs can inform them of -- plaintiffs can tell them, Listen, the regulations don't require you to do this; therefore, you do not have to do it.

Again, I think plaintiffs act as if the government is sort of trying to trick them here. That's not what's happening. We are saying absolutely, you know, without reservation we do not have the authority to require the TPAs to do this. So to the extent their alleged injuries are based on the idea that that's wrong, that we somehow do, we are

saying we don't.

So those injuries -- again, I think if you listen to the description of the injuries from Mr. Rienzi, they are all predicated on the idea that the TPAs are actually going to be required to do this when it's not.

Let me address Highmark. Because Mr. Rienzi said, Well, even if TPAs are not required to do this, Highmark has said, well, we are going to do it. And Mr. Rienzi pointed specifically to the Ormont declaration and the exhibits to that declaration, an e-mail from Highmark.

Let me say I don't think it's at all clear from the declaration what Highmark knows about their obligations or why they would provide contraceptive coverage when they're not required to do so. And nothing in the declaration or the e-mails attached to those declarations clarifies this in any way. The e-mails say nothing about whether Highmark knows that it's not required to provide coverage or about why they would provide coverage even though they're not required to do so.

The declaration says -- I think it's in the passive voice -- hold on one second; let me actually turn to the declaration.

Highmark has chosen to take this action despite being made aware of the defendant's new position in this litigation. It doesn't say who was made aware. It doesn't say whether

Highmark's attorneys have looked at the regulations to determine that they are somehow actually obligated to do this despite the government's representation that they are not. So I'm not sure that the declaration and the attachments really stand for what plaintiffs say it stands for.

Even if it does though, your Honor, the declaration itself says Highmark indicated that, in the absence of an indemnification from GuideStone, it will comply with the regulations. I would respectfully suggest that what that means is that they believe that they are required to do this. But if Highmark is -- intends to provide this coverage over Guidestone's objection and despite the government's assurances that they are not required to do so, I would argue that regulation -- that misunderstanding of the regulations by a third party is not an injury that is traceable to the regulations.

In other words, if Highmark misunderstands the law and they are doing something that plaintiffs don't like because of the misunderstanding of the law, that is not an injury that is traceable to the regulations and, therefore, that does not provide standing.

I also think I should mention briefly that, to the extent that the Court were to rely on the declaration itself, there is an evidentiary problem with that declaration. That is pure hearsay. It's textbook hearsay.

I want to just address a couple of other things that came up in Mr. Rienzi's argument. This is a very minor point. Mr. Rienzi said there is no scientific dispute about how the emergency contraception works. There is actually a scientific dispute. It doesn't matter for purposes of this case. We have no doubt they object to the provision of those drugs. I just wanted -- for the record, I want to say I think there is a scientific dispute about how they work.

That gets to a larger point. Mr. Rienzi spent quite a bit of time talking about exemptions from these regulations, the government's reasoning for differentiating between religious employers and accommodated entities. We disagree with his characterization of those things, but they are not at issue, I think, for purposes of standing. They really go to, I think, the compelling interest and least restrictive means argument, the strict scrutiny.

We have conceded in this case, given the Tenth Circuit's position in *Hobby Lobby*, we are only preserving those issues for appeal. This Court is bound by that portion of the *Hobby Lobby* opinion. It applies the same regulations, so we are not making a strict scrutiny argument here.

Mr. Rienzi said something along the lines of the employer plaintiffs are required to form a new relationship with the Guidestone's TPA, a relationship they have never had before. That's not accurate. If those employees want to have nothing

to do with the TPA, they can simply pass the self-certification form on to GuideStone, who can then pass that form on to the TPA. There is no requirement that it go directly from the employers to the third-party administrator. I'm not sure if he made that point as another injury for purposes of standing. I just want to make that clear.

Mr. Rienzi questioned why the government wouldn't just back off the requirement, the self-certification requirement. I think the simple answer to that question is in order to -- in order to benefit from an accommodation, in order to qualify for an accommodation, an organization has to do a set of things. One of those is filling out the self-certification requirement.

They're essentially saying for us just remove that requirement. But I think to do that the agencies would really have to engage in new rule-making, new notice and common rule-making. So it's simply not -- it's not an easy thing to do. I mean, it's certainly possible, but it would require a new rule-making. It would take time. There would have to be notice and comment.

The thrust of our argument is that there is no need to do that because plaintiffs aren't actually injured by having to fill out the self-certification when that self-certification does not require TPAs to provide -- to provide this coverage.

That reminds me, your Honor -- I'm sorry to jump around a

little bit, but there was -- I want to just say one other thing about the certification form itself.

Mr. Rienzi also pointed to the language in the certification that says this certification is an instrument under which the plan is operated. Again, that language is only relevant for ERISA plans. I don't want to get into too much technical detail about this, but for an ERISA plan -- in order for the TPA, essentially, to have the authority to provide coverage, the self-certification has to designate -- has to be an instrument under which the third-party administrator is designated as a provider of those specific benefits.

For the purposes of this case, where ERISA does not apply, that language is -- it simply doesn't apply either. The instrument does not designate the TPA as an administrator of the benefit. If the TPA were to provide this coverage, which is entirely speculative, it would be done outside the plan. It would not be part of the plan in any way. So I just wanted to clarify that.

So Mr. Rienzi, I think, said the self-certification is a lie. There is nothing about it that's a lie. Most of the language he referred to really applies only to the TPAs of ERISA plans.

Mr. Rienzi also mentioned the cost of filling out the form. I think I would concede, your Honor, that if that's an

injury that plaintiffs are alleging, that would probably satisfy standing. I will say it's not alleged in the complaint, and standing is determined from the complaint.

I would also say if that's the injury this case proceeds on, the government would be fine with that. I think we would have a very strong argument that's not a substantial burden. So if that's the only injury that gives plaintiffs standing, then there is no way that this Court can find that that's a substantial burden on religious exercise.

Let me finally address -- I think this is the last thing I want to address, but Mr. Rienzi also mentioned the noninterference provision or what he called the gag order. I gather that his argument is that that gives them standing for the First Amendment claim.

So even if the Court were to find that gag order somehow provides standing, it would only be as to the -- excuse me -- the free speech claim. That would not give them standing as to the RFRA claim.

That noninterference provision, however, only -- that provision does not prevent plaintiffs from telling their TPA, as they apparently already have done, that they are not required to provide contraceptive coverage. It also does not prevent them from telling their TPA, as they would do with the self-certification, we have a strong religious objection to your providing this coverage. So I'm not honestly certain how

plaintiffs allege that they are injured from that provision.

I think that's -- that's everything I have to say, your Honor. I would just reiterate that the injury that plaintiffs allege in this case is based on a misunderstanding of how the law applies to them. The Court should conduct its standing analysis based on how the law actually applies to them. I think when the Court does that the conclusion is that they are not, in fact, injured by the regulations, at least not in any way that they have alleged.

THE COURT: All right.

MR. BERWICK: Thank you.

THE COURT: Thank you, counsel.

Mr. Rienzi, since it is your ultimate burden on this issue, I will go ahead and let you have the last word.

MR. RIENZI: Thank you, your Honor.

If I could take those somewhat in reverse order just to -- because at least it's close enough in my mind.

If the only burden were the gag rule, which it's not, but if the only burden were the gag rule, that is both a speech injury and a religion injury. The documents are quite clear that the plaintiffs have religious objections to these things being done in conjunction with their plan. The government is telling them they're not allowed to say that to people. All right? That's both a religious act and a speech act they are being forbidden from doing.

The government's argument is in some ways very odd. The claim is, well, this regulation is invalid at least in a certain context, and because it's invalid in that context we can make you do it and you can't even ask for relief. Their claim is this just doesn't work in the church plan context. If that's the case, there is no plausible reason to require people to sign a certification that they say their religion tells them not to sign for a system that the government says it can't make work.

It makes -- you know, the right response to "our rule doesn't work here" is to walk away and not make people comply with half of your system. But they're insisting on the opposite. They are insisting that we fill out the form and give it.

And Mr. Berwick directed you to the words on the form. And he said it's not a lie. Well, in this context, at least according to what the government says, at the bare minimum, it is a lie. "This certification is an instrument under which the plan is operated." That's what the document we have to give to the TPA says.

Now, Mr. Berwick's argument is, Well, under ERISA, that's not true. Let's take it on faith. If that's not true, then it's a lie. Right? Then we're being asked to tell the TPA something that's not true. We are being asked to tell the TPA that their obligations are over here and the government is

saying they're not.

The government says, Well, it's obvious that we only have authority under ERISA. That's a litigation position, but the actual regulation itself says the exact opposite. It says we have authority under 26 U.S.C. for Treasury to order you to do this and that you shall provide it. That's what the law says.

The government, in its litigation position, says, Oh, but we didn't really have the authority to do what we did. Well, the answer, when the government says we didn't really have the authority to do what we did, is they should go back and undo it. It's not that people should comply with it until the government decides to fix it. It's that they need to go back and undo it.

And so things they haven't done that they could have done, under the Affordable Care Act they have the ability to issue interim final regulations, to issue them without notice and comment. It's how this mandate was originally issued. They could issue a new regulation any time saying that people who are in church plans don't have to do that. Right? Church plan TPAs, you're not obligated to do that. We will give you a different form that says, Actually, church plan TPA, you don't have to do any of this stuff we're saying.

But that's not what they're telling us to give them. We have to give them one that says they do have to do those things, that they have obligations. It's the obligations

written in the law. This form doesn't refer them to the government's legal briefs. It refers them to the actual C.F.R., the law, and tells them those are your obligations. That's something that, for religious reasons, we cannot do.

The government says that the plaintiffs are engaging in speculation about what Highmark will do. But I would suggest it's not the plaintiffs engaging in speculation. It's the government. The government's issued a rule that says if you get this form, you shall provide it. And they're asking this Court and the plaintiffs to speculate that people will openly flout that law and not do the thing the government tells them to do. Well, people don't lightly flout the federal government. It's not really a smart thing to do.

So it's speculative to say even though we have written the law to say you must do it, people will go ahead and trust our litigation position in the district court case and say, Well, they said that in the trial court, I guess I'm safe. That's not even plausible. It's really not plausible that people will rely on that position. And we know that it's not Highmark's position.

And Mr. Berwick raised some evidence-based objections that I would like to address related to that. First, he said it's textbook hearsay. It's not textbook hearsay at all. It's a textbook exemption to hearsay. It's an 8033 statement of present intention. Under 8033, Highmark's statement --

this is our intention, this is our plan -- is squarely covered by that rule and, therefore, it is admissible under 8033. It's a basic exemption to hearsay. 8033 says a statement of plan or intent -- which is exactly what that document is -- is exempt.

And Ormont's e-mail, which he attaches, is a business record. And he provides the requisite certification in his declaration, that it's kept in the ordinary course of business and so forth. So that's clearly admissible under 8036 as a business record. And for the hearsay within it, it's Highmark's statement of their intention.

We don't need to go there because at the preliminary injunction stage the federal rules of evidence actually don't apply and the Court is allowed to rely on hearsay. But to the extent you need to, it's fine because it passes the rules under the hearsay.

And even if it didn't pass those rules, I would say you could rely on the Highmark statement simply for its effect on the listener. In other words, the claim is, Oh, plaintiffs are worried about invisible dragons. Right? They are scared of their shadows. They are just making it up.

They are not just making it up. The TPA provides -- 96 or 95 percent of the TPA services have said if you give me that form, I am going to send these letters to people as young as 10 and 11 years old about the IUDs.

So they're not -- the plaintiffs here aren't crazy or making it up or jousting with invisible dragons. They are acting in the real world. The effect of that on the listener is certainly something that would make the religious objection very reasonable and rational. And, again, the religious objection doesn't need to be reasonable or rational, but it manifestly is here.

I would point out that Mr. Berwick said nothing about the government's authority to offer the carrot. In other words, the government's set up a system with both enforcement authority and a payment that it promises Highmark and other TPAs if it will go ahead with this. That payment is conditioned on receipt of our form. Right? The payment only happens if they get our piece of paper. And the government is saying, I can still force you to give the piece of paper.

Now, we disagree with them that they don't still have a stick and that the rules don't make the TPAs provide it. The rules on their face do, and we shouldn't be required to take that step. But even if they were entirely right about the stick, they've said nothing about the carrot.

They certainly haven't issued a press release -- so much as a press release, much less a rule, telling Highmark and other TPAs, Hey, if you've got a church plan, we are not reimbursing. They could say that. They haven't said that. And I don't think their argument would get there because their

argument depends on we don't have ERISA enforcement authority.

And that makes sense at some level if you're talking about enforcing something and sort of that's the government's stick. But it doesn't make any sense if you're talking about our ability to make payments to people. Right? The government's spending authority is vastly, vastly, vastly more expansive than their authority under ERISA or anything like that.

So they have claimed in the rules that if Highmark can just get that piece of paper from us, we'll make payments to you. We won't only reimburse you, Highmark, we will give you a 10-percent bonus for administrative costs and margin. And what they are saying here is the plaintiffs aren't even allowed to be in court to state the religious objection to giving somebody the form that lets them make those payments to the people on the plan, make them in connection with the plan, and then go get paid by the federal government.

Again, religious beliefs don't have to be rational or reasonable, but that one is really, really rational and reasonable.

The government asks that the Court defer to its litigation position here about the reach of its rules. Again, I would feel comfortable deferring to the litigation position the day the litigation position becomes you don't have to comply with the rule. You can go ahead, you don't have to

comply with this at all. You don't have to give them the form. You don't have to follow the gag rule. You don't have to do this. But that's not the litigation position they are taking. They are taking one step back of that, which is, There is somebody else who I can't force to do it.

I would just point the Court to the case Mr. Berwick cited, the *Auer* case, *Auer v. Robbins*. And I would note that in that case the Supreme Court expressly warned against and distinguished an interpretation that is a, quote, "Post hoc rationalization taken as a litigation position or to defend past agency action against attack." That's what this is.

The rule itself says nothing about this gap in the authority. Right? The rule doesn't contemplate the idea that there could be accommodation situations where you comply with the accommodation, but drugs don't flow. The rule says nothing about it. It's not for want of words. It's a 30-page, small-print Federal Register document. They spent a lot of words on it. They never said those words at all. They never say there are some people who are going to get the accommodation and we are not going to make the drugs flow. And the text of the rule says the drugs have to flow.

So the idea that they can come in and say, Wait, but part of that we didn't have the authority to do, and that they can then ask for the remedy to be not that and, therefore, the rule is invalid and people in church plans don't have to

comply, that would make sense. But instead, oh, we don't have the authority over here; therefore, Judge, treat our rule as valid and make them comply with it. And don't give them any relief. Don't even let them ask the Court the question as to whether it's okay. That's a fairly bizarre, invalid rule. Right?

If it's invalid in the church plan context, it ought to be invalid in the whole church plan context. And it shouldn't be the case that they can still force us to give forms and regulate our speech and regulate our conduct to comply with something that they are claiming, oh, it's meaningless. If it's meaningless, great, let me tear the thing up and let's walk away. But it's obviously not meaningless. It's something they are insisting on.

And the argument that, well, that's what the law says, right, the argument is, well, we might have to go back and pass a new regulation. That's what the law says, Judge. Well, the law also says the TPA has to do it. Right? The government is being very selective with its "that's what the law says; I can't change it without a rule-making position." Right? The law says, TPA, you shall provide. TPA, you'll be punished if you don't. TPA, we will pay you if you do. That's what the law says. And the law doesn't say anything about a church plan exemption.

So to say, Well, the law also says you have to do the

verification form, I agree. The law says we have to do the verification form. That's why we are here and that's what we are seeking relief from.

Last point I will make, your Honor. Mr. Berwick said that Reaching Souls doesn't have to create this new relationship. They can just have GuideStone do it. To state the obvious, GuideStone doesn't want to do it. GuideStone has a religious obligation not to be the middleman of the form that says this is an instrument under the GuideStone plan and you have obligations to provide these drugs. GuideStone can't hand the piece of paper to Highmark. That would make GuideStone complicit in the flow of those drugs. GuideStone exists for the exact opposite purpose.

So the idea that the government can just say, GuideStone, be the opposite of what you are, put down your religious identity, step in and be the middleman and make this form flow, that doesn't solve it. GuideStone can't do that.

So, ultimately, the right response here is the government should back off its regulation, which it says it can't make work here anyway. But so long as the government is saying we're going to show up in court and we're going to fight to make them fill out that form, then people have a right to be in court and say, Judge, it's not legal for them to do that.

Thank you, your Honor.

THE COURT: All right. Thank you, counsel.

It's 11:00. We are going to take a short comfort break -- about 10 or 15 minutes. And when we come back in, we will address the preliminary injunction motion.

Court is in recess.

(A short recess was taken.)

THE COURT: Plaintiffs, please proceed.

MR. RIENZI: Thank you, your Honor.

So now we are proceeding to the plaintiffs' motion for a preliminary injunction?

THE COURT: Correct.

MR. RIENZI: If it's okay with the Court, I will also assume that all of the argument this morning, to the extent that it relates to things now, you've already heard it and you don't want me to repeat it.

THE COURT: Correct.

MR. RIENZI: Thank you.

So plaintiffs move for a preliminary injunction seeking temporary relief from the mandate during the course of this litigation. So it's a temporary remedy we are asking for. It's just during the course of this litigation. And it is during a time in which the government says they can't even make the rest of the regulation work.

And there are four factors that we are required to show in order to get a preliminary injunction. The first is the biggest and the one that usually gets the most attention:

Likelihood of success on the merits.

The second is likelihood to suffer irreparable harm in the absence of preliminary relief.

The third is balance of equities tips in the plaintiffs' favor.

And the fourth is that an injunction is in the public interest.

There are three grounds on which the plaintiffs have likelihood of success. Any one of them would be sufficient today for the Court to issue a preliminary injunction. Those three grounds are RFRA, the Religious Freedom Restoration Act, a religious discrimination claim that mostly sounds in the establishment clause, although the Tenth Circuit has also said that it has some free exercise aspect to it, but essentially a constitutional religious discrimination claim, and a free speech claim.

Again, any one of those three would be sufficient for the preliminary injunction. We think we have likelihood of success on each of the three.

If I may start with the Religious Freedom Restoration Act. The Religious Freedom Restoration Act, or RFRA, is a federal civil rights statute. That statute says that the government cannot substantially burden the exercise of religion unless it can pass, essentially, strict scrutiny, the compelling interest test. It needs to prove that there is a

compelling governing interest enforcing these particular plaintiffs to do with the government wants to force them to do and that that is the least restrictive means of achieving the government's compelling interest.

RFRA is also a very reasonable statute, if I can say something along those lines. It's a very reasonable statute in that it gives future Congresses the ability, if they so choose, to essentially opt out of RFRA in the statute. So any Congress that's passing a law can say, Well, in this particular law, we don't want to be bound by RFRA. This one may put some burdens on religion and we don't want to be subject to strict scrutiny over there.

And the important fact of this morning is that while Congress could have done that when it passed the Affordable Care Act, it did not. So RFRA absolutely applies in this context. That's clear from *Hobby Lobby*. It's also clear from the face of the statute and the face of the Affordable Care Act.

We also note today, based on the *Hobby Lobby* decision, that the government is not contesting strict scrutiny. To their credit, they acknowledge that that part of the *Hobby Lobby* decision binds them and binds this Court and, therefore, they cannot prove strict scrutiny here today.

And so that leaves the question: Does this law impose a substantial burden on plaintiffs' religious exercise? Let me

start by suggesting that I think at some level the government already recognizes that being forced to include contraceptive coverage that violates your religion in your insurance plan is a substantial burden on religion.

And you can tell that not from their litigation position but from their actions. Chiefly, their action in granting an exemption to churches and integrated auxiliaries. All right? The government had this big, long, public drawn-out discussion about that exemption, and it decided that it should give that exemption to churches and integrated auxiliaries in order to spare them from having to pay for, arrange, contract, or refer for coverage that violates their religious beliefs.

So at some level I think the government has, by its actions, conceded the point that being forced to put things into your insurance plan that you don't want to put there, at least as they relate to this contraceptive mandate, is really a burden on religion. If it wasn't, there is no need for the other religious exemptions. But they have gone ahead and done that, I would suggest, because they do understand that this is an actual burden.

So, for example, there are some churches in the GuideStone plan. So the GuideStone plan is not simply what the regulations call nonexempt entities like Reaching Souls and Truett-McConnell. It also includes some exempt entities. Some things that count is actual churches and integrated

auxiliaries.

And in the Southern Baptist, while there are not a lot of those, because it's sort of a matter of Baptist theology, the idea of an integrated auxiliary is something that's sort of closely and tightly controlled and funded by the local church. It doesn't really fit with the way Baptists do and have historically done things. But there are some. And those are exempt.

And by "exempt," I mean they don't have to fill out the verification form. They don't have to give it to their TPA. They don't have to tell the TPA it's part of their plan. They don't have to tell the TPA to go look for their obligations in the regs. Those TPAs are not eligible to get the repayment from the government based on those certifications. So those are true exemptions and the government has given them, and I think the government has given them because it realized that there is, in fact, the burden.

But here the government says there is no burden on religion or, if there is, it's certainly not substantial. And so they have really shown a spotlight on the question of, well, how does the Court determine what counts as a substantial burden under RFRA? Because we know strict scrutiny is taken care of. They've already conceded they can't pass it. So all the attention today is: Is this a substantial burden?

If the plaintiffs are likely to show it's a substantial burden, I think the answer is, therefore, we should win under RFRA and we should get the preliminary injunction.

Hobby Lobby provides the framework for determining whether there is a substantial burden on religion. The government, in their brief, does not actually engage with the framework that *Hobby Lobby* sets out. They acknowledge that other parts of *Hobby Lobby* bind them.

But if you look at their brief, when they go to talk about what's a substantial burden, all of the cases they cite are RLUIPA, Religious Land Use and Institutionalized Persons Act, cases from other circuits.

What they don't cite and what they don't deal with is the fact that the Tenth Circuit this summer said, Here is how courts should determine if there is a substantial burden. And they laid that out in the *Hobby Lobby* case. And to be clear, the -- what the plaintiffs are being asked to do is somewhat different from what the plaintiffs in *Hobby Lobby* were being asked to do.

Hobby Lobby had only one way to comply. We have been given two. So we know that for the one way to comply, if the government is trying to force us to do that, to actually provide them, then we are on all four -- foursquare with *Hobby Lobby* and it's easy.

And the question really is: Okay. The government has

told us you have another way out of the fines. You could jump through a few different hoops and do these things. Their argument is that's not a substantial burden.

Okay. *Hobby Lobby* tells us how to figure out whether the government has imposed a substantial burden on religion. And the Court sets out a simple several-step analysis and says, Here's how you do it. And what the Court says must happen is this: First, the Court must identify the religious belief at issue. And then it must determine if that belief is sincere. And then it must look to see, has the government placed substantial pressure on the religious believer to violate that belief?

Here the government doesn't dispute the existence or sincerity of the religious beliefs at issue. All right? The government thinks we misunderstand the law and, therefore, we shouldn't have religious objections to signing the form. But they don't dispute that we actually do object to doing these things. Right? We are here. They are here. There is obviously a dispute about it. We have a religious objection. It's sincere. Government is not challenging that.

What the government is challenging is whether they are putting substantial pressure on us, whether it's really a burden on us to do it. And under *Hobby Lobby*, the question there is really a very narrow one. It's, well, how much pressure is the government putting on you to do the thing your

religion tells you not to?

And here the answer is: It's the exact same pressure as *Hobby Lobby*. Because if we don't fill out the form, we face the exact same fines and penalties that Hobby Lobby faced. And those penalties were enough to create a substantial burden on religion in *Hobby Lobby*. And they create just as much pressure on us here.

So the religious exercise is slightly different. *Hobby Lobby* said, I can't put it into my plan and pay for it. We are saying, I can't sign the form, give it to the TPA, shut my mouth with the TPA and not tell them I don't want them to provide it. I can't do those things. I can't be part of your system. My religion tells me not to. My religion tells me I can't have anything to do with giving out abortion-inducing drugs. My religion tells me I can't be seen to be participating in your system. Right? That it would be -- it would be leading others astray.

It's something akin to the Catholic concept of "scandal." Right? That if GuideStone, which is part of the Southern Baptist convention, is seen to go along with this system, to fill out forms, to make something an instrument of their plan, that that leads others astray. And that is in direct conflict with their religious witness. So these are things that they have religious beliefs that they simply cannot do.

And the question is: Is the government putting

substantial pressure on them to do those things? And the answer is: Of course, they are. If the plaintiffs won't do them, they will get crushed with fines. Reaching Souls will face a thousand dollars of fines a day. Truett-McConnell, $7,800 in fines a day. GuideStone will lose about $39 million in contributions to its plan each year. That is substantial pressure.

Hobby Lobby also talked about two other ways that you can qualify for a substantial burden, both of which are also satisfied here. So if you look at *Hobby Lobby*, the Court talks about the *Abdulhaseeb* case having set forth -- this is on page 1138. It talks about the *Abdulhaseeb* case having set forth three different ways a law could impose a substantial burden.

The first one is that it requires participation in an activity prohibited by a sincerely-held religious belief. Well, here, filling out the form and giving it to the TPA and telling them here are your obligations and being silent about it and setting it up so that the TPA is able to go get paid back for sending -- selling -- giving these drugs to our employees and sending the letters that they're going to send, we have a sincere religious belief that we shouldn't participate in that.

And it's unquestioned that if we can get an injunction from the Court saying we don't have to do that, we are not

going to do it, because it violates our religion to do those things.

So the mandate requires participation in an activity prohibited by a sincerely-held religious belief. That's one of the ways to get the substantial burden, and we have that here. Again, that's even on the government's view that its regulation doesn't really work. If its regulation works the way it says it does in the Code of Federal Regulations, the way the law actually says, as opposed to the litigation briefs, all the more burden, because then we are directly leading to the flow of drugs without question.

But our point -- and this is established in the declarations with our preliminary injunction reply brief -- is that we have heard the government's presentation of its views and, as a religious matter, it doesn't change the fact that we have an obligation not to do that. And the mandate is trying to make us. That's a substantial burden under *Hobby Lobby*.

The second way *Hobby Lobby* says you can have a substantial burden is if the law prevents participation in conduct motivated by a sincerely-held religious belief. I would suggest that one is satisfied too. GuideStone and Reaching Souls and Truett-McConnell have all deliberately associated for the purpose of providing healthcare consistent with their shared religious beliefs. That's what they do. That's their religious exercise.

GuideStone exists -- its religious ministry is to provide exactly this kind of insurance to exactly these kinds of religious ministries. And they're being prevented from continuing to engage in that without bringing someone else in and tagging them to give these drugs.

They want to just be left alone and provide the good healthcare that they have always provided without the government saying we're going to stop you from doing it your way. We are going to make you do it our way by designating someone else to do this. So we are also being prevented from participating in that religiously-motivated conduct.

And then the third one, the one that the *Hobby Lobby* Court dealt with in more depth, was substantial pressure. And there the Court said the right thing to look for substantial pressure is not, What do I think of the theological belief? It's, How much pressure is the government putting on them to violate it?

And, again, that's where the Court goes out of its way to say that it's not our -- it's not our job, it's not our role to second-guess anybody's religious beliefs. All we are supposed to do is see, whatever those beliefs are. You know, they could believe all paper is sinful. They don't. But if they believe filling out any piece of paper ever is sinful, the question would still be the same. The government is requiring them to do it. It violates their sincerely-held

religious beliefs.

Okay. How much pressure? If it's substantial pressure, then the government needs to satisfy strict scrutiny, which it can't. Here it's obviously substantial because it's the same pressure as *Hobby Lobby* and it's huge fines. It's clearly substantial.

The government in *Hobby Lobby* tried to make the same argument that they essentially made here, which is, Oh, come on, it's not that big a burden on your religion. Some third party later on is going to make the decision. A woman and her doctor will make it later on, not you. That doesn't affect your religion.

And the Tenth Circuit in *Hobby Lobby* rejected precisely that kind of reasoning. They said, "This position is fundamentally flawed because it advances an understanding of substantial burden that presumes substantial requires an inquiry into the theological merit of the belief in question rather than the intensity of the coercion applied by the government to act contrary to those beliefs."

The intensity of the coercion is exactly the same here. It doesn't make a difference that the government thinks they should have faith in the government that the government -- you can trust us that no one is going to provide these things and we're never going to act on your permission slip, we're never going to build a step two of the system after you do step one.

I understand the government's desire to have people place faith in them. And many people can and should if they want to. But it's not a requirement of religious belief that they change their religious beliefs and say, Okay, my God says it's okay to trust the government. Their religious belief is they can't do it.

And the question then, under substantial burden, is solely: Is the government trying to pressure them to do it? And here the answer is clearly yes. They could have given up and walked away. Instead, they insist that we are here, and that, if we don't do it, we will face massive fines.

If the Court doesn't have further questions on RFRA, I will move on to the other two substantive arguments.

The second substantive argument, your Honor, is that there is a religious discrimination problem with the mandate. And the religious discrimination problem involves entities who have been given a complete pass under the mandate and, therefore, do not have to do any of the stuff that we have talked about for the past few hours. All right?

Everything we have talked about for the past few hours -- filling out the form, telling your TPA that it's their obligation, and making it an instrument under the plan, and the TPA being eligible for this payback plus 10 percent -- all of that is off the table for the right kind of religious objector. If you're the right kind of religious objector, you

don't have to do those things; you're completely out.

And the question then is: Okay. Does the government have the authority to draw those kinds of distinctions between and among religious objectors? And the answer is, No, they do not. And it's quite clear, particularly under the CCU -- the *Colorado Christian University v. Weaver* case from Judge McConnell. That case is spot on for this issue and makes clear the government cannot make the distinctions it's made here.

Simply put, the constitution doesn't allow the government to have preferences about how religious ministries and religious organization relate to one another. All right? What's the right way to set up a ministry like Reaching Souls? Is it to have it owned and run by your local Baptist church, in which case the government would call -- you take the exact same organization of Reaching Souls, right, the same employees, the same ministry, exact same scope, everything they do is identical. If, instead of owning and running it themselves, they just moved it over and sold it to the Southern Baptist Convention, the government's position would be, okay, integrated auxiliary. No form, no designation, no plan, no payback, no carrot, no stick, no nothing. That would be their view.

And the question is: Does the government have the authority to look at different religious organizations and

say, you, you, and you, you're the right kind. You stand close enough to the mother church. Right? You stand close enough to the mother church, you are the right kind. We will respect your religious liberty.

But you guys over here, you're a step away from the church. You may share the religious beliefs, you may have the same objection, you may do the exact same stuff day-to-day, you may be indistinguishable to the rest of the world, but because you are not controlled by your church, we don't respect your religious liberty in the same way and you have to do different things. That's forbidden and should be forbidden by the constitution. And the *CCU v. Weaver* case tells us why.

So in *CCU v. Weaver*, Colorado had a statute which said that certain schools, certain colleges would be eligible to get certain scholarships. And what the Tenth Circuit said was, Okay, well, we have to look at how -- how are you sorting between which schools are getting them and which schools don't?

And prior to the case it was clear that some schools qualified -- so I think a Catholic and a -- I forget what the other denomination -- two schools qualified as not being pervasively sectarian. Right?

And the test for pervasively sectarian included things like: Do your faculty and students all practice the same denomination or do you take people from all faiths? Right?

And some qualified. The Catholic one did and another did. And some didn't qualify. Colorado Christian didn't qualify and a Buddhist University didn't qualify.

And the government came in with the exact arguments it's making here. It said, Well, we had a good reason for distinguishing. We are not treating different religious groups differently based on their religion. We are not saying we like the Catholics but not the Jews. Right? We're not discriminating among religious groups. We are distinguishing among institutions. And any religion could come forward and have a pervasively sectarian school or a not pervasively sectarian school. So anyone -- you know, any religion could qualify either one. Therefore, we are allowed to distinguish among these different religious organizations.

The Tenth Circuit in Colorado Christian clearly and, you know, strongly rejected that type of distinction. It said that the free exercise clause and the establishment clause require the government not only not to distinguish between religions, not to have favorites among religious, but also not to discriminate between and among religious institutions. But that's precisely what the exemption does.

You have got religious institutions that object to participating in the mandate. Some of them have been told you're free to go, you don't have to do anything. Some of them have been told fill out the form, designate your TPA, we

are going to pay your TPA back, we are going to give them 10 percent bonus, you have to make it part of your plan.

The government says, We had a good reason. And their good reason is what they state in the Federal Register. The good reason is their predictions about the religiosity of the people who work for you. It's that they believe people who work for churches and integrated auxiliaries are more likely to share the religious belief of the organization than people who work for other religious nonprofits.

Now, I would point out they don't cite anything at all for that statement. That's guesswork. And, worse, it's guesswork about something the government shouldn't be guessing about, which is: What are the religious beliefs of people who work at different religious institutions? The government ought to be agnostic about that. The government should have no business even having opinions about how religious people are or ought to be to work at religious organization one versus religious organization two.

So they have no basis for it. They should have no basis for it. But their argument is: Well, that's a valid basis for us to look at a group of different religious objectors and say some of you, you are exempt; some of you, you are not quite exempt. You comply with this law. We'll give you a different way, but you are going to comply with that one. The others, they're okay; they are out. And the government says

they had a good reason. Because they had a good reason, it's okay.

But, again, *Colorado Christian* very clearly says that's not the way it works. The government is not allowed to discriminate among them based on the internal religious characteristics. But that's exactly what they're doing.

The government acknowledges that where the -- where the employees likely share the religious beliefs, its interest isn't implicated. Well, here at Reaching Souls, for example, all the employees sign a statement of faith. They all share the same religious beliefs. Right? So the idea that the government is allowed to look at different religious organizations and guess from afar, based on how they're organized, what the likely religious beliefs are of the people who work there and, based on that guesswork, say some religious groups get an exemption and some don't is directly contrary to *CCU v. Weaver* and it should be contrary to *CCU v. Weaver*.

The government really shouldn't have any opinion on the right way or the wrong way to organize Reaching Souls International. It should have no opinion on that. And the fact that Reaching Souls could simply sell itself to SBC or give itself to SBC and the same organization, doing the same work, employing the same people would be completely exempt from all of this, we wouldn't even need to be here shows that

it's an irrational distinction and it's not the one they have the authority to make. *CCU v. Weaver* says you can't discriminate among religious institutions.

The government's answer to that is that it's reasonable. And I would just say the establishment clause and the free exercise clause don't give the government the right to discriminate when it's reasonable. It's actually not reasonable. But even if it were, that's not the test.

And, secondly, they point to cases like *Gillette*. *Gillette* is a case where there was a question: Does the statute that allows for conscientious objection to the military, is it okay that that statute requires that the objection be an objection to all wars as opposed to this particular war? And the Court in *Gillette* said that was okay. But note that in *Gillette* everyone who had the same religious objection got the same treatment. Whether you were Catholic or Quaker or even atheist ultimately, right, as long as your religious objection was, I can't fight in any war, you got the same treatment.

The government didn't distinguish among them based on what faith they came from or how close they stood to the mother church or anything else. It just said if you have the same religious objection, you get the same treatment.

Here, they refuse to do that. Right? Reaching Souls, Truett-McConnell, they have the same religious objection that

countless churches and integrated auxiliaries have. But as a matter of the way the Southern Baptist community does religion, frankly, they don't stand close to a mother ship because, by definition, that's not the way Baptists tend to do their religion.

Baptists do not believe in a hierarchical structure. They are not Catholics. They don't believe in a hierarchical structure. They don't believe in controlling one another. They don't believe so much in a mother ship even. The SBC itself is a fairly loose organization of individual churches that are, you know, free to come and go if they want to come and go.

So the idea that this is okay and doesn't discriminate is also wrong. This does discriminate. Setting it up this way and saying we will prefer actual churches and actual integrated auxiliaries to other religious entities discriminates in favor of religions that do their work primarily through actual churches or through things tightly controlled by the mother ship, the integrated auxiliaries. And it discriminates against groups, like the Baptists, that tend to have very few ministries organized like that and, instead, organize most of their ministries in a much less controlled fashion, in an individual believer-driven fashion.

So the government should not be allowed to say we're going to pick and choose among religious objectors who state

the exact same objection. We are going to pick and choose who is exempt and who is not. That's what they have done here. That violates the establishment clause and the free exercise clause.

I would also point out that that claim does not depend at all on a showing of substantial burden or religious burden. You don't even have to get to those points. Religious discrimination under *Larson* and *CCU* per se, not allowed, end of case.

The last of the three claims on which we have a likelihood of success on the merits is the free speech claim, and there are two aspects to that claim. One is the forced speech claim and one is the gag rule or the forced silence claim.

The forced speech claim is simply that the government is trying to make us say things that we don't want to say. And the Supreme Court in cases like *West Virginia v. Barnette* and *Wooley v. Maynard*, among others, and most recently *AID v. AOSI* from, I believe, last term, the Court has said over and over again that the First Amendment protects your right to speak, but it also protects your right not to speak. You have control over your own tongue and your government can't come in and say, You must say certain things. But here that's precisely what the government is saying to Reaching Souls and Truett-McConnell. You must say something. They're trying to

control their speech.

They don't have any particularly compelling reason for it, and they've actually said they can't pass the strict scrutiny test, but that's the test they would need to pass here in order to satisfy the constitution.

If you're compelling speech, the answer under *Barnette* and Wooley *v. Maynard* and *AOSI* is you need to pass -- I'm sorry, *AOSI* didn't get to this because that was a funding thing. So *AOSI* was slightly different on what the right test is. But the relevant test is strict scrutiny, and that's the test they say they cannot pass.

The government's answer on that is a few things. One, they say, Well, this is a speech regulation that is incidental to a conduct regulation. But that's just simply not true on the regulations as the government has laid them out. In other words, the government's argument is it's just the speech. Why are they complaining? I'm just making them speak. It's just speech. They are saying there is no further conduct regulation.

If that's true, if that's their theory, then the answer is this is not incidental to anything. This is a freestanding, compelled-speech requirement. It sits there. There is one and only one thing we have to do. We have to tell the TPA that they have obligations and that we designate them and that this is an instrument under our plan.

They're saying it's just the forced speech. Well, if it's just the forced speech, then a case like *Rumsfeld v. FAIR* simply does not apply. In *Rumsfeld v. FAIR*, the Court said this is all about your conduct and maybe it has a little incidental effect on your speech. Here the government is not saying that. They are saying the opposite. They are saying it's all about your speech and you just shouldn't care so much.

There is also the compelled silence point. The government says there are things we can say to the TPA. But, again, they're not saying that we can say to the TPA, Don't do this. You can't be my TPA if you're going to send those letters to the 11-year-old daughters of our employees. You can't.

In a free world -- so the baseline assumption before this mandate, in a free world, of course you're free, when you contract with someone, to say, Well, look, there are things I don't want you to do, and if you can't do it my way I am going to go contract with someone else. I don't want you to be my TPA if you being my TPA means you're going to send those letters.

What the government says and what the rule says is that we're not allowed to even indirectly ask them not to do that. We are not allowed to directly or indirectly do it. That is a clear and basic First Amendment violation. We're allowed to

say that. And they don't have the authority to tell us we can't.

One last point, your Honor. Earlier Mr. Berwick referenced the fact that Highmark talked about an indemnification. This relates to the speech provision. Talked about indemnification, that while Highmark maybe would do it if you would indemnify them. Well, first, the fact that Highmark says that just confirms that the reality is people read the statute and read the regulation and say, Oh, I need to follow the regulation and I have exposure if I don't. That's utterly rational, and it's pure speculation to think anyone would do otherwise.

But, too, the idea of GuideStone giving an indemnification doesn't work for two reasons. Right? One is if GuideStone gives an indemnification, it's ultimately agreeing to pay for the same stuff. Right? So if Highmark refuses and then someone sues Highmark or the government sues Highmark and says, Well, you've got to go give out those things, well, GuideStone can't indemnify for that because then GuideStone is signing up to pay for the stuff. And that's exactly what GuideStone can't do. And that can't possibly be the price of GuideStone being allowed to exercise its religious liberty.

But the second thing on the indemnity is that the rule actually forbids -- forbids nonexempt entities from trying to

indirectly influence the TPA not to provide. Reaching Souls and Truett-McConnell work through GuideStone. Right? GuideStone is essentially -- the plan is essentially made up of all of these participants. They can't go out and sign a contract and say, We want you not to provide this stuff and we're going to pay you -- we're going to cover your back and pay you if you won't. The rules say the opposite. You can't even indirectly ask them to do that.

So for all those reasons I think we have likelihood of success on RFRA, on religious discrimination, and on free speech.

As to the other preliminary injunction categories, I think they flow pretty naturally from the rest of the discussion. Are we likely to face irreparable harm? *Hobby Lobby* said being forced to violate your religion is irreparable harm. Certainly, being forced to violate your speech rights is irreparable harm. So if we're likely to succeed, there is no doubt we've got likelihood of irreparable harm.

The last two factors, balance of harms and public interest, I would suggest have been -- I think they were easy when we filed the brief and I think they've been made even easier by the government's new position. They were easy when we filed the brief because there is no compelling government reason to do this. The government has lots of other ways it

can provide this stuff if it wants to. That's why it failed strict scrutiny, and it concedes it fails it here.

But even with the new position -- the new position is, Judge, our system doesn't work, let us make them participate in step one. Well, if your system doesn't work, there is no way the public interest requires the Court to let them force us to do it. Right?

If the system doesn't work, the public interest cannot have -- the public cannot have any interest in that piece of paper. The public cannot have an interest in the piece of paper if the system doesn't work. And the balance of equities in the public interest can't possibly cut in the government's favor rather than the plaintiff's favor on a system that they say doesn't work and for a form that they say is meaningless. It's not meaningless to us. For us, we have serious religious objections to doing it, and our religion tells us not to. And we have got a real problem because they are trying to make it -- make us do it. But on their own view of the world, that form doesn't mean a whole lot. And it can't possibly be that the public interest requires us to be forced to do it.

So unless the Court has questions, I will take a seat.

THE COURT: All right. Thank you.

Mr. Berwick.

MR. BERWICK: Thank you, your Honor.

So let me start by saying that our argument on

substantial burden on the merits on RFRA, quite similar to this standing argument in some ways, we still think that the burden that they allege is based on their misunderstanding of the law. And nothing that Mr. Rienzi just said, I think, contradicts that.

It really seems that the burden they -- the burden they assert is based on the idea that providing the self-certification will trigger or authorize their third-party administrator to provide this coverage. But for the reasons that we explained in the standing portion of the argument, that's simply not accurate.

Let me distinguish between sort of the two parts of the accommodation, which I think Mr. Rienzi sort of tends to inflate a little bit.

There is no dispute that plaintiffs themselves, specifically Truett-McConnell and Reaching Souls, are required to fill out the self-certification form if they want to benefit from the accommodations. The reason there is no dispute is because the government has authority over Reaching Souls and Truett-McConnell. They can -- they have regulatory authority to say if you want to benefit from the accommodation, if you want to be free from the obligation to provide this coverage, you must comply with these requirements. One of those requirements is providing the self-certification.

The real question in this case is whether -- for purposes of standing, whether they are injured by that requirement or, for purposes of the substantial burden analysis, whether they are substantially burdened by that requirement.

Again, the government understands their substantial burden argument to turn on this idea that providing the self-certification somehow triggers or authorizes their TPA to provide this coverage. But, as I have explained, that's not true.

THE COURT: Let me ask you this.

MR. BERWICK: Yes.

THE COURT: Let's say, for purposes of argument, that Highmark determines that it will voluntarily comply. Let's say Highmark knows that at present there is no enforcement authority but we're just going to comply anyway. We are going to voluntarily comply. And maybe that's because they agree with the government's two purposes -- two general, overarching purposes in the -- providing these type of services. Well, doesn't Highmark get to avail itself of the carrot described by counsel?

MR. BERWICK: Yes. Yes, they do, your Honor. That's accurate.

THE COURT: And so Highmark not only gets to be reimbursed but they get a 10-percent bump for their margin as well.

MR. BERWICK: That's correct, your Honor. Can I just say --

THE COURT: Well, aren't they -- aren't the plaintiffs injured if any TPA decides to voluntarily comply even once?

MR. BERWICK: So if one of their -- so the argument would be if one of their TPAs is voluntarily going to comply, that's an injury?

THE COURT: Yes.

MR. BERWICK: Well, so let me -- I don't want to go back to standing if your Honor doesn't want to go there, but let me just say that I think that's a standing question --

THE COURT: Well, these are kind of -- these are kind of interrelated.

MR. BERWICK: Well, they are, but in a way I think -- I would argue, even if they have standing, they have to show more to show that they're substantial burdened. So let me address --

THE COURT: Well, hold on a second. If the equation is stated thusly, if you fill out this little piece of paper, nothing is going to happen, so this fear that you have -- I think you described in your brief as -- or in your reply brief --

MR. BERWICK: Uh-huh.

THE COURT: -- as, you know, chasing the scarecrows

or afraid of demons or something like that. What did you say?

MR. BERWICK: I think it was invisible dragons.

THE COURT: Invisible dragons. There you go. So this invisible dragon that they're scared of, there is nothing to it. But if providing that self-certification thereby empowers a TPA who chooses to voluntarily comply and provide these services and get reimbursed and make a profit, doesn't that equate to a substantial burden? Because the argument nothing happens, don't worry about it, it kind of goes away under those circumstances. Does it not?

MR. BERWICK: Well, so I think our standing argument -- so I don't -- I think that's a little bit a not correct characterization of our argument. Our argument is not nothing happens, at least for purposes of substantial burden.

For purposes of standing, our argument is it's entirely speculative that Highmark will provide this coverage. If it weren't speculative, if Highmark -- and I would posit, as I said in the standing portion of the argument, that if you look at the declaration and the attachments to the declaration, it doesn't really say what plaintiffs claim it says. In other words, we don't know why -- we don't know really to what extent Highmark is aware that they don't have to do it.

THE COURT: Yeah. But --

MR. BERWICK: And you don't know --

THE COURT: -- but for purposes -- excuse me.

MR. BERWICK: Sure.

THE COURT: For purposes of preliminary injunctive relief, the plaintiffs don't have to hang around until they're harmed. They don't have to say, you know, there's some level of theoretical speculation that a TPA out there might not voluntarily comply and, therefore, we're just going to stick around and we're going to do the self-certification and we're just going to wait and see if somebody does. I mean, there is no requirement under the law. I mean, there has to be an imminent threat --

MR. BERWICK: Yes.

THE COURT: -- of irreparable harm. It doesn't say -- there is no requirement that they have to actually have been harmed.

MR. BERWICK: No. You're right. You're right. There is no requirement they actually have to have been harmed. But their harm has to be more than speculative.

THE COURT: Oh, I agree with you there.

MR. BERWICK: Just for standing purposes.

THE COURT: Yeah.

MR. BERWICK: So --

THE COURT: Well, for temporary injunction purposes, it has to be more than purely speculative.

MR. BERWICK: Yes. I agree with you. And I think our argument here, for standing purposes and for preliminary

injunction purposes -- let me separate them, because I think the arguments are a little different and I will explain why.

But for standing purposes, at least, we think what they have provided regarding Highmark is uncertain enough that it's still too speculative to satisfy the imminent injury requirement for purposes of standing.

THE COURT: Okay. Well, let's assume --

MR. BERWICK: And you disagree with that.

THE COURT: Let's assume that standing --

MR. BERWICK: Okay.

THE COURT: -- is established.

MR. BERWICK: So for substantial burden purposes -- so if -- so, again, let's assume that Highmark says, yeah, we're going -- we are going to do this and we are going to do it because -- and, again, I don't understand this to be the case or I think it's totally unclear, but let's say they say we're going to do it because we want to take advantage of the benefits that -- you know, the user fee reimbursement benefits that we would get. So there is a couple issues with that.

First of all, substantial burden -- what plaintiffs' argument in that case would essentially be, that when we sign the self-certification, the consequences of signing that form is that a third party, our TPA, will do something that we don't want them to do. But this type of consequences-based objection does not -- is not enough for substantial burden

under RFRA.

THE COURT: Well, right now, as the situation exists, the plaintiffs know with a great degree of certainty, I would submit, that a TPA involved in their plan is not going to provide these services because they're contractually obligated to provide certain things and not others.

MR. BERWICK: Right.

THE COURT: So right now, under the status quo, they have that assurance. But if they self-certify, then are they not empowering a TPA -- even if we accept the government's position that we don't have the ability to enforce it, are they not empowering a TPA to provide these services and seek reimbursement?

MR. BERWICK: I think I take issue with the word "empowering." I will -- I will concede that the TPA is eligible -- once -- if they receive the certification, they are eligible for reimbursement. They would not otherwise be eligible.

But that issue aside, the reimbursement issue aside, I don't think the self-certification really does anything beyond what would -- the TPA would be allowed to do prior to these regulations. Because the government can't -- so in the ordinary case where we are not talking about a self-insured church plan, once the employer signs a self-certification, the TPA is required to provide coverage.

By the way, we don't think even that is a substantial burden, and we've made that argument in quite a few cases around the country, because that is the case in -- that is the situation in most of the cases the government has been arguing.

The -- but in this case the -- because the regulations do not require the TPA to provide a coverage, the relationship between the TPA and GuideStone is still governed by the contract between TPA and GuideStone.

So whether the TPA could voluntarily decide to provide contraceptive coverage to the employees of -- members of the GuideStone plan, I think, is dependent on the contract between those entities and, thus, is no different than it was prior to the enactment of these regulations.

So, yes, the TPA, by virtue of receiving a self-certification, is now eligible to claim, essentially, a reimbursement for the cost, but that's sort of the only new piece here. As I explained before, that self-certification, for purposes of a self-insured ERISA plan, doesn't give the TPA any sort of new authority because the government, frankly, can't do that.

But, your Honor, let me say this. Even if it did, even if that -- even if it did give the TPA new authority, even if it required the TPA to provide contraceptive coverage or, let's say, somehow gave them new authorization or new

authority to do so, that would not amount to a substantial burden because that objection is not -- we -- the objection -- so plaintiffs, I think, have admitted, to their credit, that they have no objection to signing the self-certification independent of -- if that self-certification didn't lead to anything else, they would have no objection to signing it.

They don't oppose what the form says. At least that's what I understand plaintiffs to say. They can correct me if I'm wrong. In other words, they have no inherent objection to the self-certification form. Their objection stems entirely from the fact that once they sign that form, in their view, a TPA may be required to or may voluntarily, whatever it is -- the objection stems from the actions of a third party.

Your Honor, that type of objection does not amount to a substantial burden under RFRA. And I think it's sort of this consequences-based objection. I would point specifically to the D.C. Circuit's opinion in *Kaemmerling* as, I think, the best example of this.

THE COURT: State that again.

MR. BERWICK: *Kaemmerling*. Sorry. I'll spell it. It's K-A-E-M-M-E-R-L-I-N-G. I can provide the cite if you would like.

THE COURT: Is it in your papers?

MR. BERWICK: It is. Yeah. It's referred to several times.

THE COURT: All right.

MR. BERWICK: So in *Kaemmerling*, the facts of the case were essentially this: The plaintiff was, I believe, a prisoner who had been arrested for a felony. And the law required the prisoner to provide a fluid and tissue sample, I think. And that sample would then be -- then DNA analysis would then be done on that sample. I think the point was to try and tie -- to see if the prisoner might be responsible for any other past crimes.

The plaintiff in *Kaemmerling* had an -- objected to the taking of the fluid and tissue sample. But the objection was not an inherent objection to the taking of fluid and tissue. The plaintiff, in fact, said, you know, if it were just that, I would have no objection. That doesn't violate my religion. What violates my religion is that the inevitable consequences of that -- of the taking of the fluid and tissue sample -- in fact, the consequences required by law are that that sample will then be subject to DNA analysis. And for -- I don't want to try and characterize the plaintiff's religious belief, but the religion -- the religious beliefs were violated by DNA -- this type of DNA analysis.

What the D.C. Circuit says is -- said was: The objection here is only based on what a third party is going to do with the tissue sample. You have no inherent objection to the taking of the tissue sample. It's only a consequences-based

objection, and that objection is not a substantial burden under RFRA.

I think *Bowen* -- the Supreme Court case, *Bowen*, which we also cite in our briefs, also is somewhat similar to that. I won't try and characterize the facts of *Bowen* because it's extremely complicated. But, essentially, I think *Bowen* stands for a similar proposition.

If that type of consequences-based objection were a substantial burden, it would really have no limiting principle, because, for example, it would prevent the government from providing contraceptive coverage to plaintiffs' employees.

The reason is because -- hypothetically, let's say the government said, okay, we're going to step in -- you don't want to provide contraceptive coverage. We are going to step in and we are going to provide it to your employees because we think it's important that they get this benefit. But under that -- under plaintiffs' theory, that would be triggered by the fact that plaintiffs provide a health plan that doesn't include contraceptive coverage. They object to providing contraceptive coverage. So plaintiffs, presumably, would argue that RFRA prevents the government from stepping in and providing that coverage to their employees.

So what plaintiffs claim is that RFRA gives them not only the right to be free from substantial burdens on their

religious exercise, it gives them the right to prevent their employees from receiving benefits from a third party. We contend, your Honor, that that is not what RFRA requires.

THE COURT: Wasn't this very analogy discussed by the Court in *Hobby Lobby*?

MR. BERWICK: So I'm glad you mentioned that. No, your Honor, I don't think it was. So the -- let me say a couple of things about *Hobby Lobby*. I will start with this question.

The argument in *Hobby Lobby* was that the government -- the argument the government made and the Court rejected in *Hobby Lobby* -- let me just say we obviously think *Hobby Lobby* was wrongly decided. The Supreme Court has granted cert on *Hobby Lobby*. Of course, it isn't controlling on this Court until and unless the Supreme Court overturns it.

The argument that the government made in *Hobby Lobby*, this, quote-unquote, attenuation argument, was that there is no substantial burden because the religious objection really depends on the employees of Hobby Lobby actually obtaining contraceptive coverage. Sorry. Actually, obtaining contraceptive benefits. Actually taking advantage of that coverage and actually getting and using contraception.

The Tenth Circuit said -- and, again, we disagree with the Tenth Circuit, but the Tenth Circuit said, No, that's a misstatement of the religious belief here. The religious

belief is that, you know, as soon as they provide this coverage, their religious belief has been violated. They have an inherent objection to providing the coverage. And that is a substantial burden. It doesn't matter what a third party does.

Here, I think this illustrates the difference -- the problem in this case. That's not so here. The religious objection depends on the fact that a third party will or might, in this case, provide this coverage.

Again, I do not understand plaintiffs to have an inherent objection to signing the form. I think Mr. Rienzi said, We would be fine signing that form if it meant that we were then exempt.

So that really distinguishes this case from *Hobby Lobby*. So the argument that the Court -- the Tenth Circuit rejected in *Hobby Lobby* is not the same as the argument here.

Let me say a couple of other things about *Hobby Lobby*. Plaintiffs acknowledge that *Hobby Lobby* is factually different. The government conceded that -- concedes that *Hobby Lobby* controls the strict scrutiny analysis because that's really about -- it's the same regulations really. Specifically, the compelling interest issue is the same in *Hobby Lobby* and this case.

But the substantial burden analysis is quite different. *Hobby Lobby* involved -- sorry. One moment, your Honor.

Hobby Lobby involved for-profit corporate plaintiffs that were not eligible for the accommodation and, thus, they were required to provide coverage themselves. The Tenth Circuit did not address whether an accommodation that requires a plaintiff to do nothing beyond satisfying this purely administrative self-certification requirement imposes a substantial burden on religious exercise.

Hobby Lobby also did not abandon the requirement that the law, in order to impose a substantial burden, must force a change in behavior. *Hobby Lobby* explicitly cited to -- I'm going to mispronounce this, but I think it's *Abdulhaseeb*, which is a previous Tenth Circuit case. *Abdulhaseeb* makes clear that one of the requirements for substantial burden under RFRA is that the law must actually require a plaintiff to modify their behavior.

So here, where all plaintiffs have to do -- the only arguable change in behavior here is that they have to sign a self-certification form. We would argue, your Honor, and have argued in our briefs, that's really no different from what they are already doing, which prior to the regulations they would inform their TPA that they don't want contraception or certain contraceptive services as part of their -- as part of their coverage. So any change in behavior here where there -- is really de minimis. I mean, they were just -- they just have to say the same thing they said before in the form of a

self-certification form.

I don't -- I don't want to in any way suggest that the government is doubting that they have a religious objection to this. I understand that they object as a religious matter to being -- to signing the self-certification form. But that is not the only inquiry here.

The Court has to independently decide whether what they object to really amounts to a substantial burden. That is not a theological inquiry. They don't have to -- the Court does not have to in any way question their religious belief, parse their religious belief, but the Court still does have to decide whether it imposes a substantial burden on the religious exercise.

Otherwise, the substantial burden test loses all meaning. It would just be any time a plaintiff says we object to "X," that's it. As long as the law imposes some -- has some force behind it, as long as the law really requires plaintiff to do "X," under plaintiffs' description of the substantial burden test, all that would be left is if a plaintiff says we object to "X," that is a violation of RFRA. I would posit that is not -- RFRA is not that simple.

The pre-Smith Free Exercise cases, which RFRA explicitly incorporates, are not that simple. Courts undertake a really extensive -- in Smith, in *Wisconsin v. Yoder* -- sorry, I said Smith -- I meant *Sherbert*. In *Sherbert* and *Wisconsin v.*

Yoder, in *Thomas*, in *Bowen*, the Court undertakes a long substantial analysis of whether the burden really is substantial.

Sorry, your Honor. Let me just see if I want to say anything else about RFRA.

Oh, let me just address a couple of things that Mr. Rienzi said.

Mr. Rienzi said something about being forced to include contraceptive coverage in their plan. That's not accurate. They are not forced to do that. If a TPA were hypothetically to voluntarily provide this coverage, it would not be part of their plan.

Mr. Rienzi also said the government has in some sense conceded that this is a substantial burden because the government has exempted certain religious employers, essentially houses of worship. That's not accurate. The government does not concede that even for houses of worship this would amount to a substantial burden.

The government in this case, as I said right off the bat in my intro, when they first issued the regulations was faced with quite a bit of feedback from religious entities about very sincere religious objections to this requirement. And the exemption and the accommodations are a real attempt -- I understand in plaintiffs' eyes it has failed -- but a real attempt to accommodate those objections.

The agency specifically said in their regulations they do not believe that it is required by the constitution or by RFRA, but the government is certainly allowed to attempt to accommodate religious beliefs even where not required to do so. That's the "play in the joints" between the free exercise clause and the establishment clause that the Supreme Court has referred to.

So, again, the government -- that's all to say that the government does not concede in any sense that there is a substantial burden here.

One last thing on the RFRA claim. Actually, it sort of applies more broadly. Mr. Rienzi repeatedly referred to the regulations not working. I think to the extent that means that the employees here won't get coverage, that is -- or might not get coverage, that is correct. But I think it implies that the government enacted these regulations thinking, oh, this is going to cover everybody and, all of a sudden, the government realized, whoops, that's wrong, it's not. That's not true.

As I said before, when the government promulgated these regulations, they were aware that, because self-insured church plans are exempt from ERISA, it would not apply to self-insured church plans. Again, these employers are still required to provide the self-certification, but that is the only requirement here.

Your Honor, if -- I think -- let me just make sure, but I think that's all I want to say about RFRA. Yeah, it is.

So unless you have any questions, your Honor, I will move on to -- briefly -- I don't have much to say about the non-RFRA claims.

So let me talk first about the, quote-unquote, religious discrimination claim. First, I think it's useful to be precise here. I understand plaintiffs to be raising both a free exercise claim and an establishment clause claim. Those are not the same. And the tests are different.

Let me talk about the free exercise claim first. Most importantly, for your Honor's purposes, I think the Court does -- does not actually need to decide the free exercise claim. The -- so, of course, if the Court rules against the government on RFRA, which we hope your Honor won't do, but if the Court were to do that, then you don't need to address any of the constitutional claims because they would be entitled to the relief they seek only on the RFRA claim. That would be complete relief.

However, if the Court were to rule, we think, correctly, that RFRA does not -- that the regulations do not violate RFRA, there would still need to be -- there would still be no need for the Court to address specifically the free exercise claim, because a free exercise claim still requires a substantial burden. And in rejecting their RFRA claim, the

Court would necessarily have determined there is no substantial burden in this case and, thus, wouldn't really need to address the free exercise claim except to say there is no substantial burden; the free exercise claim fails.

That aside, your Honor, I would say the free exercise claim still clearly fails. First, as we mention in our briefs, numerous courts have considered and rejected very similar free exercise claims. In short, what they have said is the law is neutral and generally applicable. The free exercise clause is only violated if a law is non-neutral or not generally applicable.

Here the law is neutral. It does not target religiously-motivated conduct. The fact that it may have a disproportionate impact on certain religious groups over others just based on how they're organized or something like that does not make a law non-neutral. It's still -- neutrality is really about -- neutrality is really about where a law expressly discriminates against certain religious groups.

That is clearly not the case here. In fact, the government has attempted to accommodate and exempt -- which -- certain religious organizations which suggest -- argues in favor of neutrality here. It is clearly not an attempt to disfavor certain religious organizations.

It's also generally applicable. The law does not

selectively impose burdens only on religiously-motivated conduct. The fact that there are some objectively-defined exemptions in the law does not make it non-generally applicable, to use a double negative. The law applies to all non-grandfathered, non-exempt plans.

But, your Honor, as I said, the Court really doesn't need to address the free exercise claim. I understand plaintiffs' discrimination claim to really be an establishment clause claim. Again, as we mentioned in our briefs, it's all turned to that claim.

As we mentioned in our briefs, every court to have considered this establishment clause claim has rejected it. The main problem with the claim is that the establishment clause only -- the establishment clause only prohibits denominational preferences. So that is preferences between religion and non-religion or just preferences based on specific denominations, preferring Christians or Catholics or Jews or anything of that type.

Nothing about the establishment clause or the establishment clause case law prevents the government from differentiating between organizations based on their structure and purpose in creating an accommodation or exemption. In fact, this is quite common. The government, I think, frequently gives certain benefits to specific types of religious organizations. For example, I think that's done in

the tax code, if I'm not mistaken. *Walz*, which I believe we cite in our briefs, is such a case.

In fact, that's really what makes accommodation pos- -- religious accommodation possible. If plaintiffs' argument were correct, it would perversely disincentivize accommodations for religious entities because, essentially, it would be an all-or-none proposition. The government would have to give the benefit to every entity claiming -- claiming an entitlement to it based on religion and couldn't sort of select certain types of entities based on their organization and structure for certain government benefits.

And, again, that is not -- I think the case law makes quite clear that that type of distinction between entities based on their structure and purpose is permitted.

Plaintiffs mention *Colorado Christian University v. Weaver*. *Colorado Christian* is not to the contrary. As plaintiffs described, that case involved a benefit that was generally available to all entities except to certain religious entities. So the Court described it as express discrimination, express exclusion of certain entities from what otherwise was a generally-available benefit.

That's very different from the case here where the government is distinguishing between certain types of religious entities, again not discriminating based on denomination, just distinguishing between certain types of

entities based on their structure and purpose in providing an accommodation and an exemption to, again, certain religious entities. Every denomination receives the same -- effectively, the same treatment.

That's all I have to say about the free exercise and establishment clause, your Honor. Let me just turn very briefly to the free speech argument.

So I understand plaintiffs to essentially be advancing two arguments. One is that they object to what they call compelled speech. That is, the signing of the self-certification. And, two, it's they object to the fact that they -- the noninterference provision or what they called the gag order prevents them from certain speech. So let me address those in turn very briefly. Again, we laid this out in our briefs.

The self-certification form is really conduct, not speech. Well, that's not exactly accurate. It is speech that is incidental to conduct, which the Supreme Court said in *FAIR* does not violate the First Amendment. The conduct at issue here is the providing of a health plan that does or does not include contraceptive coverage.

The courts to have addressed this issue have held that this is, indeed, a regulation of conduct and that, thus, it is not a violation of the speech clause or the First Amendment.

As to the noninterference provision, I think it's

important to explain what that provision does and does not prevent. So -- one moment, your Honor.

The agencies included as a footnote to the preamble, when discussing that provision, the language "Nothing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraception."

So, as I said before, your Honor, the plaintiffs can tell their TPA, can tell anyone else that the regulations don't require the TPA to provide contraceptive coverage. They can inform their TPA. In fact, to comply -- to be eligible for an accommodation, they must inform their TPA that they have a religious objection to providing this coverage. They can tell anyone else that they have religious objection to providing the coverage. The only thing that the noninterference provision prohibits is essentially threats to the TPA that would cause the TPA to -- to forgo providing this coverage when they otherwise would have.

Here, it's a little complicated because, as we've said, they're really not required to do so in the first place. But let's take Highmark as an example. If we assumed that Highmark says, No, we understand we're not required to do it, we are going to do it anyway and we believe we have the authority to do it and we are going to go ahead and do it, the noninterference provision would, presumably, prevent plaintiff from saying something like, Don't do this or we're going to

fire you, from threatening them.

And, your Honor, we would argue that is -- that comports with the First Amendment, consistent with *NLRB v. Gissel Packing*, which I believe we cite in our briefs. It's 395 US 575, where the Supreme Court considered a similar provision in the *NLRB* context.

I would add, your Honor, that if the Court were to decide, over the government's objection, that this noninterference provision violated the First Amendment, the remedy would be to strike that provision -- that specific provision. Again, it would not be to invalidate the entire -- the entire statutory scheme.

And the government believes that the scheme can certainly continue without that -- that specific provision. Again, we don't recommend that course of action. We don't think it would be appropriate to strike that down. But that would be the remedy if the Court disagreed.

That's all I have, your Honor, unless you have any more questions.

THE COURT: No.

MR. BERWICK: Thank you.

THE COURT: Thank you.

Plaintiffs, I'll allow you to have the last word since it's your motion.

MR. RIENZI: Thank you, your Honor.

If I may take them in reverse order just because they are freshest in mind.

On the speech claims, the cases that Mr. Berwick refers to of other courts rejecting a compelled speech argument, those were all, to my knowledge, for-profit cases where the speech requirement was much closer to -- connected to actual conduct. In other words, those were plaintiffs who actually were forced to directly include it in their plan.

The government's argument here is you don't have to do that; you just need to speak. So there is at least a passable argument that it was incidental to conduct in those other cases. But you have heard the government say time and again this morning, the only thing you have to do is speak; therefore, those cases don't apply.

Rumsfield v. FAIR, the Court specifically said the regulation is about what you may do and not what you may say. Here it's the opposite. Here it's about what you must say. So those cases are all distinguishable.

The government says that the one thing you can't do from a speech point of view now is tell your TPA, I don't want to do business with you if you're going to send those letters to the 11-year-old daughters of our employees. All right. As I understand it now, we have got a clear statement from the government that there are messages you are not allowed to deliver to your TPA anymore. And one of them is, I don't want

to do business with you if you're going to take my certifications and start sending those letters.

Now, before this law there is no doubt that was an utterly lawful thing to do, to say I'm going to pick a TPA who shares my views and my values, and I'm only going to do business with someone who is not going to take my information for these other purposes, which I am religiously bound not to facilitate, but will actually do what I ask them to do.

Even if it only relates to what the government calls threats, just slapping the label "threat" on it doesn't mean that they haven't restricted our speech impermissibly. We are allowed to associate with who we want to associate with.

We are allowed to speak to and say, Hey, this really matters to me so I am happy to do business with you, Highmark, but you have got to follow my rules if you're going to be part of this plan because we have an obligation to our God and to the people in our plan that we are going to do it a certain way. So we just want to make sure you are going to do it that way. Are you, Highmark, or are you not?

The idea that that conversation is now illegal, one, just to go back to standing, okay, we have now really made it clear that there is something we can't do anymore. But, two, it's still a classic First Amendment violation. Labeling that a threat doesn't change the fact that there is a conversation we can't have. And it's -- it's not a threat of violence, the

things that fall outside the First Amendment. I am going to kill somebody. All right. It's not that kind of threat. It's an I don't want to do business with you if you do it a certain way threat. It's an utterly lawful thing to say. It's forbidden here. That's a clear violation of the First Amendment.

On the religious discrimination claim, the *Larson/CCU* claim, the government's argument -- first, the argument that this is a free exercise objection, not an establishment clause objection, just to be clear, we pled separate free exercise violations in the complaint. We did not advance them for the preliminary injunction because we thought, frankly, three grounds were enough.

The claim here, though, under *CCU* is -- I would agree it's largely an establishment clause claim. But the Court in *CCU* says it has some free exercise aspects to it, which is why we have characterized it the way we have. But it's a little bit like the claim in *Hosanna-Tabor*, where the Court said, Well, there are some religious claims, and sort of straddled the two, and this is one.

So the government's argument is that, Well, we're allowed to draw distinctions because we haven't drawn them based on denominational lines and, instead, it's based on types of institutions.

And I will save the Court from hearing me recite it, but

I would just direct the Court to page 1259 of *CCU v. Weaver*, where the Tenth Circuit rejects that kind of argument as puzzling and wholly artificial. It's the exact argument the government just presented this morning, that they can distinguish among institutions based on the characteristics of those institutions as long as they're not saying they're doing it based on denomination. That is precisely the argument rejected in *CCU v. Weaver*.

And the Court in *CCU v. Weaver* did not draw the line that the government is arguing for now, that, well, this is only for, you know, participation in government benefit programs but it's not for when you're doling out religious liberty rights. They didn't say that.

That was the -- it was a factual circumstance about a program that pervasively sectarian schools were shut off from. But the flaw, the thing that the Court said was impermissible, is the line drawing. That's what they said was impermissible.

And the idea that *CCU v. Weaver* can be taken to stand for the proposition that, well, when it's about scholarship money and what we pay for college the government can't draw these lines, but if it's only doling out religious liberty rights, we will let them draw those lines. Well, that doesn't make any sense at all.

Religious liberty has extra special protection under federal law and under the constitution, and it's obviously

extraordinarily important and it would make no sense to limit *CCU v. Weaver* in that way. There is nothing in the decision that says it.

What the decision says is there is a kind of line drawing that's forbidden for the government. And it's forbidden exactly on the terms that the government just described it. So *CCU v. Weaver*, I think, answers that -- that argument.

Let me turn to -- turn to the substantial burden argument, which, frankly, I think, with the government's last argument they have confirmed why it's a substantial burden, why there's standing, and why it makes absolute sense for the plaintiffs to object to signing the form.

I would like to ask the Court to envision for a moment a world in which they didn't issue the regs the way they did and there never was a stick and the only thing that exists is the carrot. All right?

So government passes a rule that says, Religious objector, you have to fill out this piece of paper and give it to your TPA. And when you do it, the TPA is suddenly eligible for a lot of repayments -- a lot of repayments plus a 10-percent bonus.

If that were the only thing that were ever enacted -- in other words, if you take everything else they say about the limits of their authority as absolutely true and you ignore the text of the rule, the only thing that exists is the

carrot, it's an injury for standing, but it's also a substantial burden.

The question again comes back to what the Court said in *Hobby Lobby*. It's not -- the government at one point said that you need to sit and figure out whether the -- you need to decide whether what they objected to imposes a substantial burden. And that's not what *Hobby Lobby* said. *Hobby Lobby* rejected that kind of argument. The question is not what do they object to. Let me think about whether it's really a big deal or it's not such a big deal. Right? That's not the test. The Court is not asked to think about whether what they object to is a substantial burden.

The question is: Is the government trying to make them do the thing that they object to? And, if so, how intense is that coercion? All right? That's exactly how *Hobby Lobby* phrases it. *Hobby Lobby* says you don't ask that question, well, are they being a little too sensitive here? All right? Are they wrong about moral complicity, because it's not that complicit if all that's happening is Highmark is getting paid back. That's not the test.

Hobby Lobby said the test is you just look to the degree -- the intensity of the government's coercion. The intensity of the coercion, whether their religious belief is that, you know, all paper is the devil and, therefore, I can't do paper or their religious belief is I can't fill out this

form because I've got to give it to Highmark and they're going to use it or anything else.

The substantial burden question says, Judge, you look at the statute and you look at what -- what's the pain? What's the pressure the government is putting on? Is it substantial or not? *Hobby Lobby* answered the question how to do that.

The government is reaching for D.C. Circuit cases and old pre-RFRA cases. It doesn't change the fact that the binding one here is *Hobby Lobby*, and that's how the Court in *Hobby Lobby* said to do it.

The Court also said in *Hobby Lobby* that the moral implicity question is religious and not legal. And that's exactly -- that's exactly the case here. It is religious. It is not legal. But, again, I would say, you know, the invisible dragon has now appeared. Right?

At the very least, even if everything they say is exactly true and even if, by law, religious people must believe what the government says, even if that's all true, it's still the case that these plaintiffs are being told fill out that form or I'll crush you with fines. Give it to Highmark or I'll crush you with fines.

And then the government's waiting on the other side saying, Okay, Highmark, now that you've got the form, you're eligible for a lot of payments and we're going to make them.

Again, religious beliefs don't need to be rational. It's

really rational for them to say, Look, my religious beliefs don't let me be part of that. That's a system I cannot be part of. My God tells me I can't have anything to do with the flow of those drugs even if it's just filling out the form that deputizes somebody else to go collect from the government. They can't do that.

Again, the rules -- the law that's actually written, not the litigation position, the rules say much, much more than that. But even if it's just the carrot, that's more than enough for substantial burden. They still are allowed to say my God tells me don't do that and the government is saying do it or I'll crush you with fines. That's enough.

Government argued that the plaintiffs don't object to filling out the form alone. And, just to be clear, we do object to filling out that form. We do not object to stating that our God tells us to have nothing to do with the delivery or the facilitation or anything to do with these drugs. We say that all the time. That's part of our religious faith to say that. We have said it in this court. So we don't object in the abstract to saying God tells me don't do that.

But we very much object to signing this form. All right? We object to signing this form. You know, among other things, again, the form isn't just I think these things are sinful and wrong, it's I think these things are sinful and wrong and it's got to be given to someone who now uses it as a ticket to get

payment for giving out those things. Our religion tells us we can't do that. That's what our fundamental problem is.

You know, it's a little bit like if the government passes a rule that says when you go to a hospital, you have to sign a form that says they can harvest your organs if you go into a coma. Right? And they say, Well, look, I can't force the hospital to harvest your organs so, therefore, you have no right to object to being forced to sign that form saying they can harvest your organs because I can't force them to do it.

Now, once you sign it, I am going to pay them a lot of money to harvest the organs. So once you give them the permission to do it, I am going to pay them for it.

The fact that the government can't force the hospital in that circumstance doesn't change the fact that it's a deeply important -- deeply religiously important move to say whether or not you can sign the form.

Here their religion, which the government says it doesn't contest, their sincere religious beliefs are they just can't do the thing that's being asked of them and being required of them.

The government argues that there is a no limiting principle to the plaintiffs' position. I would say a couple of things about that. One, I think they are really arguing with *Hobby Lobby* and not with -- not with the plaintiffs here. They made the no limiting principle argument at the Tenth

Circuit. They lost the no limiting principle argument.

There is a limiting principle though. The limiting principle is sincerely-held religious beliefs, are they being forced to do something that violates those beliefs, and is the government putting serious pressure on them to comply? That's been the law since 1993. It's not unadministerable, it's not no stopping point. It's actually perfectly fine, and it really has not made much of a ripple in the whole scheme of things. It lets people who have religious objections out of certain things unless the government has got a really good reason to force them to comply. The problem for the government here is they have no good reason to force these plaintiffs to comply.

The last thing I would say, your Honor, is, again, the form itself makes -- makes itself part of the plan, so the plaintiffs are being forced to sign something, submit something, give it to somebody that makes it part of the plan and that we know, as a factual matter, is going to trigger their action. As a religious matter, our God tells us don't do that. That's why GuideStone doesn't write contracts that say people can give this stuff out. They do it the opposite. Reaching Souls, Truett-McConnell, they don't write contracts that have this term in them either.

The idea that the government is saying we can make you put the contract term in and we can incentivize the other guy

to act on your contract term but you can't claim a religious objection to that makes no sense. We have a right to say that violates our religion.

They may think it's a goofy religious belief. They may not like it. They may think it's too sensitive. That's all fine. But, under the law, we are entitled to that religious belief. And given that they concede they have no compelling interest, we are entitled to injunctive relief against it.

The last thing I would say, your Honor, I know you are very much aware of this, but the plaintiffs really do have very serious time pressures here in that January 1st is very close. So to the extent that we can get a relatively quick ruling, we would very much appreciate it.

Thank you, your Honor.

THE COURT: All right. Thank you, counsel.

Thank you to all counsel for your work in presenting this matter to the Court. I will endeavor to make a decision as soon as I can.

And I hope -- I know all of you are -- or substantially all of you are coming from out of town, so I wish you safe travels back to your homes.

And we are now in recess.

(Proceedings concluded at 12:35 p.m.)

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REPORTER'S CERTIFICATE

I hereby certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

s/CHRISTINA L. CLARK
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