IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

AVE MARIA SCHOOL OF LAW,

Plaintiff,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, *et al.*,

Defendants.

Case No. 2:13-cv-795-SDM

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Although plaintiff is free under the regulations that it challenges *not* to provide coverage for contraceptive services, plaintiff nevertheless claims that the regulations substantially burden its exercise of religion in violation of the Religious Freedom Restoration Act (RFRA). But by availing themselves of the accommodations in the regulations and opting out, eligible organizations do not trigger or otherwise facilitate the provision of contraceptive coverage. Rather, third parties provide such coverage as a result of independent legal obligations. "The fact that the scheme will continue to operate without [plaintiff] may offend [plaintiff's] religious beliefs, but it does not substantially burden the exercise of those beliefs." *Mich. Catholic Conf. v. Sebelius*, -- F. Supp. 2d --, 2013 WL 6838707, at *8 (W.D. Mich. 2013). Furthermore,

even if the challenged regulations were deemed to impose a substantial burden on plaintiff's religious exercise, the regulations would not violate RFRA because they serve compelling governmental interests and are the least restrictive means of achieving those interests.

Plaintiff's First Amendment, Fifth Amendment, and Administrative Procedure Act (APA) claims also lack merit. Indeed, nearly every court to have considered similar claims has rejected them.

ARGUMENT

I. Plaintiff's RFRA Claim Fails

A. The regulations do not substantially burden plaintiff's exercise of religion

1. The regulations impose no more than a *de minimis* burden on plaintiff's exercise of religion

In determining whether a law imposes a substantial burden on a plaintiff's religious exercise under RFRA, courts must determine (1) whether the plaintiff's religious objection to the challenged law is sincere, (2) whether the law applies significant pressure to comply, and (3) whether the challenged regulations actually require plaintiff to modify its behavior in a significant—or more than *de minimis*—way. *See* Defs.' Mot. [ECF No. 31] at 16-17. Relying on *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), plaintiff seems to reject the third prong of this test and continues to describe the substantial burden inquiry as if it involves only the first two prongs. *See* Pl.'s Opp'n [ECF No. 43] at 14, 17-20. But the

majority in *Hobby Lobby* relied on *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010), which makes clear that, for a law to impose a substantial burden, it must require some actual change in religious behavior—either forced participation in conduct or forced abstention from conduct. *See Hobby Lobby*, 723 F.3d at 1138 (citing *Abdulhaseeb*, 600 F.3d at 1315). In addition, other courts of appeal—including the Eleventh Circuit—have been equally clear that "a 'substantial burden' must place more than an inconvenience on religious exercise." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (surveying the case law); *see, e.g.*, *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) ("[a]n inconsequential or *de minimis* burden on religious practice does not rise to this level" (citation omitted)).

In any event, plaintiff does not appear to contest that, for a law to impose a substantial burden, it must "coerc[e] entities to take actions that violate their sincere religious beliefs." Pl.'s Opp'n at 19. But, contrary to plaintiff's claims, the regulations neither require plaintiff to modify its religious behavior nor to "actively participate in a scheme to provide" the coverage of contraceptive services. *Id.* at 15 (internal quotation marks and citation omitted); *see Mich. Catholic Conference*, 2013 WL 6838707, at *8 ("[A]lthough Plaintiffs assert that the [regulations] require[] them to participate in a scheme to provide contraceptives, in fact, [they do] just . . . the opposite."). Plaintiff, as an eligible organization, is not required to contract, arrange, or pay for such coverage. To the contrary, it is free to continue to refuse to do so, to

voice its disapproval of contraceptive use, and to encourage its employees to refrain from using contraceptive services. Plaintiff needs only to fulfill the self-certification requirement and provide a copy of the form to its insurance issuer. It need not provide payments for contraceptive services for its employees. Instead, plaintiff's issuer will provide separate payments for contraceptive services, at no cost to plaintiff, as a result of independent legal obligations. *See* 45 C.F.R. § 147.130(a)(1)(iv).

Plaintiff misconstrues the regulations when it claims that "[t]his coverage [for contraceptive services] will not be contained in any insurance policy separate from [plaintiff's] plan." Pl.'s Opp'n at 10; *see id.* at 20. Rather, the regulations require plaintiff's insurance issuer to "*[e]xpressly exclude* contraceptive coverage from the group health insurance coverage provided in connection with [plaintiff's] group health plan," and to "[p]rovide *separate* payments for any contraceptive services" to plaintiff's employees. 45 C.F.R. § 147.131(c)(2)(i) (emphasis added). Plaintiff's issuer is prohibited by law from passing any costs arising from such payments on to plaintiff. *Id.* § 147.131(c)(2)(ii). Thus, under the regulations, plaintiff in no way "serve[s] as the conduit" for the coverage to which it objects, Pl.'s Opp'n at 10, 20, nor must it "contract and arrange for its insurer to provide" such coverage "through [its] . . . health plan," *id.* at 13. This alone distinguishes plaintiff from the for-profit plaintiffs in *Hobby Lobby* that are not eligible for the accommodations and that must

themselves contract, arrange, and pay for contraceptive coverage for their employees. 723 F.3d at 1140. "Unlike [for-profit organizations], [non-profit organizations that are] eligible for the accommodations . . . [are] not required to provide contraceptive services to [their] employees." *Priests for Life*, *v. HHS*, -- F. Supp. 2d --, 2013 WL 6672400, at *6 (D.D.C. Dec. 19, 2013).

In short, with respect to contraceptive coverage, plaintiff must only do what it did prior to the promulgation of the regulations that it challenges: "sponsor a plan for its employees, contract with [an insurance issuer], and notify the [issuer] that it objects to providing contraceptive coverage," *Mich. Catholic Conf.*, 2013 WL 6838707, at *7, in order to ensure that it is not contracting, arranging, or paying for such coverage. Thus, the regulations do not require plaintiff "to modify [its] religious behavior in any way." *Kaemmerling*, 553 F.3d at 679; *see, e.g.*, *Priests for Life*, 2013 WL 6672400, at *8. The Court's inquiry should end here. A law cannot be a substantial burden on religious exercise when "it involves no action or forbearance on [plaintiff's] part, nor . . . otherwise interfere[s] with any religious act in which [plaintiff] engages." *Kaemmerling*, 553 F.3d at 679.

Plaintiff argues that the regulations do, in fact, require it to take certain actions. Specifically, plaintiff alleges that, under the regulations, it must "facilitate a healthcare plan, participation in which entitles a plan beneficiary to access insurance coverage of" contraceptive services to which plaintiff objects. Pl.'s Opp'n at 20. Yet

where it is not plaintiff, but rather plaintiff's insurance issuer, that provides coverage for such services pursuant to independent legal obligations, 45 C.F.R. § 147.130(a)(1)(iv), there can be no substantial burden on plaintiff. "The accommodation[s] specifically ensure[] that provision of contraceptive services is entirely the activity of a third party—namely, the issuer—and [plaintiff] plays no role in that activity." *Priests for Life*, 2013 WL 6672400, at *8. As the Seventh Circuit held, "while a religious institution has a broad immunity from being required to engage in acts that violate the tenets of its faith, it has no right to prevent other institutions, whether the government *or a health insurance company*, from engaging in acts that merely offend the institution." *Univ. of Notre Dame v. Sebelius* (*Notre Dame II*), 743 F.3d 547, 552 (7th Cir. 2014) (emphasis added),[1] *aff'g Univ. of Notre Dame v. Sebelius* (*Notre Dame I*), -- F. Supp. 2d --, 2013 WL 6804773 (N.D. Ind. 2013). Thus, contrary to plaintiff's argument, the fact that its employees will now receive contraceptive coverage does not mean that plaintiff is put in the position of "facilitat[ing]," Pl.'s Opp'n at 16, or in any other way condoning, the provision of such coverage to its employees. Plaintiff's "employees will receive contraceptive coverage from their insurer[] *even if* [plaintiff] self-certif[ies]—but not *because* [plaintiff] self-certif[ies]."

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[1] Plaintiff protests that the Seventh Circuit's decision is distinguishable because, whereas plaintiff is a "fully insured" law school, Notre Dame is a "self-insured university," Pl.'s Opp'n at 19, but that is inaccurate. While Notre Dame "self-insures its *employees'* medical coverage," the Seventh Circuit also considered Notre Dame's claims with regard to its student health plan, which, like plaintiff's plan, is insured. *See Notre Dame II*, 743 F.3d at 549 (emphasis added). The Seventh Circuit's reasoning, therefore—by its very terms and with regard to the specific claims that that court addressed—applies to both self-insured and insured entities.

Notre Dame II, 745 F.3d at 559 (citing the "independent obligation on insurers to provide contraceptive coverage to" the employees of eligible organizations) (internal quotation marks and citation omitted).

Nor does the self-certification requirement itself impose a substantial burden. *See id.* at 558 (describing the self-certification process as "the opposite of cumbersome"). Plaintiff must only self-certify that it is a non-profit religious organization with a religious objection to providing contraceptive coverage, and share its self-certification with its issuer. Thus, plaintiff is required to convey to its issuer that it does not intend to cover contraceptive services, which it presumably has done or would have to do absent these regulations to ensure that it is not contracting, arranging, or paying for such coverage. As defendants explained in their opening brief, any burden imposed by the purely administrative self-certification requirement is, at most, *de minimis*, and thus cannot be "substantial" under RFRA. Defs.' Mot. at 12-13; *see, e.g.*, *Notre Dame II*, 743 F.3d at 559.

Plaintiff's reliance on the Supreme Court's order in *Little Sisters of the Poor Home for the Aged v. Sebelius*, -- U.S. --, 134 S. Ct. 1022 (2014), is misplaced. Most importantly, the Supreme Court in *Little Sisters* emphasized that its "order should not be construed as an expression of the Court's views on the merits." *Id.* Moreover, the Court's order was "based on all the circumstances of the [*Little Sisters*] case," and therefore has no application to *this* case, which presents dramatically different facts.

Little Sisters involved a "church plan" that is exempt from regulation under the Employee Retirement Income Security Act of 1974 (ERISA). *See* 29 U.S.C. § 1003(b)(2).[2] Accordingly, in that case, the employers' third-party administrator (TPA) was under no legal obligation to provide contraceptive coverage, and indeed had declared that it would not provide such coverage, regardless of whether or how the employers informed it of their religious objection. Here, plaintiff is insured rather than self-insured, does not operate a church plan, and is otherwise differently situated.

Moreover, plaintiff's apparent willingness to express its religious objection to the regulations, Pl.'s Opp'n at 21, reveals that plaintiff does not object to the self-certification requirement *per se* but rather objects to "the issuer's subsequent provision of coverage"—*i.e.*, to the subsequent actions of a third party. *See Priests for Life*, 2013 WL 6672400, at *2. To put it another way, plaintiff objects to the fact that, while the regulations do not require it to substantially change its behavior, and, indeed, merely require it to inform its insurer of the religious objection already asserted in the complaint in this case, the consequences of its behavior have changed because its employees will now receive contraceptive coverage from a third party. But this objection only illustrates the problem with plaintiff's argument. Plaintiff does not have an inherent religious objection to the self-certification requirement; its objection

[2] Thus it is not, as plaintiff repeatedly claims, that defendants "*refrained* from imposing penalties" on church plans' TPAs under the regulations. Pl.'s Opp'n at 8 (emphasis added); *see id.* at 8-9, 23, 29-30, 33, 36, 47-48. Rather, it is that defendants *lack statutory authority* to do so.

stems entirely from the actions of third parties. Thus, not only does plaintiff want to be free from contracting, arranging, or paying for contraceptive coverage for its employees—which, under these regulations, it is—but it also wants to prevent anyone else from providing such coverage to its employees. RFRA should not be interpreted as enabling plaintiff to project its religious exercise onto third parties. *Notre Dame II*, 743 F.3d at 552. That this is the de facto aim of plaintiff's stated objection is made clear by its position that RFRA is violated whenever plaintiff triggers the provision of the products and services to which it objects. But plaintiff's characterization of the self-certification as a "trigger" is inaccurate. *See id.* at 553. "Federal law, not the religious organization's signing and mailing the form, requires health-care insurers . . . to cover contraceptive services." *Id.* at 554. Thus, "[t]he accommodation . . . consists in the [eligible] organization's . . . washing its hands of any involvement in contraceptive coverage, and the insurer . . . taking up the slack under compulsion of federal law." *Id.* at 557.

Because plaintiff's behavior need not change in any significant way as a result of the regulations, plaintiff has failed to demonstrate that the regulations impose anything more than a *de minimis* burden.

2. Even if the regulations were found to impose more than a *de minimis* burden, any such burden would be too attenuated to be "substantial" under RFRA

In their opening brief, defendants also argued that, even if the regulations were found to impose some burden on plaintiff's religious exercise, any such burden

would be too attenuated be substantial under RFRA. *See* Defs.' Mot. at 17-20. Plaintiff has not responded to defendants' argument in any meaningful manner. As defendants explained, cases that find a substantial burden involve an alleged burden that applies more directly to the plaintiff than does the burden alleged in this case. *See, e.g.*, *Potter v. Dist. of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009); *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 413-14 (E.D. Pa. 2013).

Here, not only is plaintiff separated from the use of contraception by a "series of events," *id.* at 414, but it is also further insulated by the fact that a third party—plaintiff's independent insurance issuer—and not plaintiff, will make separate payments for such services, at no cost to plaintiff. Plaintiff is therefore in no way subsidizing or arranging for, much less paying for, even indirectly, the use of the preventive services that it finds objectionable. Under plaintiff's theory, its religious exercise is substantially burdened when an employee and her health care provider make an independent determination that the use of certain contraceptive services is appropriate, and such services are paid for exclusively by plaintiff's issuer, with none of the cost being passed on to plaintiff, and no administration of the payments by plaintiff. But its religious exercise is not so burdened. *See Catholic Diocese of Nashville v. Sebelius*, No. 3:13-1303, 2013 WL 6834375, at *5 (M.D. Tenn., Dec. 26, 2013) (concluding that, under these circumstances, any burden is "too attenuated and speculative to be substantial"); *Mich. Catholic Conf.*, 2013 WL 6838707, at *7 ("It is

difficult to see how a substantial burden exists when the relationship to the objectionable act is so attenuated.”).

B. Even if the regulations do impose a substantial burden, they do not violate RFRA because they serve compelling governmental interests and are the least restrictive means of achieving those interests

Because plaintiff has not established a “substantial burden” on its religious exercise, plaintiff’s RFRA claim fails. But even if the Court were to determine that plaintiff has made out a prima facie case under RFRA, the challenged regulations satisfy strict scrutiny because they are justified by compelling governmental interests and are the least restrictive means of achieving them.

Defendants have identified two unquestionably compelling interests: promoting public health and ensuring that women have equal access to health-care services. *See* Defs.’ Mot. at 20-27. Although plaintiff attempts to portray these interests as too “broadly formulated” to be characterized as compelling, *see* Pl.’s Opp’n at 22-23 (internal quotation marks and citation omitted), plaintiff ignores that the regulations promote these interests even with respect to plaintiff’s 68 employees who have elected to be covered by its insurance plan by ensuring that they (and their covered dependents) have access to the clinically recommended contraceptive services to which plaintiff—but not necessarily its employees—objects. The contraceptive coverage requirement furthers the government’s compelling interest in promoting public health by “expanding access to and utilization of recommended preventive services for women,” including plaintiff’s employees (and covered

dependents), and in promoting gender equality by helping to assure that plaintiff's employees (and covered dependents) "have equal access to health care services." 78 Fed. Reg. at 39,887, AR at 19. The government has shown with "particularity," therefore, that these interests "would be adversely affected by granting an exemption," *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972), as plaintiff's employees would not enjoy the full range of recommended preventive services coverage if not for the challenged regulations.

Furthermore, contrary to plaintiff's assertion, *see* Pl.'s Opp'n at 22, strict scrutiny does not require the government to separately analyze the need for the regulations as to each and every employer and employee in the United States. This level of specificity would be impossible to establish and would render this regulatory scheme—and potentially every regulatory scheme that is challenged due to religious objections—completely unworkable. *See United States v. Lee*, 455 U.S. 252, 259-60 (1982). Thus, courts have not required the government to analyze the effect of a regulation on the single entity seeking an exemption, but have conducted the inquiry with respect to all similarly situated individuals or organizations. *See, e.g., Lee*, 455 U.S. at 260 (considering the effects on the tax system if all religious adherents—not just the plaintiff—could opt out).

The government's compelling interests, moreover, are not undermined by any of the so-called "exemptions" that plaintiff alleges. Pl.'s Opp'n at 6-9, 12-13, 23. An

exemption undermines a compelling interest only if "it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal quotation marks and citation omitted). But the "exemptions" relied on by plaintiff—unlike the exemption that plaintiff seeks—do no appreciable damage to the government's compelling interests. *See* Defs.' Mot. at 22-25 & n.15. In fact, aside from the religious employer exemption, the "exemptions" referred to by plaintiff are not specific exemptions from the contraceptive coverage requirement at all, but are instead provisions that exclude individuals and entities from various requirements imposed by the ACA. They reflect the government's attempt to balance other significant interests supporting the complex administrative scheme created by the statute. *See Lee*, 455 U.S. at 259.

The ACA's grandfathering provision, for example, is transitional in effect and was adopted for reasons relating to the entire ACA and not just preventive care services in general or contraceptive coverage in particular. Unlike the relief that plaintiff seeks, grandfathering does not effect a permanent exemption from the regulations. Fewer and fewer group health plans will be grandfathered over time, mitigating any perceived effect on the government's compelling interests.[3] And plaintiff cites nothing to suggest that, in order for an interest to be compelling, the

[3] *See* 78 Fed. Reg. at 39,887 n.49, AR at 19; 75 Fed. Reg. at 34,552; Kaiser Family Foundation and Health Research & Educational Trust, Employer Health Benefits 2013 Annual Survey at 7, 196, *available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/08/8465-employer-health-benefits-20132.pdf (showing that the percentage of employees in grandfathered plans is steadily declining, having dropped from 56 percent in 2011 to 48 percent in 2012 to 36 percent in 2013).

government must achieve its goals immediately. To the contrary, such a holding would undermine any attempt to phase in important and large-scale government programs over time, perversely encouraging Congress in the future to require immediate and draconian enforcement of all provisions of major laws, without regard to pragmatic considerations, in order to preserve compelling interest status. *Cf. Heckler v. Mathews*, 465 U.S. 728, 746-48 (1984) (noting that "protection of reasonable reliance interests is . . . a legitimate governmental objective" that Congress may permissibly advance through phased implementation of regulatory requirements).

Plaintiff also points to the fact that small employers are exempt from the employer responsibility provision of the ACA, which means that, starting in 2015, such employers are not subject to the possibility of assessable payments if they do not provide health coverage to their full-time employees and their dependents. But this is not an exemption from the challenged regulations. Small businesses that *do* offer non-grandfathered health coverage to their employees are required to provide coverage for recommended preventive services, including contraceptive services, without cost-sharing. 78 Fed. Reg. at 39,887 n.49, AR at 19.

Finally, despite seeking a much broader exemption, plaintiff insists that the narrow, existing exemption for religious employers undermines the government's interests in promoting public health and gender equality. But such a conclusion, as defendants have pointed out, would discourage the government from attempting to

accommodate religion for fear that its actions would then cause its regulations to fail strict scrutiny. *See* Defs.' Mot. at 25. It would also undermine defendants' ability to administer the regulatory scheme in a rational manner. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435 (2006). Although plaintiff attempts to elide the distinction between houses of worship and their integrated auxiliaries that are exempted under the regulations and eligible organizations that are accommodated under (but not exempted from) the regulations, this distinction is a perfectly rational one. Employees of a house of worship, for example, would surely be less likely as a group to use contraceptive services, even if such services were covered under the plan, than would be, for example, the employees of a large religious institutional provider of health care services that employs thousands of people, including a large number of medical professionals. *See* 78 Fed. Reg. at 39,874, 39,887, AR at 6, 19. Given the rational distinction between these two types of entities, plaintiff's argument that the religious employer exemption must be extended to eligible organizations fails.

Furthermore, plaintiff misses the point when it attempts to minimize the magnitude of the government's interests by arguing that contraception is "widely available." Pl.'s Opp'n at 24. Although a majority of employers cover FDA-approved contraceptives, *see* IOM REP. at 109, AR at 407, many women forego preventive services because of cost-sharing imposed by their health plans, *see id.* at

19-20, 109, AR at 317-18, 407. The challenged regulations eliminate that cost-sharing. 78 Fed. Reg. at 39,873, AR at 5. Thus, plaintiff is wrong to suggest that access to contraception is not "an actual problem." Pl.'s Opp'n at 24 (internal quotation marks and citation omitted). The Institute of Medicine—which, unlike plaintiff, is an expert scientific body—reached the opposite conclusion. Plaintiff fails to mention the IOM's findings that, based on 2001 data, "an estimated 49 percent of all pregnancies in the United States were unintended," and "[t]he unintended pregnancy rate is much lower in other developed countries." IOM REP. at 102, AR at 400.

The challenged regulations are also the least restrictive means of furthering the government's compelling interests. To satisfy the least restrictive means test, the government need not refute every conceivable alternative to a regulatory scheme; rather, it need only "refute the alternative schemes offered by the challenger." *United States v. Wilgus*, 638 F.3d 1274, 1289-95 (10th Cir. 2011). Defendants have done so here.

Plaintiff purports to identify five less restrictive means, *see* Pl.'s Opp'n at 25, but defendants have shown that they are infeasible, that they are not as effective as the scheme defendants have put in place, and/or that defendants lack statutory authority to implement them. *See* 78 Fed. Reg. at 39,888, AR at 20. All five alternatives put forward by plaintiff depart from the employer-based model on which

the ACA builds and involve, in one fashion or another, government provision of, or government payments for, contraceptive services. As defendants demonstrated in their opening brief, *see* Defs.' Mot. at 26-27, in implementing the preventive services coverage provision of the ACA, defendants were required to work within the statutory framework established by Congress, which built on the existing system of employment-based health care coverage. Thus, even if plaintiff's non-employer-based alternatives were otherwise feasible, defendants could not have considered them because they were beyond defendants' statutory authority.[4] Plaintiff's attempt to rebut this point is unsuccessful. If Congress were to pass a statute requiring law enforcement agents to conduct warrantless searches under circumstances plaintiff considered unreasonable, the appropriate course would be to challenge the statute itself; it would not be to fault the law enforcement officers for exercising their duties under the law. The same logic applies here. To the degree that plaintiff objects to the provision of preventive services coverage through the existing employer-based system, its objection is to the ACA—a fundamental underpinning of which is that

[4] With specific regard to plaintiff's assertion that defendants "already provide[] for or subsidize[] contraceptives distributed through [the] Title XIX-Medicaid Program," Pl.'s Opp'n at 26, plaintiff ignores that Medicaid is a joint federal-state program that provides coverage of specified medical and health-related care and services to certain groups encompassing very low-income individuals. *See* 42 U.S.C. § 1396. It is unlikely that most women employed by eligible organizations would be eligible for Medicaid, and it is not feasible for defendants to create a separate government-funded insurance program to cover contraceptive services or any other services that individual employers find objectionable.

coverage will continue to be provided through the employer-based system—which plaintiff does not challenge in this lawsuit.

Because plaintiff's proposed alternatives are incompatible with the ACA, and well outside of defendants' statutory authority, defendants would be prohibited by law from adopting them. For this reason, all of plaintiff's proposed alternatives are not feasible, and therefore do not constitute less restrictive means. A proposed alternative scheme is not a viable less restrictive means if it is not "workable." *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2420 (2013); *see also, e.g.*, *New Life Baptist Church Acad. v. Town of E. Longmeadow*, 885 F.2d 940, 947 (1st Cir. 1989) (Breyer, J.).

Finally, plaintiff fails to explain how its proposed alternatives would be "less restrictive." Under plaintiff's own logic, even assuming defendants could provide contraceptive services directly to plaintiff's employees, that action would violate plaintiff's religious beliefs because plaintiff's refusal to provide or pay for the services to which it objects would still "trigger" or "facilitate" their provision or payment. *See* Defs.' Mot. at 15. Plaintiff cannot have it both ways, claiming that defendants should have taken a different approach while simultaneously arguing that the proposed alternative is just as objectionable. *See New Life Baptist*, 885 F.2d at 950-51.

II. The Regulations Do Not Violate the Establishment Clause

Every court to have considered an Establishment Clause challenge to these regulations—including the Seventh Circuit and, most recently, the District Court for the Northern District of Georgia—has rejected it. *See* Defs.' Mot. at 33 & n.23 (citing

cases); *Notre Dame II*, 743 F.3d at 560 ("The [E]stablishment [C]lause does not require the government to equalize the burdens (or the benefits) that laws of general applicability impose on religious institutions."); *Roman Catholic Archdiocese of Atlanta v. Sebelius*, No. 1:12-cv-3489, 2014 WL 1256373, at *30 (N.D. Ga., Mar. 26, 2014) (rejecting identical Establishment Clause challenge). This Court should do the same.

Plaintiff attempts to re-write Establishment Clause jurisprudence by arguing that the Clause prohibits the government from enacting not only denominational preferences but also any distinctions among types of institutions based on their structure and purpose. Pl.'s Opp'n at 26-32. This is not the law. The Establishment Clause prohibits laws that "officially prefer[]" "one religious denomination" over another. *Larson v. Valente*, 456 U.S. 228, 244 (1982) (emphasis added); *see Powell v. United States*, 945 F.2d 374, 378 (11th Cir. 1991) (The Establishment Clause "*prohibits denominational preferences*, including those created by discriminatory or selective application of a facially neutral statute *against a particular denomination*." (emphasis added)). The Clause does not prohibit the government from distinguishing between different types of organizations based on an organization's structure and purpose when the government is attempting to accommodate religion. *See* Defs.' Mot. at 31-32 (citing cases); *Roman Catholic Archdiocese of Atlanta*, 2014 WL 1256373, at *30 ("Line drawing by the Government based on the structure and purpose of religious organizations is permissible under the Establishment Clause.").

Indeed, the problem in *Larson*, on which plaintiff relies, was not that the challenged statute distinguished between types of organizations based on their structure and purpose, but rather that it violated the constitutional prohibition against denominational preferences because it "effect[ed] the selective legislative imposition of burdens and advantages upon particular denominations." 456 U.S. at 254. Although the challenged statute did not refer to any particular religious denomination on its face, it was drafted to "includ[e] particular religious denominations and exclud[e] others." *Id.* (citing the legislative history of the statute, which showed that language was changed during the legislative process "for the sole purpose of exempting the [Roman Catholic] Archdiocese from the provisions of the Act"); *see id.* at 255 (referring to law's capacity "to burden or favor selected religious denominations"). Here, there is no similar discrimination among denominations: "the religious employer exemption does not make distinctions based on religious affiliation" and "is available to all religions." *Roman Catholic Archdiocese of Atlanta*, 2014 WL 1256373, at *30.[5]

Plaintiff stretches an out-of-circuit decision, *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), well beyond its facts in asserting that the case stands for the proposition that the Establishment Clause prohibits the

[5] *Accord Notre Dame I*, 2013 WL 6804773, at *19 (rejecting identical attempt to analogize the challenged regulations to the law at issue in *Larson*); *Priests for Life*, 2014 WL 6672400, at *14 n.8 (same); *Roman Catholic Archbishop of Washington v. Sebelius*, -- F. Supp. 2d --, 2013 WL 6729515, at *40-41 (D.D.C. 2013) (same).

government from distinguishing among different types of organizations that adhere to the same religion. The court's decision in *Weaver* was limited to "laws that facially regulate religious issues," *id*. at 1257, and, particularly, those that do so in a way that denies certain religious institutions public benefits that are afforded to all other institutions, whether secular or religious. The court in *Weaver* said nothing about the constitutionality of exemptions from generally applicable laws that are designed to accommodate religion, as opposed to discriminate against religion. A requirement that any religious exemption that the government creates must be extended to all organizations—no matter their structure or purpose—would severely hamper the government's ability to accommodate religion. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) ("There is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." (internal quotation marks and citation omitted)); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 469 (N.Y. 2006) (rejecting an identical Establishment Clause challenge because the plaintiff's underlying "theory would call into question any limitations placed by the [l]egislature on the scope of any religious exemption—and thus would discourage the [l]egislature from creating any such exemptions at all"). Thus, none of the seven categories of employers that plaintiff argues are treated differently under the regulations, *see* Pl.'s Opp'n at 27-31, show

that the regulations discriminate among religions.[6] Furthermore, even if the regulations were found to discriminate among religions, they would be valid under the Establishment Clause because they satisfy strict scrutiny. *See supra* Section I(B).

III. The Regulations Do Not Violate the Free Exercise Clause

Nearly every court to have considered a free exercise challenge to the contraceptive-coverage regulations has rejected it, concluding that the regulations are neutral and generally applicable. *See* Defs.' Mot. at 28 & n.16; *see also Roman Catholic Archdiocese of Atlanta*, 2014 WL 1256373, at *23-26. This Court should do the same.

Plaintiff contends that the regulations are not generally applicable because they contain "exemptions" for certain objectively defined categories of entities, like grandfathered plans, small employers, and religious employers. But as defendants

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[6] Contrary to plaintiff's claim, there is no "discriminatory caste system" here. Pl.'s Opp'n at 27. Rather, defendants have demonstrated that the exemption for religious employers, 45 C.F.R. § 147.131(a), and the accommodations for eligible organizations, *id.* § 141.131(b), represent the government's attempts to balance the compelling interests underlying the regulations against other significant interests supporting the complex scheme created by the ACA. *See* Defs.' Mot. at 23-24. And as explained above, with regard to employers that operate "church plans" as they are defined in ERISA, it is not that defendants "chose not to impose" the regulations on their TPAs, Pl.'s Opp'n at 29, but rather that defendants lack statutory authority to do so, *see supra* pp. 7-8 & n.2. As to the grandfathering of certain health plans, as also explained above, *see supra* pp. 13-14, grandfathering is not specifically limited to the preventive services coverage regulations, *see* 42 U.S.C. § 18011; 45 C.F.R. § 147.140, and the effect of grandfathering is not a permanent "exemption" but rather, over the long term, a transition in the marketplace with respect to several provisions of the ACA, *see* 78 Fed. Reg. at 39,887 n.49, AR at 19. Finally, while 26 U.S.C. § 5000A(d)(2) exempts from the minimum coverage provision of the ACA members of recognized religious sects who, on the basis of their religion, are opposed to the concept of health insurance, and members of health care sharing ministries, this provision is entirely unrelated to the preventive services coverage regulations. The minimum coverage provision provides no exemption from the regulations plaintiff challenges, as it only excludes certain *individuals* from the requirement to obtain health coverage and says nothing about the requirement that non-grandfathered group health plans provide recommended preventive services coverage without cost-sharing. It is also clearly an attempt by Congress to *accommodate* religion and, unlike the broad exemption plaintiff seeks, is sufficiently narrow so as not to undermine the larger administrative scheme.

have already explained, what plaintiff calls "exemptions" are not really exemptions at all. *See supra* pp. 12-15, 21-22 & n.6. Furthermore, as defendants pointed out in their opening brief, *see* Defs.' Mot. at 29-30, numerous courts have made clear that such categorical exceptions do not negate general applicability.[7] In *Olsen v. Mukasey*, 541 F.3d 827 (8th Cir. 2008), for example, the plaintiff challenged the Controlled Substances Act under the Free Exercise Clause because it prohibited his sacramental use of marijuana and argued that the Act was not generally applicable because it contained exemptions for certain research and medical uses of marijuana as well as the sacramental use of peyote, another controlled substance. *Id.* at 832. The Eighth Circuit rejected the plaintiff's claim, explaining that "[g]eneral applicability does not mean absolute universality" and that "[e]xceptions do not negate that the [law is] generally applicable." *Id.*

The regulations are also neutral. *See* Defs.' Mot. at 28-29. There is simply "no evidence that the [challenged regulations] constitute[] a religious 'gerrymander,'" and "[t]his is not a case where [a] 'pattern of exemptions [is carefully designed] to parallel the pattern of narrow prohibitions' targeted at [plaintiff's] religious beliefs."

[7] *See, e.g.*, *Roman Catholic Archdiocese of Atlanta*, 2014 WL 1256373, at *26 (rejecting identical claim); *Priests for Life*, 2013 WL 6672400, at *11 (same); *Notre Dame I*, 2013 WL 6804773, at *17 (same); *Mich. Catholic Conf.*, 2013 WL 6838707, at *9 (same); *see also Ungar v. N.Y.C. Hous. Auth.*, 363 Fed. App'x 53, 56 (2d Cir. 2010) (concluding that exceptions to city policy, which were "only for specified categories" and were available to the plaintiffs on the same terms as everyone else, did not negate general applicability); *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 698, 701 (10th Cir. 1998) (concluding school district's attendance policy was generally applicable despite exemptions for "strict categories of students," such as fifth-year seniors and special education students).

Roman Catholic Archdiocese of Atlanta, 2014 WL 1256373, at *26 (quoting *Lukumi*, 508 U.S. at 537). Plaintiff's reliance on *Lukumi* is of no help, as this case is a far cry from that one, where the legislature specifically targeted the religious exercise of members of a single church (Santeria) by enacting ordinances that used terms such as "sacrifice" and "ritual," 508 U.S. at 533-34, and prohibited few, if any, animal killings other than Santeria sacrifices, *id.* at 535-36. Here, there is no indication that the regulations are anything other than an effort to increase women's access to and utilization of recommended preventive services.[8] And it cannot be disputed that defendants have made extensive efforts—through the religious employer exemption and the eligible organization accommodations—to accommodate religion in ways that will not undermine the goal of ensuring that women have access to coverage for recommended preventive services without cost-sharing. *See Catholic Charities of Diocese of Albany*, 859 N.E.2d at 464 ("To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather than promote, freedom of religion.").[9]

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[8] *See, e.g.*, *Notre Dame I*, 2013 WL 6804773, at *16-17; *Roman Catholic Archbishop of Washington*, 2013 WL 6729515, at *28; *Catholic Diocese of Nashville*, 2013 WL 6834375, at *6; *O'Brien v. HHS*, 894 F. Supp. 2d 1149, 1161 (E.D. Mo. 2012); *Conestoga*, 917 F. Supp. 2d at 410.

[9] Even if the regulations were not neutral and generally applicable (which they are), plaintiff's free exercise challenge would still fail because the regulations satisfy strict scrutiny. *See supra* Section I(B).

IV. The Regulations Do Not Violate the Right to Free Speech or Expressive Association

Defendants explained in their opening brief that the preventive services coverage regulations do not violate the Free Speech Clause. Defs.' Mot. at 33-37. In fact, every court to review a compelled speech challenge to the regulations has rejected it, in part, because the regulations deal with conduct. *See* Defs.' Mot. at 34 & n.25 (citing cases); *see also Roman Catholic Archdiocese of Atlanta*, 2014 WL 1256373, at *27-29. Plaintiff contends that the regulations violate its free speech rights in three ways, Pl.'s Opp'n at 37-39, 43-46, none of which has merit.

First, execution of the self-certification form is "plainly incidental to the . . . regulation of *conduct*," *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47, 62 (2006) (emphasis added), not *speech*. The scheme of accommodations regulates conduct by relieving an eligible organization of the obligation to contract, arrange, or pay for contraceptive coverage to which it has religious objections. 78 Fed. Reg. at 39,874, AR at 6. Plaintiff's suggestion that the mere act of self-certifying its eligibility for an accommodation violates its speech rights is baseless. *FAIR*, 547 U.S. at 61-63; *see, e.g.*, *Roman Catholic Archdiocese of Atlanta*, 2014 WL 1256373, at *28 (concluding the self-certification requirement is "incidental to the regulation of conduct"); *Priests for Life*, 2013 WL 6672400, at *12 (same); *Mich. Catholic Conf.*, 2013 WL 6838707, at *10 (same).

Second, plaintiff is simply wrong to assert that the regulations require plaintiff to "cover 'education and counseling' in favor of items to which [it] object[s]." Pl.'s Opp'n at 38. The regulations require coverage of "education and counseling for women with reproductive capacity." Health Resources and Services Administration, Women's Preventive Services: Required Health Plan Coverage Guidelines, AR at 283-84. There is no requirement that such education and counseling be "in favor of" any particular contraceptive service, or even in support of contraception in general. The conversations that may take place between a patient and her health care provider cannot be known or screened in advance and may cover any number of approaches to women's health. To the extent that plaintiff argues that the covered education and counseling is objectionable because some of the conversations between a doctor and one of plaintiff's employees might be supportive of contraception, this theory would extend to all interactions between an employee and her health care provider based on the mere possibility of an employer's disagreement with a potential subject of discussion, and would allow the employer to impose a prior restriction on any doctor-patient dialogue. The First Amendment does not require such a drastic result. *See, e.g.*, *Conestoga*, 917 F. Supp. 2d at 418-19; *O'Brien*, 894 F. Supp. 2d at 1166.

Furthermore, the argument that the education and counseling component of the regulations somehow compels *plaintiff* to speak is incorrect. It is not plaintiff, but

rather plaintiff's employees and their health care providers, who are engaged in speech. The challenged regulations do not require plaintiff—or any other person, employer, or entity—to say anything. Nor is the conduct required by the regulations "inherently expressive," *FAIR*, 547 U.S. at 66, such that it is entitled to First Amendment protection. *See, e.g.*, *Roman Catholic Archdiocese of Atlanta*, 2014 WL 1256373, at *27 ("To the extent that the requirement to [cover] education and counseling compels any speech, the speech is incidental to the regulation of conduct, which does not infringe the Free Speech Clause."); *O'Brien*, 894 F. Supp. 2d at 1166-67 ("Giving or receiving health care is not a statement in the same sense as wearing a black armband or burning an American flag." (internal citations omitted)). Finally, under the accommodations, it is not *plaintiff* that must "fund objectionable speech," Pl.'s Opp'n at 39; rather, plaintiff's *issuer* will make separate payments for contraceptive services to plaintiff's employees, 45 C.F.R. § 147.131(c)(2)(i)(B), without passing any costs on to plaintiff, *id.* § 147.131(c)(2)(ii).[10]

[10] The cases plaintiff cites involving compelled funding of a particular message, Pl.'s Opp'n at 39 (citing *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)), have no bearing here. The regulations do not compel plaintiff to fund contraceptive services, and the idea that the regulations require a particular message is entirely of plaintiff's invention. Under the accommodation, contraceptive services are paid for by plaintiff's issuer, and the required payments involve not any particular message but rather concern an employee's ability to access whatever recommended preventive services she and her health care provider conclude are appropriate. "[U]nlike the unconstitutional speech subsidies in *United Foods* [and] *Abood* . . ., the regulations here do not require funding of one defined viewpoint." *O'Brien*, 894 F. Supp. 2d at 1166. Nor, as explained above, do the regulations involve "'compulsory subsidies for private speech'" by plaintiff, Pl.'s Opp'n at 39 (quoting *Knox*, 132 S. Ct. at 2289), such that *Knox* is inapposite.

Third, and finally, the regulations do not violate plaintiff's right to expressive association. Contrary to plaintiff's claims, nothing in the regulations impinges on plaintiff's ability to "associate[] for the purpose of expressing and inculcating its students and faculty with its religious views." Pl.'s Opp'n at 44. As already explained, *see* Defs.' Mot. at 10-17; *supra* pp. 3-9, the regulations require only that plaintiff self-certify that it qualifies for an accommodation, *see* 78 Fed. Reg. at 39,874, AR at 6. This is a far cry from "forcing [plaintiff] to cooperate with and engage in behavior that promotes the use of" the preventive health services to which plaintiff objects. Pl.'s Opp'n at 44. Furthermore, the regulations do not interfere in any way with the composition of plaintiff's workforce, faculty, or student body. They do not force plaintiff to hire employees it does not wish to hire or to admit students it does not desire to be a part of its school. And plaintiff, and plaintiff's employees and students, remain free to associate to voice their disapproval of the use of contraception, and of the regulations.[11] In sum, "[a]s in *FAIR*, the regulations . . . do not violate [plaintiff's] right to associate." *Priests for Life*, 2013 WL 6672400, at *13. The regulations "in no way restrict" those involved with plaintiff's organization

[11] Plaintiff's reliance on *Lyng v. Int'l Union*, 485 U.S. 360 (1996), is misplaced. Plaintiff quotes language from *Lyng*, *see* Pl.'s Opp'n at 45, where the Supreme Court described cases that considered laws requiring organizations to disclose their membership, and that are irrelevant to plaintiff's claims. 485 U.S. at 367 n.5 (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)). Regardless, under plaintiff's theory, any penalty imposed on an entity that happens to engage in First Amendment activities would, by posing the threat of "economic harm," Pl.'s Opp'n at 44, violate the entity's right to expressive association. That simply cannot be true.

"from associating to express their opposition to contraception," and "the fact that a third party provides contraceptive coverage to [plaintiff's] employees, separate from [plaintiff and] its . . . health plan, does not affect [plaintiff's] ability to express its message under the First Amendment." *Id.*

V. The Regulations Do Not Violate the Fifth Amendment's Guarantees of Due Process and Equal Protection

Plaintiff fails to address defendants' arguments as to why plaintiff's Fifth Amendment due process claims fail. Defendants' opening brief explained why the challenged regulations are not unconstitutionally vague and do not lend themselves to discriminatory enforcement. *See* Defs.' Mot. at 37-39. Instead of responding to those arguments, plaintiff merely asserts that the "statutory authority" granted to defendants under the ACA is "unfettered." Pl.'s Opp'n at 40. But plaintiff does not even attempt to identify a source of vagueness or confusion in the regulations it challenges, and it still has no difficulty determining what the regulations require of it, which means that plaintiff's vagueness challenge fails. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S. Ct. 2705, 2720 (2010).

Similarly, plaintiff fails to identify any unconstitutional discretion in the regulations. As defendants have explained, *see* Defs.' Mot. at 37-38 & n.28, the regulations do not leave defendants with any discretion to decide who is exempt or

who is accommodated because they set out the criteria for both determinations.[12] Plaintiff also claims that the ACA unconstitutionally delegates legislative power to HHS because the "statute . . . does not define what qualifies as [a] 'preventive service.'" Pl.'s Opp'n at 41. But the District Court for the Northern District of Georgia recently rejected this precise argument, describing it as a "shallow claim that contradicts the Supreme Court's decisions." *Roman Catholic Archdiocese of Atlanta*, 2014 WL 1256373, at *32. "Congress has the power to delegate its authority to a federal agency under '*broad* general directives,'" and the "'broad general directive'" in the ACA, which "require[s] the HRSA to provide comprehensive guidelines regarding preventive care and screenings for women," *see* 42 U.S.C. § 300gg-13(a)(4), "is indistinguishable from the delegations of authority previously upheld by the Supreme Court." *Roman Catholic Archdiocese of Atlanta*, 2014 WL 1256373, at *31-32 (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989); citing *Yakus v. United States*, 321 U.S. 414 (1944), and *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001))). There is no merit to plaintiff's contention that the regulations violate the Fifth Amendment's due process guarantee.

Plaintiff's Fifth Amendment equal protection claim also fails. As defendants have explained, *see* Defs.' Mot. at 31-33; *supra* pp. 20-24 & n.6, the regulations do not

[12] An entity that is organized and operates as a nonprofit and that is referred to in § 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended, qualifies for the exemption. 45 C.F.R. § 147.131(a). And an organization that satisfies the four criteria to be an "eligible organization" is eligible for the accommodation. *Id.* § 147.131(b).

discriminate among religions, such that plaintiff's claim warrants only rational basis review. *See Midrash Sephardi*, 366 F.3d at 1239. Plaintiff's arguments to the contrary fail for the reasons already stated; the regulations clearly "treat individual religions and religious institutions without discrimination or preference." *Weaver*, 534 F.3d at 1257 (internal quotation marks and citations omitted). Furthermore the regulations, and the religious employer exemption in particular, satisfy rational basis review because defendants rationally concluded that, as a general matter, houses of worship and their integrated auxiliaries are more likely than other religious organizations, such as religious charities, schools, and hospitals, to employ people of the same faith who share their objection to the use of contraceptive services. *See* 78 Fed. Reg. at 39,874, 39,877, AR at 6, 19.

VI. Plaintiff's APA Claims Fail

A. The regulations are neither arbitrary nor capricious

Plaintiff's claim that the regulations are arbitrary and capricious remains, essentially, a complaint about the content of the regulations themselves. Indeed, plaintiff's argument morphs from an accusation that defendants "failed to respond" to comments that the proposed regulations would violate some entities' religious beliefs, to a complaint that defendants did respond but that their responses were "conclusory," to an insistence that defendants' responses are "wrong as a matter of law." Pl.'s Opp'n at 47-48. Of course, as plaintiff's shifting argument seems to recognize, it is undeniable that defendants considered and responded to such

comments. *See* 78 Fed. Reg. at 39,886-88, AR at 18-20 (responding to comments regarding RFRA and other federal law). And it is inaccurate to describe as "conclusory" well over one full page of three-column Federal Register text detailing defendants' basis for concluding that the regulations do not substantially burden religious exercise and do satisfy strict scrutiny. *See id.* At bottom, then, plaintiff simply disputes defendants' reasoning as "wrong." But this is a merits issue already addressed by defendants. The relevant question under the APA is whether defendants "articulate[d] a satisfactory explanation for [their] action." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The text of the rules and the preamble provide that explanation, and other than by disagreeing with the conclusions defendants reached, plaintiff has not shown otherwise.[13]

B. Certain of plaintiff's claims fall outside the zone of interests of the relevant statutory guarantees, and regardless, the regulations do not violate restrictions relating to abortion

Plaintiff claims that the regulations violate the provision of the ACA stating that "nothing in this title . . . shall be construed to require a qualified health plan to provide coverage of [abortion services] as part of its essential health benefits for any plan year," 42 U.S.C. § 18023(b)(1)(A)(i), and the Church Amendment, which protects individuals from being required to "perform or assist in the performance of

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[13] Plaintiff's sole attempt at showing some arbitrariness is with regard to the regulations' reference to the distinction between integrated auxiliary schools and seminaries, and other schools and seminaries. *See* Pl.'s Mot. at 42. But this very distinction has long been present in the Internal Revenue Code. *See* 26 U.S.C. § 6033(a)(3)(A)(i). It can hardly be irrational or arbitrary for the government to rely on such a longstanding statutory distinction here.

any part of a health service program or research activity funded . . . by the Secretary of [HHS] if his performance or assistance . . . would be contrary to his religious beliefs or moral convictions," 42 U.S.C. § 300a-7(d); *see* Pl.'s Opp'n at 49-50, 51. But plaintiff has failed to respond to defendants' arguments, *see* Defs.' Mot. at 42-43, that plaintiff's claims do not fall within "the zone of interests to be protected or regulated by" the relevant statutory guarantees, *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970), because plaintiff neither purchases a "qualified health plan," 42 U.S.C. § 18023(b)(1)(A)(i), nor "perform[s] or assist[s] in the performance" of a "health service program or research activity funded . . . under a program administered by the Secretary of [HHS]" within the meaning of the Church Amendment, 42 U.S.C. § 300a-7(d).[14] Plaintiff has therefore conceded that it cannot claim that the regulations violate these statutory provisions.

Regardless, and as specifically relevant to plaintiff's Weldon Amendment claim, plaintiff's allegation that the regulations require coverage of abortion is incorrect. As defendants have explained, *see* Defs.' Mot. at 44-45 & n.33, the regulations do not require that any health plan cover abortion according to federal law's longstanding definition of that term. Decades of regulatory policy and practice have consistently considered FDA-approved contraception and emergency

[14] In defendants' opening brief, defendants cast their "zone of interests" arguments as pertaining to plaintiff's standing and asserted them under Fed. R. Civ. P. 12(b)(1). *See* Defs.' Mot. at 1, 9, 42-43. Intervening Supreme Court authority has established, however, that such arguments instead go to whether a plaintiff has "state[d] a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6); *see Lexmark Int'l, Inc. v. Static Control Components*, 134 S. Ct. 1377, 1386-88 (2014).

contraception not to be abortifacient drugs and not to cause abortions, and that determination is entitled to deference. *See Bhd. of R.R. Signalmen v. Surface Transp. Bd.*, 638 F.3d 807, 815 (D.C. Cir. 2011) (according particular deference to an agency's longstanding interpretation). Moreover, while that regulatory policy has not changed, Congress has continued to reenact restrictions dealing with abortion without change, which suggests that Congress has acted, then and now, consistent with and in recognition of this regulatory policy. *See Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) ("'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.'" (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). Because they reflect a settled understanding of FDA-approved contraceptives that accords with existing federal laws, the regulations are not contrary to any law dealing with abortion.

C. Plaintiff lacks standing to raise its statutory authority claim, which fails in any event

By again failing to respond, plaintiff has also conceded defendants' argument, *see* Defs.' Mot. at 40-41, that plaintiff lacks standing to assert its claim that "[t]here is no statutory authority to enforce the accommodation." Pl.'s Opp'n at 51. Plaintiff argues that the regulations are "contrary to law because no statutory authority exists in the ACA or elsewhere to coerce *insurance companies* or [*TPA*s] to offer payments for contraception," *id.*, but because plaintiff is neither an insurance company nor a

TPA, plaintiff attempts to challenge the government's regulation of third parties and therefore runs afoul of the "general rule that a party must assert [its] own legal rights and interests, and cannot rest [its] claim to relief on the legal rights or interests of third parties." *Hinck v. United States*, 550 U.S. 501, 510 n.3 (2007) (internal quotation marks and citation omitted). Regardless, as to the merits of plaintiff's statutory authority claim, plaintiff has also failed to respond to defendants' argument, *see* Defs.' Mot. at 41, that the relevant authority is provided by Section 2713 of the Public Health Services Act, which requires "group health plan[s]" and "health insurance issuers offering group or individual health coverage" to provide coverage without cost-sharing for recommended preventive services. 42 U.S.C. § 300gg-13.

CONCLUSION

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

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2014, I electronically filed a copy of the foregoing Reply in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, and Opposition to Plaintiff's Motion for Summary Judgment. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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