IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-02105-REB-MJW

COLORADO CHRISTIAN UNIVERSITY,

Plaintiff,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, *et al.*

Defendants.

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

Plaintiff challenges regulations related to the provision of contraceptive coverage that require it to take the *de minimis* step that it would have to take even in the absence of such regulations: convey to its third party administrator ("TPA")/issuer that it does not wish to provide contraceptive coverage. Plaintiff is eligible for a regulatory accommodation that relieves it from having to contract, arrange, pay, or refer for contraceptive coverage, and that in no way prevents plaintiff from continuing to voice its disapproval of contraceptive use or even from encouraging its employees to refrain from using contraceptive services. To avail itself of this significant accommodation, plaintiff need do nothing more than provide its TPA/issuer with a copy of a self-certification that it is eligible for the accommodations.

Plaintiff's arguments that the regulations violate the Religious Freedom Restoration Act ("RFRA") fail. The regulations impose no more than *de minimis* requirements on plaintiff. Ultimately, plaintiff objects to the fact that its religious opposition to providing contraceptive coverage to its employees no longer has the effect of preventing its employees from receiving such coverage. But the scheme of separate

payments for contraceptive services under the accommodations does not amount to a substantial burden under RFRA. In plaintiff's view, RFRA is violated whenever plaintiff believes that the requirements of a law violate its religious beliefs, as long as those requirements are enforced with substantial penalties. In other words, plaintiff attempts to convert the "substantial burden" standard into a "substantial pressure" standard. But in determining whether an alleged burden is substantial, courts look not only to the magnitude of the penalty imposed but also to the *objective* character of the actions required by the challenged law. Despite plaintiff's insistence to the contrary, defendants do not themselves undertake, nor do they ask this Court to undertake, a theological inquiry of any kind. The Court need not doubt the sincerity or centrality of plaintiff's religious beliefs, parse the content of those beliefs, or make a value judgment about those beliefs. Instead, the Court must examine the alleged burden imposed by the challenged regulations on plaintiff's religious exercise as a legal matter, outside the context of its religious beliefs—that is, from the perspective of an objective observer.

Plaintiff's other claims also lack merit. Plaintiff's free exercise claim fails because the regulations are neutral and generally applicable. And plaintiff's other First Amendment claims are also unsupported. Indeed, nearly every court to consider similar First Amendment challenges to the prior version of the regulations rejected the claims, and their analysis applies here. Plaintiff's APA claim is also unpersuasive.

For these reasons, and for those already stated, defendants' motion should be granted.

ARGUMENT

I. PLAINTIFF'S RELIGIOUS FREEDOM RESTORATION ACT CLAIM FAILS

It is not the case, as plaintiff suggests, that the Court should merely credit, without inquiry, plaintiff's assertion that the regulations substantially burden its religious

exercise. *See Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 413 (E.D. Pa. 2013). Under RFRA, a plaintiff is entitled to its sincere religious beliefs, but it is not entitled to decide what does and does not impose a substantial burden on such beliefs. Here, plaintiff would limit the Court's substantial burden inquiry to two prongs: first, whether plaintiff's religious objection to the challenged regulations is sincere, and second, whether the regulations apply significant pressure on plaintiff to comply. But plaintiff ignores a critical third criterion of the "substantial burden" test, which gives meaning to the term "substantial": whether the challenged regulations actually require plaintiff to modify its behavior in a significant—or more than *de minimis*—way. *See, e.g.*, *Living Water Church of God v. Charter Twp. Of Meridian*, 258 F. App'x 729, 734-36 (6th Cir. 2007) (reviewing cases).[1]

They do not. Plaintiff need only sign the self-certification, which states that it is a non-profit religious organization with religious objections to providing contraceptive coverage, and provide a copy of the self-certification to its TPA/issuer. Thus, plaintiff is required to convey to its TPA/issuer that it does not intend to cover or pay for contraceptive services, which it presumably has done or would have to do voluntarily anyway even absent these regulations in order to ensure that it is not contracting, arranging, paying, or referring for contraceptive coverage. Any burden imposed by this purely administrative self-certification requirement is, at most, *de minimis*, and thus cannot be "substantial" under RFRA. *See* Defs.' Mot. to Dismiss or, in the Alt., for Summ. J. & Mem. in Supp. & Defs.' Mem. in Opp'n to Pl.'s Mot. for Partial Summ. J. ("Defs.' Mem.") at 9-13, ECF No. 40; *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007); *Kaemmerling v. Lappin*, 553 F.3d 669,

[1] As defendants explained in their opening brief, despite plaintiff's heavy reliance on *Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), that does not support plaintiff's arguments. *See* Defs.' Mem. at 9.

678 (D.C. Cir. 2008); *Washington v. Klem*, 497 F.3d 272, 279-81 (3d Cir. 2007); *McEachin v. McGuinnis*, 357 F.3d 197, 203 n.6 (2d Cir. 2004); *Civil Liberties for Urban Believers*, 342 F.3d at 761; *see also Tony & Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290, 303-04 (1985); *Gooden v. Crain*, 353 F. App'x 885, 888 (5th Cir. 2009).

In short, plaintiff's behavior need not change in any significant way as a result of the regulations. Ultimately, plaintiff's complaint is that informing its TPA/issuer of its intention not to provide contraceptive coverage to its employees no longer has the effect of preventing its employees from receiving such coverage. Prior to the adoption of the challenged regulations, plaintiff's refusal to provide contraceptive coverage to its employees effectively meant that those employees went without it. In effect, plaintiff had a veto over the health coverage that its employees received. Now, plaintiff no longer exercises such a veto over its employees' health coverage. In other words, plaintiff's religious objection to offering and funding contraceptive coverage remains effective as to plaintiff, but plaintiff's employees will receive such coverage from another source. But the fact that plaintiff's employees will now receive contraceptive coverage does not mean that plaintiff is put in the position of "participat[ing] in," Pl.'s Reply at 7, or in any other way condoning, the provision of such coverage to its employees. Plaintiff's employees will receive coverage for contraceptive services from another source *despite* plaintiff's objections, not *because* of those objections.

To put it another way, plaintiff seems to object to the fact that, while the regulations do not require it to substantially change its behavior, the *consequences* of plaintiff's behavior have changed because plaintiff's employees will now receive contraceptive coverage from a third party. But this objection only illustrates the problem with plaintiff's argument. Plaintiff has not alleged that it has any inherent religious objection to the self-certification requirement—its objection stems entirely from the

actions of *other* parties once plaintiff satisfies the self-certification requirement. As defendants have explained, under plaintiff's theory, any organization could claim both the right to an accommodation and the right to prevent the government from establishing alternate means of achieving important statutory goals based on its religious objections once it has provided such an accommodation. *Cf. Bowen v. Roy*, 476 U.S. 693, 699 (1986) ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.").

In plaintiff's view, if it sincerely believes that these actions violate its religious beliefs, the Court's inquiry is limited to the magnitude of the penalty imposed by the challenged regulations—if this penalty is "substantial," then so is the burden. Pl.'s Mot. for Partial Summ. J. & Mem. in Supp. at 10-11, ECF No. 27. This is not how RFRA works. In determining whether an alleged burden is substantial, courts look not only to the magnitude of the penalty imposed, but to the character of the actions required by the challenged law and the magnitude of the burden imposed by those requirements. *See, e.g.*, *Church of Scientology of Ga., Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328, 1353-54 (N.D. Ga. 2012); *Living Water Church of God*, 258 F. App'x at 734-36; *Kaemmerling*, 553 F.3d at 678; *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 997 (7th Cir. 2006); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348-49 (2d Cir. 2007); *Klem*, 497 F.3d at 279-81; *McEachin*, 357 F.3d at 203 n.6; *Civil Liberties for Urban Believers*, 342 F.3d at 761; *Alamo Found.*, 471 U.S. at 303-04. It is telling that plaintiff attempts to re-label the "substantial burden" test as the "substantial pressure" test. *See, e.g.*, Pl.'s Reply at 4, 9 & n.1. If plaintiff were correct that the only relevant question under RFRA is whether the challenged law imposes substantial pressure on the religious adherent, then one would expect court opinions in RFRA cases to focus

primarily on the magnitude of the penalty imposed by the law. But they do not. For example, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the plaintiffs were fined $5 for failure to comply with Wisconsin's compulsory school-attendance law. *See id.* at 207-08. Although the Court noted that this fine was a criminal sanction, it spent virtually no time on the question of whether the magnitude of the penalty was sufficient to amount to a substantial burden, *see id.* at 218—the only relevant question in plaintiff's view. Instead, the Court focused on the character of the burden imposed by the challenged law. *See id. Yoder* and other cases make clear that, under RFRA, a plaintiff must show not only that the challenged regulations exert substantial *pressure—i.e.* a penalty of sufficient magnitude—but also that the *burden* imposed is more than *de minimis*.

Under plaintiff's alternative theory, the mere fact that plaintiff claims that it sincerely believes that the challenged regulations violate its religious beliefs would be sufficient to amount to a substantial burden under RFRA. But courts have rejected such a hollow interpretation of the substantial burden standard. *See Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 413 (E.D. Pa. 2013), *aff'd*, 724 F.3d 377 (3d Cir. 2013); *Autocam Corp. v. Sebelius*, No. 1:12-cv-1096, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012), *aff'd*, 730 F.3d 618 (6th Cir. 2013). This Court should do the same.

The inquiry that the government asks this Court to undertake is not a theological one. The Court need not doubt the sincerity or centrality of plaintiff's religious beliefs, parse the content of plaintiff's beliefs, or make a value judgment about those beliefs. Instead, the Court must examine the alleged burden imposed by the challenged regulations *as a legal matter* outside the context of plaintiff's religious beliefs (which need not be, and are not in this case, disputed)—that is, from the perspective of an objective observer. *See, e.g.*, *Roy*, 476 U.S. at 701 n.6; *Yoder*, 406 U.S. at 218; *Levitan*

v. Ashcroft, 281 F.3d 1313, 1321 (D.C. Cir. 2002). Under RFRA, a plaintiff may not decide for itself, as a matter of law, what does and does not impose a substantial burden within the meaning of the statute. *See Conestoga*, 917 F. Supp. 2d at 413.

II. THE REGULATIONS DO NOT VIOLATE THE FREE EXERCISE CLAUSE

Defendants explained in their opening brief that nearly every court to have considered a free exercise challenge to the prior version of the regulations has rejected it, concluding that the regulations are neutral and generally applicable. Plaintiff ignores this authority, perhaps hoping this Court will do the same. Contrary to plaintiff's argument, however, the regulations at issue here are clearly neutral. In *O'Brien v. U.S. Department of Health and Human Services*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012), for example, the court—like nearly every other court to have addressed this claim—determined that the regulations "are neutral." *Id.* at 1161. The regulations, the court explained, "were passed, not with the object of interfering with religious practices, but instead to improve women's access to health care and lessen the disparity between men's and women's healthcare costs." *Id*. Rejecting the same argument plaintiff makes here, the court further determined that "the religious employer exemption does not compromise the neutrality of the regulations by favoring certain religious employers over others. Rather, . . . the religious employer exemption presents a strong argument in favor of neutrality." *Id*. The court also concluded that the regulations were generally applicable despite exceptions for grandfathered plans and religious employers. *Id*. The court explained that the exceptions do not suggest disfavor of religion because they apply to all employers that satisfy the requirements, "regardless of those employers' personal religious inclinations." *Id*. at 1162. Plaintiff's arguments to the contrary are no more persuasive here than they were in *O'Brien* or any of the other cases that have upheld the regulations against Free Exercise Clause challenges.

Plaintiff blithely states that the government has "discriminat[ed] among religions" in an effort to "target[ ] certain manifestations of religious conduct (outside of a church)." Pl.'s Reply at 11-12. But plaintiff's saying it does not make it so. "It is clear from the history of the regulations and the report published by the Institute of Medicine that the purpose of the [regulations] is not to target religion, but instead to promote public health and gender equality." *Conestoga*, 917 F. Supp. 2d at 410. Moreover, 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. The fact that "the [religious employer exemption] does not extend as far as Plaintiff[] wish[es]" does not mean that the government is "target[ing]" certain religious conduct. (Pl.'s Reply at 12). *Grote Indus., LLC v. Sebelius*, 914 F. Supp. 2d 943, 953 (S.D. Ind. 2012), *rev'd on other grounds*, 735 F.3d 654 (7th Cir. 2013).

Defendants cited overwhelming authority in their opening brief to demonstrate that categorical exceptions like those present here do not negate general applicability. *See* Defs.' Mem. at 14-16 (citing cases); *see also, e.g.*, *Ungar v. N.Y.C. Hous. Auth.*, 363 F. App'x 53, 56 (2d Cir. 2010); *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 698, 701 (10th Cir. 1998). Plaintiff's only response is to suggest that the government has created a discretionary system of exceptions with respect to the regulations. *See* Pl.'s Reply at 13-14 & n.4. But it has not. A system of individual exemptions is one that enables the government to make a subjective, case-by-case inquiry of the reasons for the relevant conduct, like the "good cause" standard applied in many states for determining an individual's eligibility for uemployment. *See Emp't Div. v. Smith*, 494 U.S. 872, 884 (1990); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004).

No such system exists here. The challenged regulations do not leave defendants with any discretion to decide who is exempt or who is accommodated because the regulations set out the criteria for both determinations. *See* Defs.' Mem. at 17 & n.8. There is, therefore, no merit to plaintiff's claims.

III. THE REGULATIONS DO NOT VIOLATE THE ESTABLISHMENT CLAUSE, THE DUE PROCESS CLAUSE, OR THE EQUAL PROTECTION CLAUSE

The authority cited in defendants' opening brief, *see* Defs.' Mot. at 18-21, amply demonstrates that the Establishment Clause prohibits only denominational preferences; it does not prevent the government from distinguishing between types of religious organizations by exempting houses of worship irrespective of their denomination and accommodating non-profit religious charities, universities, and hospitals irrespective of their denomination, as defendants have done in the challenged regulations.

Larson v. Valente, on which plaintiff relies, fully supports the government's position. *See, e.g.*, 456 U.S. 228, 244, 245-56 (1982). Although the law at issue in *Larson* did not refer to any particular religious denomination on its face, it violated the constitutional prohibition against denominational preferences because it "effect[ed] the selective legislative imposition of burdens and advantages upon particular denominations." *Id*. at 254. The provision was drafted to "includ[e] particular religious denominations and exclud[e] others." *Id*. Indeed, the Court discussed 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." *Id*. at 254; *see also Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084 (8th Cir. 2000) (upholding "sect-neutral" statute after striking down prior "sect-specific" one).[2] There is no similar discrimination among

[2] Defendants distinguished *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), in their opening brief. *See* Defs.' Mem. at 20 n.9. Reading *Weaver*, as

denominations here. The religious employer exemption is available on equal terms to employers of all denominations.

Plaintiff argues in the alternative that the regulations do discriminate among denominations by distinguishing between denominations that are "vertically structured" and those that are more "horizontally structured," with ministries operating independently of any institutional church. Opp'n at 16. This argument is baseless. The fact that some entitles, like a church, are exempt while other entities, like hospitals, charities, and universities, are accommodated does not amount to discrimination among *denominations*. *See, e.g.*, *Catholic Diocese of Fort Worth v. Sebelius*, No. 1:12-cv-003014 (N.D. Tex.) (suit by Catholic entities claiming that the regulations discriminate against *vertically integrated* organizations).[3]

IV. THE REGULATIONS DO NOT VIOLATE THE RIGHT TO FREE SPEECH OR EXPRESSIVE ASSOCIATION

Defendants explained in their opening brief that the challenged regulations do not violate plaintiff's rights to free speech or expressive association. *See* Defs.' Mem. at 21-24. Nevertheless, plaintiff erroneously claims that the self-certification requirement is not

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plaintiff suggests, to mean that the Establishment Clause prohibits the government from distinguishing between different types of organizations that adhere to the same religion would bring that case into conflict with *Larson.*

[3] Plaintiff makes almost no effort to save its due process and equal protection claims. *See* Pl.'s Reply at 16 n.6. Plaintiff's argument that defendants' reason for distinguishing between houses of worship and other religious organizations does not satisfy rational basis review misunderstands the nature of the rational basis test. The rational basis test does not require a perfect fit or complete calibration between policy and objective. *See, e.g.*, *Heller v. Doe*, 509 U.S. 312, 321 (1993). Plaintiff does not dispute that defendants "could rationally have concluded" that, as a general matter, houses of worship and their integrated auxiliaries are more likely than other religious organizations, like hospitals, charities, and universities, to employ people of the same faith who share their objection to contraceptives. *See Gonzalez-Droz v. Gonzalez-Colon*, 660 F.3d 1, 10 (1st Cir. 2011). That is all the Due Process and Equal Protection Clauses require.

incidental to a conduct regulation because it is a "direct regulation of speech." Pl.'s Reply at 17. Plaintiff would have the Court ignore the statutory and regulatory scheme as a whole, which requires certain group health plans and health insurance issuers to provide coverage, without cost-sharing, for, certain preventive services, including all Food and Drug Administration (FDA)-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider. As courts have unanimously concluded, that scheme regulates conduct, not speech. *See* Defs.' Mem. at 22. The accommodations available to eligible organizations likewise concern conduct by relieving such organizations of the obligation "to contract, arrange, pay, or refer for contraceptive coverage" to which they have religious objections. 78 Fed. Reg. at 39,874, AR at 6. Although plaintiff appears to object to the self-certification requirement to the extent it results in its TPA/issuer making separate payments for contraceptive services for plaintiff's employees, execution of the simple self-certification form is "plainly incidental to the . . . regulation of conduct," *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* ("*FAIR*"), 547 U.S. 47 (2006), 547 U.S. at 62, not speech.

Furthermore, defendants have already refuted plaintiff's claim that the regulations impermissibly "muzzle" plaintiff's speech. Defendants have made clear that "[n]othing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraception." 78 Fed. Reg. at 39,880 n.41, AR at 12. The regulations merely prohibit an employer's improper attempt to interfere with its employees' ability to obtain contraceptive coverage from a third party by, for example, threatening a TPA/issuer with a termination of its relationship with the employer because of the TPA's/issuer's "arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries." *See* 26 C.F.R. § 54.9815-

2713A(b)(1)(iii); 29 C.F.R. § 2590.715-2713A(b)(1)(iii); Defs.' Mem. at 22-23. In other words, plaintiff may not interfere with a TPA's/issuer's compliance with its legal obligations under the regulations. Because the regulations do not prevent plaintiff from expressing its views regarding the use of contraceptive services, but, rather, protect employees' right to obtain separate payments for contraceptive services through an issuer/TPA, there is no infringement of plaintiff's right to free speech.

Finally, turning to expressive association, plaintiff contends that the regulations violate its right to expressive association by "forcing participation in the government's scheme." Pl.'s Reply at 19. But plaintiff cites no authority for its novel theory that the freedom of association extends this far. And it does not. "A government action does not interfere with the right of expressive association unless it directly or indirectly interferes with group membership." *Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010); *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-23 (1984). Indeed, the expressive association cases cited by plaintiff involved laws that interfered with group membership. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (requiring organization to accept gay man); *Pleasant v. Lovell*, 876 F.2d 787, 792 (10th Cir. 1989) (plaintiffs claimed the purpose of defendants' activities "was to harass [organization] members, causing some to abandon the organization and other potential members not to join").[4] Plaintiff does not dispute that the challenged regulations do not interfere with the composition of plaintiff's organizations. Thus, plaintiff's claim fails.

V. THE REGULATIONS DO NOT VIOLATE THE APA

[4] Plaintiff cites language from *Dale* indicating that "intrusion into the internal structure or affairs of an association" may implicate the right to free association. Pl.'s Reply at 19. But the cases the Supreme Court was referring to all involved interference with group membership. *See Dale*, 530 U.S. at 648 (citing *Roberts*, 468 U.S. at 623 (citing *Cousins v. Wigoda*, 419 U.S. 477 (1975))).

As defendants have explained, the HRSA Guidelines are not legislative rules within the meaning of the APA, and thus, are not required to be subject to notice and comment rulemaking. The HRSA Guidelines are not "designed to implement, interpret, or prescribe law or policy," 5 U.S.C. § 551(4); rather, the substantive obligations that are imposed on group health plans and health insurance issuers were imposed by Congress in statutory provisions that automatically import the content of various clinical guidelines. Indeed, the case on which plaintiff relies, *Mission Grp. Kansas, Inc. v. Riley*, 146 F.3d 775 (10th Cir. 1998) (quoting *Hoctor v. Dep't of Agric.*, 82 F.3d 165 (7th Cir. 1996)), is not only inapposite, but illustrates the distinction. *Hoctor* dealt with a rule that had the force of law of its own accord and that was promulgated pursuant to a statute that authorized the agency "to promulgate such rules, regulations, and orders as [it] may deem necessary in order to effectuate the purposes of [the Act]." 82 F.3d at 167. No such language appears in the statute here; in other words, the statute did not, as plaintiff suggests, instruct HRSA to create guidelines. Other parts of the ACA contain such commanding language akin to that in the statute at issue in *Hoctor*, *see* Defs.' Mot. at 26 n.11, but the statutory provisions here notably do not, and simply incorporate by reference the content of a number of clinical guidelines which, on their own, do not have the force of law.

Plaintiff is also wrong when it asserts that the regulations are arbitrary and capricious. Plaintiff makes two arguments in support of this assertion, neither of which holds water. The first is that a comment that the Secretary of Health and Human Services made on the day the comment period closed "demonstrate[s]" that the outcome of the rulemaking was determined in advance. Pl.'s Reply at 22. Plaintiff's necessary assumption is that defendants ought to not even begin to consider comments and shape policy in response to them until the comment period has closed. But

rulemaking is an ongoing and dynamic process, and defendants considered comments both as they were submitted throughout the comment period in response to the NPRM, and as they had been submitted in response to the ANPRM. When the Secretary spoke, she was reflecting where that process was at the time—informed by all the comments defendants had received and considered, including the approximately 200,000 comments defendants had received and considered even before the NPRM was issued, 78 Fed. Reg. at 8459. Moreover, plaintiff's assertion that the outcome of the rulemaking was predetermined is belied by a simple comparison of the NPRM and the final regulations. The NPRM, for example, proposed three possible approaches for accommodating self-insured group health plans established or maintained by eligible organizations, *id.* at 8463-8464, and the final regulations represent the selection of one of those approaches—a choice made "after reviewing the comments on the three proposed approaches," 78 Fed. Reg. at 39,879.

Second, plaintiff is incorrect to suggest that the distinction drawn by the regulations between exempt organizations and eligible organizations is not a rational one. The sole piece of evidence plaintiff points to is the comment submitted by the Council for Christian Colleges and Universities, which stated that a requirement for membership in the organization is that the administrators and faculty "share the Christian faith" of the institution. Pl.'s Reply at 23. But the mere fact that a distinction drawn in the regulations may not comport with the comments submitted by one, or even more than one, commenter is far from evidence that the distinction is arbitrary or capricious.

Moreover, plaintiff's argument regarding the Weldon Amendment brushes aside decades of regulatory policy and practice summarized in defendants' opening brief. Speaking in support of what was then an independent bill with essentially identical

language to the Weldon Amendment, *see* Abortion Non-Discrimination Act, H.R. 4691, 107th Cong. (2002), Representative Weldon called it "a tremendous misinterpretation or a tremendous stretch of the imagination" to suggest that the statutory language would impact the provision of contraceptive services. 148 Cong. Rec. H6566, H6580 (daily ed. Sept. 25, 2002). And he explained that "[t]he morning-after pill is not defined by the FDA as abortion. It is defined as contraception. It is something different. So to interpret this statute to claim that it is going to prohibit access is to take essentially a religious entity's doctrine and put that into the statute, and it is just not there. It is not in the language." *Id*. at H6571; *see also id*. at H6580 ("Now, some religious groups may interpret [emergency contraception] as abortion, but we make no reference in this statute to religious groups or their definitions; and under the current FDA policy that is considered contraception, and it is not affected at all by this statute."). Plaintiff disregards all of this as an out-of-date floor statement from 2002, ignoring both the fact that the language of the Abortion Non-Discrimination Act discussed in 2002 is nearly identical to the language of the Weldon Amendment that was subsequently enacted, and repeatedly reenacted thereafter, and the fact that Representative Weldon was the author, sponsor, and namesake of the nearly identical Weldon Amendment. The Supreme Court has made clear that the statements of the sponsor of a piece of legislation deserve to be accorded substantial interpretive weight. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).[5] For these reasons, plaintiff's APA claim fails.

[5] Finally, plaintiff's claim that the ACA gives issues of a qualified health plan the right to define what is and is not an "abortion" as a matter of law is baseless. The statute ensures only that the issuer may decide whether to offer coverage for abortion, unless the state prohibits it. There is absolutely no suggestion that Congress intended to so dramatically shift to regulated entities themselves the locus of statutory interpretation that is generally left to agencies charged with implementing the statute and, if need be, to the courts. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes."). Accordingly, plaintiff's APA claims must fail.

Respectfully submitted this 18th day of December, 2013,

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on December 18, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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and I hereby certify that I have mailed or served the document or paper to the following non- CM/ECF participants in the manner (mail, hand-delivery, etc.) indicated by nonparticipant's name:

None.

/s/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS
Trial Attorney