IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GENEVA COLLEGE, *et al.* Plaintiffs, v. KATHLEEN SEBELIUS, *et al.* Defendants.	Civil Action No. 2:12-cv-00207-JFC

DEFENDANTS' REPLY IN SUPPORT OF
THEIR MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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INTRODUCTION

In their opposition, plaintiffs have failed to show why this case should not be dismissed. Geneva, for its part, challenges regulations that defendants are not enforcing against it and that defendants are amending in order to accommodate the precise religious liberty concerns that form the basis of its claims. Under these circumstances, Geneva has not met the basic jurisdictional prerequisites of standing and ripeness. To date, every court to have considered defendants' jurisdictional arguments has ruled in their favor. Indeed, since defendants filed their opening brief, another court joined the two that have already dismissed similar challenges to the preventive services coverage regulations for lack of standing and ripeness. *See Wheaton Coll. v. Sebelius*, No. 12-cv-1169, 2012 WL 3637162 (D.D.C. Aug. 24, 2012) (appeal pending); *see also Belmont Abbey Coll. v. Sebelius*, No. 11-cv-1989, 2012 WL 2914417 (D.D.C. July 18, 2012) (appeal pending); *Nebraska v. HHS*, No. 12-3035, 2012 WL 2913402 (D. Neb. July 17, 2012) (appeal pending). Defendants respectfully ask this Court to do the same.

Nor have the Hepler Plaintiffs alleged facts sufficient to state a claim. When an individual establishes a for-profit, secular company, that entity becomes subject to laws and regulations designed to protect employees: from Title VII to the Occupational Health and Safety Act ("OSHA") to the Fair Labor Standards Act and the Family and Medical Leave Act to laws, like the one at issue here, that govern the health coverage that a company provides to its employees. The government knows of no case—and the Hepler Plaintiffs cite none—in which a for-profit, secular company like Seneca obtained an exemption under either the Religious Freedom Restoration Act ("RFRA") or the First Amendment from such general laws designed to protect employees. Granting such exemptions would limit the protections employees receive to only those that are consistent with the religious beliefs of the company's owner(s). Because the Hepler Plaintiffs have failed to show that the law requires such an exemption, their claims should be dismissed. Indeed, the first court to address the merits of such a challenge to the preventive services coverage regulations in the context of a motion to dismiss did just that. *See O'Brien v. Sebelius*, No. 12-cv-476 (E.D. Mo.) (appeal pending). This Court should do the same.

ARGUMENT

I. GENEVA LACKS JURISDICTION TO ASSERT ITS CLAIMS[1]

A. Geneva Has Failed to Establish Standing

Geneva now concedes that its employee and student health plans are eligible for the enforcement safe harbor, pursuant to which defendants will not bring any enforcement action against it for failing to provide contraceptive coverage until at least August 1, 2013. By that time, defendants will have finalized amendments to the preventive services coverage regulations that are designed to address the type of concerns raised by Geneva. Thus, Geneva has not been, and never will be, injured by the current regulations, and therefore lacks standing.

Geneva's standing allegations rest on two types of alleged injuries: (1) imminent injury from the supposedly upcoming enforcement of the regulations in their current form and (2) current actual injury from the "uncertainty" created by the regulations in their current form. But both types of alleged injuries suffer from the same fatal flaw, which is why the courts in *Belmont Abbey* and *Wheaton* rejected them as a basis for standing. Geneva's allegations of injury rest entirely on its speculation that the regulations will apply to Geneva as they currently exist come August 2013. This, however, ignores the reality that defendants have begun amending the regulations for the very purpose of addressing the religious objections to covering contraception by religious organizations like Geneva. Planning for such an imagined scenario (the continuation of the regulations in their current form)—even if Geneva has actually incurred some expense to plan for something that will never happen—does not provide standing.[2]

Geneva notes that "a one-year enforcement delay, even one that makes enforcement uncertain, is not 'too remote.'" Opp'n at 10. But the issue here is not just that the regulations will not be enforced against Geneva right away, but that these regulations almost certainly will never

[1] Defendants no longer contend, at this stage, that the Hepler Plaintiffs' allegations regarding grandfathering are insufficient.

[2] Geneva argues that the Court's standing analysis should be "relaxed" because this is a pre-enforcement suit alleging First Amendment claims. Opp'n at 9. But this principle applies, if at all, only where there is a "credible" threat of enforcement. *Bloedorn v. Grube*, 631 F.3d 1218, 1228 (11th Cir. 2011); *Int'l Soc. for Krishna Consciousness v. Eaves*, 601 F.2d 809, 821 (5th Cir. 1979). There is no such threat here because Geneva is eligible for the safe harbor.

be enforced against Geneva. "Because an amendment to the [regulations] that may vitiate the threatened injury is not only promised but underway, the injuries alleged by Plaintiff[s] are not 'certainly impending.'" *Belmont Abbey*, 2012 WL 2914417, at *10 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)); *see also Wheaton*, 2012 WL 3637162, at *1. Indeed, courts have found similar promises not to enforce by the government sufficient to defeat jurisdiction. *See, e.g.*, *Presbytery of N.J. v. Florio*, 40 F.2d 1454, 1470-71 (3d Cir. 1994).

The cases Geneva cites for its argument that "standing to challenge a current law is unaffected by promised non-enforcement," Opp'n at 9-11, are all inapposite. Those cases recognize standing in run-of-the-mill pre-enforcement suits where—unlike here—there was "no reason to think the law will change," *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 538 (6th Cir. 2011), or not be enforced, *see, e.g.*, *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988). In fact, *none* of the cases Geneva cites dealt with a law that was not being enforced against the plaintiff and was virtually certain to change.[3]

Geneva maintains that nothing prevents defendants from abandoning the safe harbor and that defendants' commitment to amending the challenged regulations is only "speculation." Opp'n at 11. But the federal government is entitled to a presumption that it acts in good faith. *See, e.g.*, *Comcast Corp. v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008). As the *Belmont Abbey*

[3] *See 520 S. Mich. Ave. Assocs. v. Devine*, 433 F.3d 961, 963-64 (7th Cir. 2006) (no promise of non-enforcement); *Conchatta v. Miller*, 458 F.3d 258 (3d Cir. 2006) (non-enforcement alone could not provide a limiting principle to save overbroad statute); *Larson v. Valente*, 456 U.S. 228, 241-42 (1982) (state had already used currently applicable law to attempt to compel plaintiff to register with the state before soliciting contributions); *Eckles v. City of Corydon*, 341 F.3d 762, 767-68 (8th Cir. 2003) (non-enforcement only while lawsuit was pending, and city "clearly outlined the actions it plans to take . . . as soon as the federal case ends"); *N.J. Physicians, Inc. v. Obama*, 653 F.3d 234, 240 & n.5 (3d Cir. 2011) (plaintiff lacked standing to challenge the ACA); *Fla. ex rel. Att'y Gen. v. HHS*, 648 F.3d 1235, 1243 (11th Cir. 2011) (challenge to the ACA, with respect to which there was no reason to expect a change); *Vill. of Bensenville v. FAA*, 376 F.3d 1114, 1119 (D.C. Cir. 2004) (challenged fee was final, and the city would soon "begin collecting . . . the fee"); *Chabad v. Cincinnati*, 363 F.3d 427, 432-33 (6th Cir. 2004) (currently applicable "flat prohibition"); *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 388-89 (4th Cir. 2001) (non-enforcement policy limited to a defined geographic region, and plaintiff alleged intent to engage in advocacy beyond that region); *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000) (no indication law would change, and only indication that state would not apply law to plaintiff was informal statement made in the context of litigation); *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (enforcement contingent on the vote of commissioners, and no evidence rule would change).

court explained in rejecting a similar argument: "The government [ ] has done nothing to suggest that it might abandon its efforts to modify the rule—indeed, it has steadily pursued that course—and it is entitled to a presumption that it acts in good faith." 2012 WL 2914417, at *9.

Geneva also has not established standing by alleging *current* harm from the "uncertainty" regarding whether the regulations will be amended. *See* Opp'n at 12-13. Geneva cannot transform its allegations of speculative (and highly unlikely) future harm into a current concrete injury by claiming a need to prepare for that speculative (and highly unlikely) future harm. *See Nw. Airlines, Inc. v. FAA*, 795 F.2d 195, 201 (D.C. Cir. 1986). The plaintiffs in *Wheaton* and *Belmont Abbey* made similar allegations, and both courts found standing lacking.

With good reason: Under Geneva's theory, a party claiming to be currently affected by the most remote or ill-defined government actions would have standing, thereby sapping the imminence requirement of any meaning. Every organization plans for the future, even for events that are unlikely to occur. Under Geneva's theory, an organization would have standing to challenge a future event that has only a one percent chance of happening—after all, the organization might feel the need to prepare for such an event just in case. But this theory cannot be reconciled with the Supreme Court's admonition that the threatened injury must be "certainly impending." *Whitmore*, 495 U.S. at 158. Geneva's present-injury allegations are all predicated upon the possibility that defendants will enforce the challenged regulations against it in their current form after the safe harbor expires. *See* Opp'n at 12-13. It is impossible to square any assertion that this scenario is "certainly impending" (or even at all likely) with the fact that defendants have publicly committed themselves to the development of amended regulations—and have indeed initiated the development of such regulations—aimed at addressing concerns of the very type that Geneva has raised.

Once again, *none* of the cases Geneva cites, *see* Opp'n at 12-13, involves the present effects of a law that is undergoing amendment and not being enforced by the government.[4]

[4] *See Pierce v. Soc'y of the Sisters*, 268 U.S. 510 (1925) (currently applicable law would "inevitabl[y]" result in the destruction of the plaintiffs' schools); *Miller v. Brown*, 462 F.3d 312, 321 (4th Cir. 2006) (open primary law required plaintiffs to alter their political campaign

Geneva seizes on the Seventh Circuit's statement that "the present impact of a future though uncertain harm *may* establish injury in fact," *Lac Du Flambeau Band of Lake Sup. Chippewa Indians v. Norton*, 422 F.3d 490, 498 (7th Cir. 2005) (emphasis added), but that case simply recognized that a tribe was currently harmed when the capital costs of its casino ventures rose as a result of an anti-competitive compact between the state and another tribe that was in force and unchanging. *Id.* at 499. It was not a pre-enforcement challenge and has no bearing here.

In sum, Geneva cannot rely on its speculative future injuries to create standing.

B. Geneva's Claims Are Not Ripe[5]

1. Geneva has failed to establish current adversity.

Geneva maintains that there is sufficient adversity of interest because it is challenging regulations that are "current" and published in the Code of Federal Regulations. Opp'n at 15-16. This formalistic argument ignores defendants' "clear[] and repeated[]" statements that they intend to amend the regulations. *Belmont Abbey*, 2012 WL 2914417, at *9. It also ignores the ANPRM, whereby defendants "initiated the amendment process." *Id*. And it is inconsistent with the Supreme Court's instruction that ripeness should be analyzed in a "flexible" and "pragmatic" way. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-50 (1967). Because defendants' position is "tentative" and "indeterminate," and because the forthcoming amendments may eliminate the

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decisions *immediately*, and delay would diminish the effectiveness of those decisions); *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005) (dealership harmed by car manufacturer's certification program, which was currently in effect); *Va. Soc'y for Human Life*, 263 F.3d at 388-89 (non-enforcement limited, and no indication that law would change). Although Geneva cites the decision in *Newland v. Sebelius*, No. 12-cv-1123, 2012 WL 3069154 (D. Colo. July 27, 2012), to suggest that health plans require advance planning, it ignores that the employer in that case did not have the benefit of the enforcement safe harbor.

[5] Geneva cites *Peachlum v. City of York*, 333 F.3d 429 (3d Cir. 2003), to suggest that a relaxed ripeness standard applies in cases involving fundamental rights. Even assuming that is correct, Geneva's claims would still be unripe. In *Peachlum*, the court indicated that, in such cases, "even the remotest threat of prosecution, such as the *absence* of a promise not to prosecute, has supported a holding of ripeness where the issues in the case were 'predominantly legal' and did not require additional factual development." *Id.* at 435 (emphasis added). Here, of course, defendants *have* provided a promise not to enforce, and further factual development is required to know how, if at all, the regulations will apply to Geneva. In any event, that this case has First Amendment implications just as equally warrants postponement of review. *See Belmont Abbey*, 2012 WL 2914417, at *14 ("[R]estraint is particularly warranted where, as here, the issue is one of constitutional import.").

need for judicial review entirely or at least narrow and refine the controversy, the regulations are not "final" in any meaningful sense. *Belmont Abbey*, 2012 WL 2914417 at *12 (citing *Ciba-Geigy v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986)); *see also Wheaton*, 2012 WL 3637162, at *8.

Thus, this case does not involve a "mere contingency" that defendants might revise the regulations at some future time, as Geneva claims. Opp'n at 15. There is nothing *contingent* about defendants' intent to amend the regulations. And Geneva's suggestion that it will be unsatisfied with whatever amendments result from the process, *see* Opp'n at 16, is not grounds for this Court to issue an advisory opinion on the lawfulness of the ideas proposed in the ANPRM. *See Belmont Abbey*, 2012 WL 2914417, at *13. Geneva cannot maintain that nothing flowing from the ANPRM could possibly alter its challenge when the ANPRM is a mere starting point, and Geneva has ample opportunity to help shape the coming amendments.

The hardship of which Geneva complains is just too speculative to create adversity of interest. Geneva "cannot base an argument of undue burden from postponement of a judicial decision on [its] having to plan for a future event, as opposed to the actual event, if that event is too speculative in the first instance." *Cephalon, Inc. v. Sebelius*, 796 F. Supp. 2d 212, 218 (D.D.C. 2011). Geneva's alleged desire to plan for future (if highly unlikely) contingencies does not constitute a hardship, even if, as Geneva claims, it currently feels the effects of that planning. *See, e.g.*, *Wilmac Corp. v. Bowen*, 811 F.2d 809, 813 (3d Cir. 1987); *Cephalon*, 796 F. Supp. 2d at 218. The "hardship" that it claims is rooted in a desire to plan for contingencies that almost certainly will never arise. Faced with similar allegations, the courts in *Belmont Abbey*, *Wheaton*, and *Nebraska* concluded that the plaintiffs had not demonstrated sufficient harm from delayed review. Geneva cannot distinguish those cases. Indeed, in *none* of the cases it cites with respect to hardship was there any indication that the defendants intended to amend the challenged law, much less that they were actively doing so.[6]

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[6] *See Pac. Gas & Elec. Co. v. State Energy Resource Conservation & Develop. Comm'n*, 461 U.S. 190, 198 (1983) (state law immediately affected the day-to-day operations of the plaintiffs, as they could not construct new facilities, and no expectation that the law was subject to change); *United States v. Loy*, 237 F.3d 251, 257 (3d Cir. 2001) (condition of supervised release was currently in place and not subject to change); *App. Power Co v. EPA*, 208 F.3d 1015,

2. Geneva cannot establish conclusivity given the amendment process.

For substantially similar reasons, Geneva cannot establish conclusivity. Geneva contends that this case is sufficiently conclusive because the issues in this case are predominantly legal. Opp'n at 16-18. Yet courts may not opine on the lawfulness of regulations that are not yet final no matter how "legal" the issues may be. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. N.Y. Dep't of Envtl. Conservation*, 79. F.3d 1298, 1306 (2d Cir. 1996). Until the pending rulemaking is completed, this Court has nothing to review. *See Belmont Abbey*, 2012 WL 2914417, at *14 ("[C]ourts should refrain from 'intervening into matters that may best be reviewed at another time or in another setting,' even if the issue presented is purely legal and otherwise fit for review." (quotations omitted)). Thus, a judgment on Geneva's claims, before defendants have completed amending the regulations "would itself be a 'contingency.'" *Armstrong World Indus. v. Adams*, 961 F.2d 405, 412 (3d Cir. 1992). *Compare CSI Aviation Servs., Inc. v. U.S. Dep't of Transp*, 637 F.3d 408, 410 (D.C. Cir. 2011) (agency had reiterated its "definitive" legal position); *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 398 (D.C. Cir. 2008) (issue "conclusively resolved").

3. Review of Geneva's claims would be of little practical help, or utility.

Geneva is also wrong to suggest that review at this time would be of any meaningful practical help, or utility. In conducting a utility inquiry, courts "look at the hardship to the parties of withholding decision" and "whether the claim involves uncertain and contingent events." *See Tait v. City of Phila.*, 410 F. App'x 506, 510 (3d Cir. 2011). As discussed above, Geneva faces no present harm, given the enforcement safe harbor, and Geneva's claims depend fundamentally on a contingent (and highly unlikely) future event—namely, that defendants will not amend the regulations as they have committed to do. By seeking review of the challenged regulations now,

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1022 (D.C. Cir. 2000) (suggestion that law was subject to change, asserted only in a brief, was not enough to make the challenged law unripe); *Pub. Serv. Co. of N.H. v. Patch*, 167 F.3d 15, 24 (1st Cir. 1998) (plan was ripe for review after commission "disposed of requests for reconsideration" and ongoing proceedings would only "refine" formulas); *Am. Paper Inst. v. EPA*, 996 F.2d 346, 354-55 nn. 7-8 (D.C. Cir. 1993) (challenged standard "currently required" consideration of only B list waters, and no formal indication regulation would change).

before they have taken on fixed and final shape, Geneva asks the Court to issue an advisory opinion on the lawfulness of regulations that will never be enforced against Geneva.[7]

C. Geneva Lacks Both Standing and Ripeness to Assert Each of Its Claims

Finally, Geneva misses the mark by arguing that the safe harbor and the ongoing rulemaking do not affect its challenge to the religious employer exemption and its APA claims. *See* Opp'n at 5-7. Because Geneva cannot know what form the final regulations will take, *see Wheaton*, 2012 WL 3637162, at *8 & n.11, it is pure speculation to suggest that the amended regulations will not address these concerns as well. And, with respect to Geneva's APA claim, it is difficult to see how the Court could meaningfully review regulations that are in flux, as any ruling would be immaterial once the amendment process is complete. Because there is a substantial likelihood that *all* of Geneva's claims will soon be made entirely irrelevant, *all* of its claims should be dismissed.

II. THE COURT SHOULD DISMISS THE HEPLER PLAINTIFFS' RELIGIOUS FREEDOM RESTORATION ACT CLAIM

A. The Hepler Plaintiffs Have Not Sufficiently Alleged That the Preventive Services Coverage Regulations Substantially Burden Religious Exercise

The Hepler Plaintiffs' claim that Seneca can exercise religion within the meaning of RFRA.[8] But that position cannot be reconciled with the company's status as a *secular* employer. *See* Defs.' Mot at 23-25 (explaining why Seneca is a secular company). The terms "religious" and "secular" are antonyms; a "secular" entity is defined as "not overtly or specifically religious." *Merriam-Webster's Collegiate Dictionary* 1123 (11th ed. 2003). There is no such thing as a "secular religious" company. Rather than attempt to explain this anomaly, the Hepler Plaintiffs accuse the government of suggesting that "for-profit corporations cannot engage in

[7] The Court should reject Geneva's attempts to recast defendants' jurisdictional arguments as questions of mootness. *See* Opp'n at 11, 18-19. This case would be about mootness if Geneva had already established injury, the case was proceeding, and then the cause of the injury disappeared. But here, any injury is speculative and in the future, which raises quintessential standing and ripeness questions. Indeed, the plaintiffs in *Belmont Abbey* and *Wheaton* raised similar arguments to no avail. *See, e.g.*, *Wheaton*, 2012 WL 3637162, at *4 n.6.

[8] The Hepler Plaintiffs' discussion of WLH Enterprises is, of course, irrelevant, given that WLH's employees participate in Seneca's health plan, Amend. Compl. ¶ 91, and the preventive services regulations therefore require nothing separate of WLH Enterprises.

'free exercise' as a categorical matter." Opp'n at 23. That charge is misplaced. This case presents no occasion to decide whether a for-profit company may ever assert a claim under the Free Exercise Clause or RFRA—although there is no precedent for such a claim. Here, the relevant plaintiff is a for-profit corporation that makes and sells secular products (*i.e.*, lumber products, hardware, building supplies) and that is not affiliated with or managed by any formally religious entity. Although the Hepler Plaintiffs try mightily to establish that corporations in the abstract can exercise religion, they offer no real response to the observation that *this particular* company has none of the hallmarks of a religious organization and thus cannot exercise religion.

Because Seneca is a secular company, it is not entitled to the protections of the Free Exercise Clause or RFRA. This is because, although the First Amendment freedoms of speech and association are "right[s] enjoyed by religious and secular groups alike," the Free Exercise Clause "gives special solicitude to the rights of *religious* organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (emphasis added). The caselaw is replete with statements to this effect. *See, e.g.*, *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) ("[The Court's precedent] radiates . . . a spirit of freedom for *religious* organizations, an independence from secular control or manipulation.") (emphasis added); *Hosanna-Tabor*, 132 S. Ct. at 706 (the Free Exercise Clause "protects a *religious* group's right to shape its own faith and mission") (emphasis added); *Werft v. Desert Sw. Annual Conference of United Methodist Church*, 377 F.3d 1099, 1102 (9th Cir. 2004) ("The Free Exercise Clause protects the power of *religious* organizations . . . .") (emphasis added). This case should therefore begin and end with the undisputed facts that confirm that Seneca is a secular company.

Indeed, no court has ever held that a for-profit corporation that sells secular products is a "religious corporation" for purposes of federal law. For this reason, such secular companies cannot discriminate on the basis of religion in hiring their employees or otherwise establishing the conditions of employment. Title VII generally prohibits religious discrimination in the workplace. *See* 42 U.S.C. § 2000e-2(a). But that bar does not apply to "a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work

connected with the carrying on . . . of its activities." *Id.* § 2000e-1(a). Clearly Seneca does not qualify as a "religious corporation" for purposes of Title VII; it is for-profit, it sells secular products, it holds itself out as a secular entity, and it is not affiliated with a formally religious entity. *See LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217, 226 (3d Cir. 2007).

It would be extraordinary to conclude that Seneca is not a "religious corporation" under Title VII, and thus cannot discriminate on the basis of religion in hiring or firing or otherwise establishing the terms and conditions of employment, 42 U.S.C. § 2000e-1(a), but nonetheless "exercise[s] . . . religion" within the meaning of RFRA, *id.* § 2000bb-1(b). In such a world, a secular company would be free to impose its owner's religious beliefs on its employees to deny those employees the protection of myriad general laws designed to protect their health and well-being. Moreover, any of the countless secular companies in this country would have precisely the same right as a religious organization to, for example, require that its employees "observe the [company's owner's] standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 330 n.4 (1987). Consequences like these are why the Free Exercise Clause, RFRA, and Title VII distinguish between secular and religious organizations, with only the latter receiving special protection.

The Hepler Plaintiffs find no refuge from this conclusion in cases like *United States v. Lee*, 455 U.S. 252 (1982), and *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 800 F. Supp. 2d 405 (E.D.N.Y. 2011). *See* Opp'n at 25-26. Those cases do not stand for the proposition that a for-profit company with overwhelmingly secular characteristics can exercise religion within the meaning of RFRA and the First Amendment. The plaintiff in *Lee* was an Amish individual who employed several other people on his farm; the plaintiff was not a secular company, much less a corporation with layers of legal separation from its owner. And the plaintiffs in *Commack* were a deli and butcher shop specializing in kosher foods. The court held that the challenged law "does not restrict any religious practice" and therefore had no reason to

reach the question of whether a secular organization can exercise religion. 800 F. Supp. 2d at 407. Nothing in the opinion discussed the secular or religious characteristics of the plaintiffs.[9]

The Hepler Plaintiffs alternatively contend that the contraceptive coverage requirement imposes a substantial burden on the Heplers themselves. Defendants agree, of course, that individuals like the Heplers are capable of exercising religion. But the contraceptive coverage requirement does not apply to the Heplers; it applies to their secular company's group health plan, which is two separate legal entities removed from the Heplers. *See* Defs.' Mot. at 25-28 & n.13. The Hepler Plaintiffs' contrary view—that an owner of a corporation can assert a RFRA claim on the corporation's behalf because the corporation can act only through its owners and operators, *id*. at 28-29—would expand RFRA's scope in an extraordinary way. It is of course true that all corporations act through human agency. But that cannot mean that any legal obligation imposed on a corporation is also the obligation of the owner or that the owner's and the corporation's rights are coextensive; if that were the rule, any secular company with a religious owner or shareholder would be permitted to discriminate against the company's employees on the basis of religion in establishing the terms and conditions of employment. This result would constitute a wholesale evasion of the rule that a company must be a "religious organization" to assert free exercise rights, *Hosanna-Tabor*, 132 S. Ct. at 706, or a "religious corporation" to permissibly discriminate on the basis for religion in hiring or firing its employees or otherwise establishing the terms and conditions of their employment, 42 U.S.C. § 2000e-1(a).

Nor is it enough that an owner may bear part of the financial impact of a regulation that is imposed on a corporation. Indeed, employees also will presumably bear a portion of any such

[9] Seneca's secular characteristics also show why the Hepler Plaintiffs' reliance on cases like *Primera Iglesia Bautista Hispana v. Broward County*, 450 F.3d 1295 (11th Cir. 2006), and *McClure v. Sports and Health Club*, 370 N.W. 2d 844 (Minn. 1985), is misplaced. *Primera Iglesia* involved, in the court's own words, an "incorporated *religious* organization." 450 F.3d at 1300 (emphasis added). And *McClure* expressly declined to decide whether the corporation could assert a right to free exercise of religion; the court assumed for purposes of the case that the owners and the corporation were "one and the same" and thus considered only the free exercise rights of the owners. *McClure*, 370 N.W. 2d at 850-51 & n.12. What relevant language there is in *McClure* supports defendants. *See id.* at 853 ("Sports and Health, however, is not a religious corporation—it is a Minnesota business corporation engaged in business for profit.").

financial impact. "In our modern regulatory state, virtually all legislation (including neutral laws of general applicability) imposes an incidental burden at some level by placing indirect costs on an individual's activity. Recognizing this . . . [t]he federal government . . . ha[s] identified a substantiality threshold as the tipping point for requiring heightened justifications for governmental action." *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 262 (3d Cir. 2008) (Scirica, C.J., concurring). For this reason, the Hepler Plaintiffs' view that a regulation's attenuated impact on a secular company's owner is enough to create a substantial burden cannot be reconciled with the Supreme Court's warning that "[t]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961).[10]

Indeed, the first court to decide the merits of a for-profit, secular company's challenge to the preventive services coverage regulations concluded, as defendants argue here, that the regulations do not impose a substantial burden on a company or its owner, religious though she may be. *See O'Brien*, slip op. at 7-13. Assuming, but not deciding, that the company could exercise religion, the court determined that any burden on that exercise is too attenuated to state a claim: "The burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and

[10] *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), and *EEOC v. Townley Engineering and Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988), do not suggest otherwise. Both cases expressly declined to decide whether "a for-profit corporation can assert its own rights under the Free Exercise Clause." *Stormans*, 586 F.3d at 1119; *see also Townley*, 859 F.2d at 619, 620. Instead, *Stormans* held that a particular corporation had standing to raise the rights of its owner. 586 F.3d at 1119-22. But this case does not present that standing question, as the Heplers themselves are plaintiffs here. As for the question that this case *does* present—whether a burden on a corporation is also a burden on its owner—*Stormans* had nothing to say. Indeed, while the case discussed whether the challenged rules were neutral and generally applicable, it did not address the substantial burden prong at all. Similarly, nothing in *Townley* suggests that a burden on a corporation is also a burden on its owner. Although the court allowed the company to assert the rights of its owners, *see Townley*, 859 F.2d at 619-20 & n.15, it did not find that Title VII imposed a substantial burden on the owners' religious exercise. Rather, *Townley* acknowledged that the challenged statute "to some extent would adversely affect [plaintiffs'] religious practices," and then upheld Title VII on compelling interest grounds. In short, neither case remotely supports the proposition that a burden on the corporation is a burden on its owners.

patients covered by [the company's] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiffs' religion." *Id*. at 9. The court observed that, "if the financial support of which plaintiffs complain was in fact substantially burdensome, secular companies owned by individuals objecting on religious grounds to all modern medical care could no longer be required to provide health care to employees." *Id*. at 12. Because "requir[ing] an outlay of funds that might eventually be used by a third party in a manner inconsistent with one's religious values" is "at most a de minimus burden on religious practice," the court dismissed the plaintiffs' RFRA claim. *Id*. at 13. This Court should do the same.

B. The Preventive Services Coverage Regulations Serve Compelling Interests and Are the Least Restrictive Means to Achieve Those Interests

1. The regulations significantly advance compelling governmental interests.

The "exemptions" from the preventive services coverage regulations the Hepler Plaintiffs' cite, *see* Opp'n at 31,[11] do not change the fact that the regulations are the least restrictive means to advance the government's compelling interests. Two of the three exemptions are not exemptions from the regulations at all, but are instead provisions of the ACA that exclude individuals and entities from various requirements imposed by the ACA. These provisions reflect the government's attempts to balance the compelling interests underlying the challenged regulations against other significant interests supporting the complex administrative scheme created by the ACA. *See Lee*, 455 U.S. at 259. And, unlike the exemption the Hepler Plaintiffs seek, the existing exemptions do not undermine the government's interests in any significant way. *See Church of Lukumi Babolu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993).

First, the grandfathering of certain health plans from certain provisions of the ACA, *see* 42 U.S.C. § 18011, is in effect a transition in the marketplace with respect to several provisions

[11] The Hepler Plaintiffs rely on the *Newland* decision to support their argument. *Newland*, however, was decided in the context of a motion for a preliminary injunction, and the district court applied a "relaxed standard" under which "[p]laintiffs need only establish that their challenge presents questions going to the merits . . . so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." 2012 WL 3069154 at *5 (internal quotations and citation omitted). Obviously, the standard that this Court must apply in deciding the pending motion to dismiss is more demanding. Furthermore, for the reasons stated here, defendants believe that *Newland* was wrongly decided.

of the ACA, including the preventive services coverage provision. Thus, the universe of employees with currently grandfathered plans will not remain untouched by the regulations, and the incremental transition does nothing to call into question the compelling interests furthered by the regulations. Even under grandfathering, it is projected that an ever increasing number of group health plans will transition to the requirements under the regulations as time goes on. Defendants estimate that a majority of group health plans will lose their grandfather status by 2013. *See* 75 Fed. Reg. 34,538, 34,552 (June 17, 2010). Thus, any purported damage to the compelling interests underlying the regulations will be quickly mitigated, unlike the *permanent* exemption from the regulations that the Hepler Plaintiffs seek. They would have this Court believe that an interest cannot truly be "compelling" unless Congress is willing to impose it on everyone all at once despite competing interests, but they offer no support for such an untenable proposition. In light of the complexities inherent in implementing this administrative scheme, Congress's approach is a reasonable balancing of competing interests.

Second, 26 U.S.C. § 5000A(d)(2)(A) exempts from the minimum coverage provision of the ACA those "member[s] of a recognized religious sect or division thereof" who, on the basis of their religion, are opposed to the concept of health insurance. *See also id.* § 1402(g). The minimum coverage provision will require certain individuals who fail to maintain a minimum level of health insurance to pay a tax penalty beginning in 2014. This provision is entirely unrelated to the challenged regulations. Nor could it provide any exemption from them, 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 certain preventive services coverage to their participants. It is also, unlike the exemption sought by plaintiffs, sufficiently narrow so as not to undermine the larger administrative scheme. *See Lee*, 455 U.S. at 260-61 (discussing 26 U.S.C. § 1402(g), which is incorporated by reference into 26 U.S.C. § 5000A(d)(2)(A) and is thus identical in scope to the exemption at issue here). Furthermore, exempting this particular class of individuals from the minimum coverage provision is unlikely to appreciably undermine the compelling interests motivating the preventive services coverage

regulations. By definition, a woman who is "conscientiously opposed to acceptance of the benefits of any private or public insurance which . . . makes payments toward the cost of, or provides services for, medical care," 26 U.S.C. § 1402(g)(1), would not utilize contraceptive coverage even if it were offered.

The only true exemption from the preventive services coverage regulations cited by the Hepler Plaintiffs is the exemption for "religious employer[s]," 45 C.F.R. § 147.130(a)(1)(iv). But there is a rational distinction between the narrow exception currently in existence and the Hepler Plaintiffs' requested expansion. A "religious employer" is narrowly defined to be an employer that, *inter alia*, has the "inculcation of religious values" as its purpose and "primarily employs persons who share the religious tenets of the organization." *Id*. Thus, the exception anticipates that the impact of the exemption on employees will be minimal, given that any religious objections of the exempted employers are presumably shared by most, if not all, of the individuals making the choice as to whether to use contraceptive services. *See* 77 Fed. Reg. at 8725, 8728 (Feb. 15, 2012). The same is not true for Seneca, which cannot discriminate based upon religious beliefs when hiring, and thus almost certainly employs many individuals who do not share the Heplers' beliefs. The government's interest is particularly acute as applied to employers like Seneca that do not currently provide contraceptive coverage to their employees.

2. The regulations are the least restrictive means of advancing the government's compelling interests.

The preventive services coverage regulations, moreover, are the least restrictive means of furthering the underlying dual, albeit intertwined, interests. When determining whether a particular regulatory scheme is "least restrictive," the appropriate inquiry is whether the individual or organization with religious objections, and those similarly situated, can be exempted from the scheme—or whether the scheme can otherwise be modified—without undermining the government's compelling interest. *See, e.g.*, *Quaring v. Peterson*, 728 F.2d 1121, 1126 (8th Cir. 1984); *United States v. Wilgus*, 638 F.3d 1274, 1289-95 (10th Cir. 2011).

Instead of explaining how Seneca and similarly situated secular companies could be exempted from the regulations without damage to the government's compelling interests, the Hepler Plaintiffs conjure up several new regulatory schemes. Opp'n. at 33-34. But, just because they can devise a wholly different system that would purportedly address their concerns does not make that scheme a feasible alternative. *See Wilgus*, 638 F.3d at 1289 ("Not requiring the government to do the impossible—refute each and every conceivable alternative regulation scheme—ensures that scrutiny of federal laws under RFRA is not 'strict in theory, but fatal in fact.'" (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring))).

In effect, the Hepler Plaintiffs want the government "to subsidize private religious practices," *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 94 (Cal. 2004), by adopting an entirely new legislative or administrative scheme. But a proposed alternative scheme is not an adequate alternative—and thus not a viable less restrictive means to achieve the compelling interest—if it is not "feasible" or "plausible." *See, e.g.*, *New Life Baptist Church v. Town of East Longmeadow*, 885 F.2d 940, 947 (1st Cir. 1989) (considering "in a practical way" whether proffered alternative would "threaten potential administrative difficulties, including those costs and complexities which . . . may significantly interfere with the state's ability to achieve its . . . objectives"). In determining whether a proposed alternative scheme is feasible, courts often consider the burdens and disadvantages that would be imposed on other important interests, including the additional administrative and fiscal costs of the proffered scheme. *See, e.g.*, *id*. at 947 ("[A]dministrative considerations play an important role in determining whether or not the state can follow its preferred means."); *see also Adams v. Comm'r of Internal Revenue*, 170 F.3d 173, 180 n.8 (3d Cir. 1999). The Hepler Plaintiffs' alternatives would impose considerable new costs on the government and would otherwise be impractical.

Moreover, the Hepler Plaintiffs' challenge is to regulations promulgated by defendants, not to the ACA. But it is the ACA that requires that certain preventive services be covered without cost-sharing through the existing employer-based system. *See* H.R. Rep. No. 111-443, pt. II, at 984-86. Thus, defendants are constrained by the statute from adopting one of the Hepler

Plaintiffs' non-employer-based alternatives. Nor would the proposed alternatives be equally effective in advancing the government's compelling interests. As discussed above, the anticipated benefits of the preventive services coverage regulations are attributable not only to the fact that contraceptive services will be available to women with no cost-sharing but also to the fact that these services will be available through the existing employer-based system, thus ensuring that women will face minimal obstacles to receiving coverage of their care. The Hepler Plaintiffs' alternatives, on the other hand, have none of these advantages and thus do not represent reasonable less restrictive means.

III. THE HEPLER PLAINTIFFS' FIRST AMENDMENT CLAIMS SHOULD BE DISMISSED[12]

A. The Regulations Do Not Violate the Free Exercise Clause

The Hepler Plaintiffs boldly assert that the "object of the [preventive services coverage regulations] is to infringe upon or restrict practices because of their religious motivation." Opp'n at 35. The real object of the regulations, however, is to increase access to recommended preventive services, including those for women. *See* Defs.' Mot at 7-10. In light of the broad scope of the regulations, the Hepler Plaintiffs cannot seriously contend that they were designed as an assault on religion. To the contrary, defendants have made efforts to accommodate religion by creating the religious employer exemption and announcing their intent to provide additional accommodations for certain religious organizations. *See* 45 C.F.R. § 147.130(a)(1)(iv). The First Amendment does not prohibit the government from distinguishing between *organizations* based on their purpose and composition; it only prohibits the government from favoring one *religion*, *denomination*, or *sect* over another. *See* Defs.' Mot. at 32-34. Therefore, defendants' decision not to provide an exemption for for-profit, secular companies does not destroy neutrality.[13]

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[12] As defendants explained in their opening brief, *see* Defs.' Mot. at 3-4, 46, the highest courts of two states have rejected First Amendment claims nearly identical to the ones raised here. *See Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006); *Catholic Charities of Sacramento*, 85 P.3d 67. The Hepler Plaintiffs make no effort to address these decisions in their opposition. And, of course, now, a third court has rejected their arguments. *See O'Brien*, slip op. at 13-25.

[13] The Hepler Plaintiffs' reliance on *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), and *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), to suggest

B. The Regulations Do Not Violate the Establishment Clause

Plaintiffs attempt to re-write Establishment Clause jurisprudence by arguing that it prohibits the government from making any distinctions between organizations based on their purpose, character, and composition. Opp'n at 36. But the Establishment Clause prohibits only laws that "officially prefer[]" "one religious *denomination*" over another, *Larson*, 456 U.S. at 244 (emphasis added); it does not prohibit the government from distinguishing between different types of organizations—based on an organization's purpose, composition, or character—when the government is attempting to accommodate religion. *See* Defs.' Mot. at 34-36; *see also O'Brien*, *slip op.* at 18; *Droz v. Comm'r of IRS*, 48 F.3d 1120, 1124 (9th Cir. 1995).

The Hepler Plaintiffs also have failed to allege that the religious employer exemption fosters excessive government entanglement with respect to Seneca. Seneca does not purport to be a religious organization and does not satisfy even the fourth criterion for the exemption. Defs.' Mot. at 36. In their opposition, the Hepler Plaintiffs do not contend that the fourth criterion requires any entangling inquiry. Moreover, the Hepler Plaintiffs' argument is premised on speculation about how the exemption might be administered or enforced in the future. They do not allege that the government has made any inquiries in this regard, much less any entangling ones. *See O'Brien*, slip op. at 17-22.

C. The Regulations Do Not Violate the Free Speech Clause

The Hepler Plaintiffs' free speech claim is based on a misconception of what is required by the challenged regulations. The regulations do not require Seneca to subsidize education and counseling *in favor* of the use of contraceptive services. *See* Opp'n at 37. Rather, they require that employers offer a health plan that includes coverage for "patient education and counseling for all women with reproductive capacity," as prescribed by a health care provider. *See* HRSA,

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that the challenged regulations are not generally applicable, Opp'n at 34-35, is misplaced. Those cases addressed only policies that created a secular exemption but refused all religious exemptions. *See Blackhawk*, 381 F.3d at 212; *Fraternal Order of Police*, 170 F.3d at 365. The preventive services coverage regulations, in contrast, contain both secular and religious exceptions. Thus, there is simply no basis in this case to infer "discriminatory intent" on the part of the government. *See Fraternal Order of Police*, 170 F.3d at 365.

Women's Preventive Services: Required Health Plan Coverage Guidelines, *available at* http://www.hrsa.gov/womensguidelines/. The regulations do not purport to regulate the content of the education or counseling provided—that is between the patient and her health care provider. Thus, this case does not involve the sort of "political and ideological causes" at issue in the Supreme Court's compelled-subsidy cases. *See, e.g.*, *Keller v. State Bar of Cal.*, 496 U.S. 1, 5 (1990). The Hepler Plaintiffs' free speech claim is thus meritless. *See O'Brien*, *slip op.* at 22-25.

IV. THE HEPLER PLAINTIFFS' DUE PROCESS CLAIM SHOULD BE DISMISSED

The Hepler Plaintiffs now assert that the statutory provision requiring Seneca to provide coverage for recommended preventive services—§ 2713 of the Public Health Service Act—somehow is so "standardless" as to violate due process. Opp'n at 38. But a law is not unconstitutionally vague unless it "fails to provide a person of ordinary intelligence fair notice of what is prohibited" or "is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). Under the latter prong, upon which the Hepler Plaintiffs rely, a law is void for vagueness if it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972). Section 2713 bears none of the hallmarks of a law so vague as to authorize arbitrary enforcement. Section 2713(a)(4)—like countless regulatory provisions—expressly contemplates the development of additional requirements by an agency through rulemaking, which specify the manner in which § 2713(a)(4) is to be implemented and enforced. *See* 42 U.S.C. § 300gg-13(a)(4). It cannot be that Congress violates due process when it authorizes development of guidelines to implement a statutory provision. In fact, the assertion that defendants' authority under § 2713 is "unfettered," Opp'n at 38, does not raise a vagueness question at all, but is in effect a claim that Congress has improperly delegated its authority. *See United States v. Goldfield Deep Mines Co.*, 644 F.2d 1307, 1309-10 (9th Cir. 1981). But courts have "almost never felt qualified to second-guess Congress" in this regard, *id.* at 474-75, and "[o]nly the most extravagant delegations of authority . . . have been condemned by the Supreme Court as

unconstitutional," *Humphrey v. Baker*, 848 F.2d 211, 217 (D.C. Cir. 1988). The Court should dismiss the Hepler Plaintiffs' due process claim.

V. THE COURT SHOULD DISMISS THE HEPLER PLAINTIFFS' APA CLAIM

The Hepler Plaintiffs make no effort to rebut defendants' argument that they lack prudential standing to assert their § 1303(b)(1) claim under the APA. And, therefore, the Court should conclude that they have conceded this point. *See also O'Brien*, *slip op.* at 26-27. Even if they had standing, however, their § 1303(b)(1) and Weldon Amendment claims fail. The Hepler Plaintiffs suggest that the meaning of the term "abortion" as used in federal law is a question of fact. But statutory interpretation is a question of law, *see Gov't Emps. Ins. v. Benton*, 859 F.2d 1147, 1149 (3d Cir. 1988), and the Hepler Plaintiffs cannot show that the regulations violate the APA by disputing defendants' reasonable interpretation of the relevant statutes.[14]

The Hepler Plaintiffs also contend that defendants acted arbitrarily and capriciously by failing to consider concerns expressed in comments on the interim final rules "'about paying for such [contraceptive] services,' and that the 'narrower scope of the [religious employer] exemption raises concerns under the First Amendment and [RFRA].'" Opp'n at 43 (quoting 77 Fed Reg. at 8727). Yet the Hepler Plaintiffs ignore defendants' statements in the rulemaking record in response to precisely those comments. *See* 77 Fed Reg. at 8727; *see also Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29at 43 (decision must be upheld if "the agency's path may be reasonably discerned"). Accordingly, the Hepler Plaintiffs' APA claim is without merit.

CONCLUSION

For these reasons and those set forth in defendants' opening brief, the Court should grant defendants' Motion to Dismiss the First Amended Complaint.

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[14] Likewise, with respect to the Church Amendments, the Hepler Plaintiffs implausibly suggest that the challenged regulations are a "program" and that they "are 'required to perform or assist in the performance of'" that so-called program. Opp'n at 42. But the preventive services regulations are just that—regulations—and owning a company that provides a health plan is not performing or assisting in the performance of anything administered by the United States Department of Health and Human Services.

Respectfully submitted this 4th day of October, 2012,

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2012, I caused a true and correct copy of the foregoing to be served on plaintiffs' counsel by means of the Court's ECF system.

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