IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

GRACE SCHOOLS and BIOLA UNIVERSITY, INC., Plaintiffs, v. KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, *et al.*, Defendants.	Case No. 3:12-cv-00459-JD-CAN

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, AND MEMORANDUM IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs challenge regulations related to the provision of contraceptive coverage that require plaintiffs to take the *de minimis* step that they would have to take even in the absence of such regulations: convey to their issuers or third party administrators (TPAs) that they do not wish to provide contraceptive coverage. Plaintiffs are eligible for a regulatory accommodation that relieves them from having to contract, arrange, pay, or refer for contraceptive coverage, and that in no way prevents plaintiffs from continuing to voice their disapproval of contraceptive use or even from encouraging their employees to refrain from using contraceptive services. To avail themselves of this significant accommodation, plaintiffs need do nothing more than provide their issuers or TPAs with a copy of a self-certification that they are eligible for the accommodations. Such a minimal requirement is no "burden" at all, let alone one sufficient to invalidate the regulations. In response to this reality, which defendants described in their opening brief, plaintiffs contend that the challenged regulations interfere with their ability to foster their academic community's religious convictions, and that the regulations *do* require them to change their behavior in a significant way.

Plaintiffs' arguments fail for several reasons. First, courts have been clear that a substantial burden exists under RFRA "when government action puts 'substantial pressure on an adherent *to modify his behavior* and to violate his beliefs.'" *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (citing *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981) (emphasis added)). Plaintiffs' broader complaint about their ability to foster their religious beliefs does not amount to a substantial burden under that case law. Further, the regulations do not prevent plaintiffs from fostering their convictions in their community, since plaintiffs are in no way prevented from voicing their disapproval of contraceptives or from encouraging their employees to refrain from using contraceptives.

Second, the regulations impose no more than *de minimis* requirements on plaintiffs. Ultimately, plaintiffs object to the fact that their religious opposition to providing contraceptive coverage to their employees no longer has the effect of preventing their employees from

receiving such coverage. But the scheme of separate payments for contraceptive services under the accommodation does not amount to a substantial burden under RFRA. In plaintiffs' view, RFRA is violated whenever they believe that the requirements of a law violate their religious beliefs, as long as those requirements are enforced with substantial penalties. In other words, plaintiffs attempt 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 and the magnitude of the burden imposed by those requirements. Despite plaintiffs' insistence to the contrary, defendants do not themselves undertake a theological inquiry of any kind, nor do they ask this Court to do so. The Court need not doubt the sincerity or centrality of plaintiffs' 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 plaintiffs' religious exercise as a legal matter, outside the context of their religious beliefs—that is, from the perspective of an objective observer.

Moreover, any impact of the regulations is too attenuated to impose a substantial burden under RFRA. Cases that find a substantial burden uniformly involve a *direct* burden on the plaintiff. Here, by contrast, plaintiffs object to the fact that the consequence of their refusal to provide contraceptive coverage to their employees is that a third party will provide such coverage in their stead. Plaintiffs remain free to refuse to contract, arrange, pay, or refer for contraceptive coverage; to voice their disapproval of contraceptive use; and to encourage their employees to refrain from such use. The preventive services coverage regulations therefore affect plaintiffs' religious practice, if at all, in a highly attenuated way, which is little different from plaintiffs' payment of salaries to their employees, which those employees can also use to purchase contraceptive services if they so choose. And finally, even if the challenged regulations were deemed to impose a substantial burden on plaintiffs' religious exercise, the regulations would not violate RFRA because they are narrowly tailored to serve two compelling governmental interests.

Plaintiffs' other claims also lack merit. Plaintiffs' free exercise claim fails because the regulations are neutral and generally applicable. And plaintiffs' 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. Plaintiffs APA claims are likewise groundless. Finally, plaintiffs cannot satisfy the remaining requirements for obtaining a permanent injunction.

For these reasons, and those explained below and in the government's opening brief, plaintiffs' motion for summary judgment should be denied, and defendants' motion to dismiss or, in the alternative, for summary judgment should be granted.

ARGUMENT

I. PLAINTIFFS' CLAIMS LACK MERIT

A. Plaintiffs' Religious Freedom Restoration Act Claim Is Without Merit

1. The regulations do not substantially burden plaintiffs' exercise of religion

a. The regulations impose no more than a de minimis *burden on plaintiffs' exercise of religion because the regulations require virtually nothing of plaintiffs*

As defendants explained in their opening brief, 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 plaintiffs to modify their behavior in a significant—or more than *de minimis*—way. *See* Defs.' Mem. in Opp'n to Pls.' Mot. for Prelim. Inj. & in Support of Mot. to Dismiss or, in the Alternative, for Summ. J. ("Defs.' Mem."), ECF No. 59, at 15. Plaintiffs seem to reject the third prong of this test and argue that RFRA protects the "freedom to" "creat[e] and sustain[] an academic community" with certain religious convictions. Pls.' Mem. in Supp. of Mots. For Prelim. Inj. & Summ. J. ("Pls.' Mem."), ECF No. 70, at 11. They cite no authority for the

proposition that a plaintiff may challenge a law under RFRA even without identifying a modification of behavior required by the law. But courts have been clear that "[a] substantial burden exists when government action puts 'substantial pressure on an adherent *to modify his behavior* and to violate his beliefs.'" *Kaemmerling*, 553 F.3d at 678 (citing *Thomas*, 450 U.S. at 718 (emphasis added)). Moreover, the regulations simply do not prevent plaintiffs from fostering their religious convictions in their community. Plaintiffs are in no way prevented from voicing their disapproval of contraceptives or from encouraging their employees to refrain from using contraceptives.

Plaintiffs go on to contend that the challenged regulations do require them "to engage in behavior that violates their religious convictions." Pls.' Mem. at 11. But the regulations do not require plaintiffs to modify their religious behavior. As eligible organizations, plaintiffs are not required to contract, arrange, pay, or refer for contraceptive coverage. To the contrary, plaintiffs are free to continue to refuse to do so, to voice their disapproval of contraceptive use, and to encourage their employees to refrain from using contraceptive services. Plaintiffs need only fulfill the self-certification requirement and provide a copy to their issuers or TPAs. Plaintiffs need not provide payments for contraceptive services for their employees. Instead, third parties—plaintiffs' issuers or TPAs—provide separate payments for contraceptive services on behalf of plaintiffs' employees, at no cost to plaintiffs. The accommodation does not require plaintiffs to find new issuers/TPAs, or to modify their existing contracts with their current issuers/TPAs. Once plaintiffs satisfy the self-certification requirement, their issuers/TPAs will provide separate payments—using none of plaintiffs' funds—for contraceptive services used by plaintiffs' employees. In short, with respect to contraceptive coverage, plaintiffs need do what they did prior to the promulgation of the challenged regulations—that is, to convey to their issuers or TPAs that they do not wish to provide contraceptive coverage in order to ensure that they are not contracting, arranging, paying, or referring for such coverage.[1] Thus, the regulations

[1] In fact, prior to the promulgation of these regulations, Biola University "inadvertently" provided its employees with health coverage that *included* coverage for emergency contraception. *See* Compl. ¶ 68, ECF No. 1.

do not require plaintiffs "to modify [their] religious behavior in any way." *Kaemmerling*, 553 F.3d at 679. 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 [plaintiffs'] part, nor . . . otherwise interfere[s] with any religious act in which [plaintiffs] engage[]." *Id.*; *see also Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003) (holding, in the context of the Religious Land Use and Institutionalized Persons Act (RLUIPA), that "a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable").

Plaintiffs also argue that the regulations do in fact require them to take action, in the form of the self-certification requirement. But plaintiffs simply need to self-certify that they are non-profit religious organizations with a religious objection to providing contraceptive coverage—a statement which they have already made repeatedly in this litigation and elsewhere—and share that self-certification with their issuers or TPAs, to avoid having to contract for, pay for, or arrange for contraceptive coverage. Thus, plaintiffs are required to convey to their issuers or TPAs that they do not intend to cover or pay for contraceptive services, which they presumably have done or would have to do voluntarily anyway even absent these regulations in order to ensure that they are not contracting, arranging, paying, or referring for contraceptive coverage. The sole difference in the communication is that they must inform their issuers or TPAs that their intention not to cover contraceptive services is due to their religious objections. Any burden imposed by this purely administrative self-certification requirement is, at most, *de minimis*, and thus cannot be "substantial" under RFRA. *See* Defs.' Mem. at 14; *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007); *Kaemmerling*, 553 F.3d at 678 ("An inconsequential or *de minimis* burden on religious practice does not rise to this level [of a substantial burden]."); *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)

(noting that application of the challenged law would "work little or no change in [the plaintiffs'] situation").

In short, plaintiffs' behavior need not change in any significant way as a result of the regulations. Ultimately, plaintiffs' complaint is that informing their issuers or TPAs of their intention not to provide contraceptive coverage to their employees no longer has the effect of preventing their employees from receiving such coverage. Prior to the adoption of the challenged regulations, plaintiffs' refusal to provide contraceptive coverage to their employees effectively meant that those employees went without it. In effect, plaintiffs had a veto over the health coverage that their employees received. Now, plaintiffs no longer exercise such a veto over their employees' health coverage. In other words, plaintiffs' religious objection to offering and funding contraceptive coverage remains effective as to them, but their employees will receive such coverage from another source. But contrary to plaintiffs' argument, the fact that their employees will now receive contraceptive coverage does not mean that plaintiffs are put in the position of authorizing or condoning the provision of such coverage to their employees. Plaintiffs' employees will receive coverage for contraceptive services from another source *despite* plaintiffs' religious objections, not *because* of those objections.

To put it another way, plaintiffs object to the fact that, while the regulations do not require them to substantially change their behavior, the *consequences* of their behavior have changed because their employees will now receive contraceptive coverage from a third party. *See* Pls.' Mem. at 12. But this objection only serves to illustrate the problem with plaintiffs' argument. Plaintiffs have not alleged that they have any inherent religious objection to the self-certification requirement—their objection stems entirely from the actions of *other* parties once plaintiffs satisfy the self-certification requirement.

Instead, not only do plaintiffs want to be free from contracting, arranging, paying, or referring for contraceptive coverage for their employees—which, under these regulations, they are—but plaintiffs also want to prevent *anyone else* from providing such coverage to their employees, who might not subscribe to plaintiffs' religious beliefs. They thus want to project

their personal religious exercise onto third parties to dictate the third parties' conduct. That this is the *de facto* impact of plaintiffs' stated objections is made clear by their assertion that RFRA is violated whenever plaintiffs "trigger" a third party's provision to plaintiffs' employees of services to which plaintiffs object. Am. Compl. ¶¶ 153, 155, ECF No. 54. This theory would mean, for example, that even if the government could realistically provide contraceptive coverage to plaintiffs' employees directly (as plaintiffs elsewhere suggest), such benefits would be impermissible because they would be "trigger[ed]," *id.*, by plaintiffs' refusal to provide such coverage themselves. In fact, under plaintiffs' theory, the government would be unable to provide any benefit to employees of an entity with religious objections to that benefit in an effort to accommodate the religious beliefs of the entity, which would leave the employees with only those benefits that their employers do not to object to. But RFRA is a shield, not a sword, *see O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1158-60 (E.D. Mo. 2012), *appeal pending*, No. 12-3357 (8th Cir.), and in this way, it is plaintiffs' approach to RFRA, not the government's, that is "astonishing." Pls.' Mem. at 13. RFRA does not give religious objectors both the right to a religious accommodation *and* the right to demand that no one else fill in any gaps left by that accommodation. The government remains able to provide alternative means of achieving important statutory objectives once it has provided such a religious 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.").

Recognizing the deeply troubling nature of such a position, and utterly failing to explain why it could be correct as a matter of law, plaintiffs insist that it is not their position at all—that they do not think RFRA would prevent the government from providing contraceptive coverage to their employees based on plaintiffs' failure or refusal to do so. Pls.' Mem. at 15-16. Without sacrificing consistency, it is hard to see how that could be true. Indeed, just a few pages earlier, plaintiffs clearly state that they object to contraception coverage being offered by a third party to their employees "because of his or her status as a School employee." *Id.* at 12. But that is

precisely what would happen in the hypothetical scenario with which plaintiffs now claim they would be comfortable: if the government were to provide contraception coverage to plaintiffs' employees, plaintiffs would still "know that the individual (and perhaps his or her family as well)" receives the coverage "because of" his or her employment by plaintiffs. *Id.* At bottom, this hypothetical, and plaintiffs' feeble attempt to evade it, illustrate that plaintiffs' "trigger" theory of RFRA has no limiting principle and must be rejected.

Finally, plaintiffs barely even address the question of what makes a burden "substantial" within the meaning of RFRA. As defendants have explained, 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.*, *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); *Church of Scientology of Ga., Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328, 1353-54 (N.D. Ga. 2012); *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 plaintiffs attempt to re-label the "substantial burden" test as the "substantial pressure" test. *See* Pls.' Mem. at 15. If plaintiffs' 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 plaintiffs' 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, plaintiffs must show not only that the challenged

regulations exert substantial *pressure—i.e.* a penalty of sufficient magnitude—but also that the *burden* imposed on plaintiffs' religious exercise is more than *de minimis*.

Indeed, the mere fact that a plaintiff claims that he or she sincerely believes that a law violates his or her religious beliefs cannot alone be sufficient to amount to a substantial burden on their religious exercise under RFRA. To hold otherwise would mean courts play virtually no role in determining whether an alleged burden is "substantial"—as long as a plaintiff's religious belief is sincere, that would be the end of the inquiry. 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) ("[W]e reject the notion . . . that a plaintiff shows a burden to be substantial simply by claiming that it is."), *aff'd*, 724 F.3d 377 (3d Cir. 2013); *Gilardi v. Sebelius*, 926 F. Supp. 2d 273, 282 (D.D.C. 2013) ("[T]he Court declines to follow several recent cases suggesting that a plaintiff can meet his burden of establishing that a law creates a 'substantial burden' upon his exercise of religion simply because he claims it to be so."), *appeal pending sub nom. Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069 (D.C. Cir.); *Autocam Corp. v. Sebelius*, No. 1:12-cv-1096, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012) ("The Court does not doubt the sincerity of Plaintiff Kennedy's decision to draw the line he does, but the Court still has a duty to assess whether the claimed burden—no matter how sincerely felt—really amounts to a substantial burden on a person's exercise of religion."), *aff'd*, 730 F.3d 618 (6th Cir. 2013); *see also Grote Indus., LLC v. Sebelius*, 914 F. Supp. 2d 943, 949 (S.D. Ind. 2012), *appeal pending*, No. 13-1077 (7th Cir.). "If every plaintiff were permitted to unilaterally determine that a law burdened their religious beliefs, and courts were required to assume that such burden was substantial, simply because the plaintiff claimed that it was the case, then the standard expressed by Congress under the RFRA would convert to an 'any burden' standard." *Conestoga*, 917 F. Supp. 2d at 413-14; *see also Autocam*, 2012 WL 6845677, at *7;

Grote, 914 F. Supp. 2d at 952; *Mersino Mgmt. Co. v. Sebelius*, No. 13-cv-11296, 2013 WL 3546702, at *16 (E.D. Mich. July 11, 2013).[2]

The Court need not doubt the sincerity or centrality of plaintiffs' religious beliefs, parse the content of plaintiffs' beliefs, make a value judgment about those beliefs, or even question a plaintiff's contention that a challenged law violates his or her beliefs. Instead, the Court must examine the alleged burden imposed by the challenged regulations *as a legal matter* outside the context of plaintiffs' 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.*, *Bowen*, 476 U.S. at 701 n.6 ("Roy's religious views may not accept this distinction between individual and governmental conduct. . . . It is clear, however, that the Free Exercise Clause, and the Constitution generally, recognize such a distinction; for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference."); *Yoder*, 406 U.S. at 218 ("Nor is the impact of the compulsory-attendance law confined to grave interference with important Amish religious tenets from a *subjective* point of view. It carries with it precisely the kind of *objective* danger to the free exercise of religion that the First Amendment was designed to prevent." (emphasis added)); *Levitan v. Ashcroft*, 281 F.3d 1313, 1321 (D.C. Cir. 2002) (suggesting that, even where the religious "practice at issue is indisputably an important component of the litigants' religious scheme," any alleged interference with such practice is not substantial where "the impact of the challenged law is *de minimis*"). Under RFRA, plaintiffs are entitled to their sincere religious beliefs, but they are not entitled to decide as a matter of law what does and does not impose a substantial burden on such beliefs. Although "[c]ourts are not arbiters of scriptural interpretation," *Thomas*, 450 U.S. at 716, "RFRA still requires the court to

[2] RFRA's legislative history makes clear that Congress did not intend such a relaxed standard. The initial version of RFRA prohibited the government from imposing *any* "burden" on free exercise, substantial or otherwise. Congress amended the bill to add the word "substantially," "to make it clear that the compelling interest standards set forth in the act" applies "only to Government actions [that] place a substantial burden on the exercise of" religious liberty. 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *see also id.* (text of Amendment No. 1082).

determine whether the burden a law imposes on a plaintiff's stated religious belief is 'substantial.'" *Conestoga*, 917 F. Supp. 2d at 413.

b. Even if the regulations were found to impose some more than de minimis *burden on plaintiffs' exercise of religion, any such burden would be far 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 plaintiffs' religious exercise, any such burden would be too attenuated to amount to a *substantial* burden under RFRA. *See* Defs.' Mem. at 17-20. As defendants explained, a burden cannot be substantial when it is attenuated. Cases that find a substantial burden uniformly involve an alleged burden that applies more directly to the plaintiff than the alleged burden in this case. *See, e.g.*, *Potter v. Dist. of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009); *Grote*, 914 F. Supp. 2d at 950-52; *Conestoga*, 917 F. Supp. 2d at 413-14; *Korte v. U.S. Dep't of Health & Human Servs.*, 912 F. Supp. 2d 735, 748 (S.D. Ill. 2012), *appeal pending*, No. 12-3841 (7th Cir.); *Autocam*, 2012 WL 6845677, at *7.

Here, not only are plaintiffs separated from the use of contraception by "a series of events" that must occur before the use of contraceptive services to which plaintiffs object would "come into play," *Conestoga*, 917 F. Supp. 2d at 414-15, but plaintiffs are also further insulated by the fact that a third party—plaintiffs' issuers or TPAs—and *not* plaintiffs, will make separate payments for such services, at no cost to plaintiffs, and thus plaintiffs are in no way subsidizing or arranging for (much less paying for)—even indirectly—the use of preventive services that they find objectionable. Under plaintiffs' theory, their religious exercise is substantially burdened when one of their employees 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 plaintiffs' issuers or TPAs, with none of the cost being passed on to plaintiffs, and no administration of the payments by plaintiffs, solely because plaintiffs self-certified and informed their issuers or TPAs that they have religious objections to providing contraceptive coverage.

Plaintiffs' only response to this argument is to assert, again, that the government expresses a "deeply erroneous understanding" of plaintiffs' religious objections. Pls.' Mem. at 11. Not so. Defendants understand that plaintiffs have a religious objection to what they view as their "facilitat[ion]" of someone else's arranging and paying for coverage of contraceptive products and services to which they object. *Id.* at 13. The Court need not question the nature of these beliefs nor their sincerity. But the Court must determine whether the alleged burden is too attenuated—viewed from the perspective of an objective observer—and therefore fails to rise to the level of "substantial." *See, e.g.*, *Conestoga*, 917 F. Supp. 2d at 414-15; *Autocam*, 2012 WL 6845677, at *6; *O'Brien*, 894 F. Supp. 2d at 1158-60; *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013) (Rovner, J., dissenting); *Eden Foods, Inc. v. Sebelius*, No. 13-cv-11229, 2013 WL 1190001, at *4 (E.D. Mich. Mar. 22, 2013); *Annex Medical, Inc. v. Sebelius*, No. 12-cv-2804, 2013 WL 101927, at *4-*5 (D. Minn. Jan. 8, 2013), *appeal pending*, No. 13-1118 (8th Cir.); *Grote*, 914 F. Supp. 2d at 949-52.

Cases like *Yoder* and *Thomas* are not to the contrary. *See Conestoga*, 917 F. Supp. 2d at 415 (explaining that the indirect nature of any burden imposed by the regulations distinguished them from the statutes challenged in *Yoder*, *Sherbert*, *Thomas*, and *O Centro*). In *Thomas*, the alleged burden was not attenuated, as the plaintiff objected to his actual participation in the manufacture of armaments. *See* 450 U.S. at 710-11. To be sure, the Supreme Court recognized that "a compulsion may certainly be indirect and still constitute a substantial burden, such as the denial of a benefit found in *Thomas*." *Conestoga*, 917 F. Supp. 2d at 415 n.15. But that is not so where the burden itself is too attenuated—that is, where the plaintiff's objection is not inherent to the act allegedly required by the challenged law, but is inextricably intertwined with the actions of a third party. *See id.*; *Gilardi*, 2013 WL 781150, at *9. Similarly, in *United States v. Lee*, 455 U.S. 252 (1982), the plaintiff had an inherent objection to filing social security tax returns, withholding social security taxes from his employees' pay, and paying his share of social security taxes. *See Lee*, 455 U.S. at 254-55; *see also id.* at 257 (noting that "both payment and receipt of social security benefits is forbidden by the Amish faith"). Here—unlike in such

cases—plaintiffs object to the fact that the *consequence* of their refusal to provide contraceptive coverage to their employees is that a third party will provide such coverage in their stead. Plaintiffs remain free to refuse to contract, arrange, pay, or refer for contraceptive coverage; to voice their disapproval of contraceptive use; and to encourage their employees to refrain from such use. The preventive services coverage regulations therefore affect plaintiffs' religious practice, if at all, in a highly attenuated way.

2. Even if there were a substantial burden on religious exercise, the regulations serve compelling governmental interests and are the least restrictive means to achieve those interests

Because plaintiffs have not established a "substantial burden" on their religious exercise, the Court's analysis should end there. But even if the Court were to determine that plaintiffs had made out a *prima facie* case under RFRA, the challenged regulations are justified by compelling governmental interests and are the least restrictive means to achieve them.

Defendants have identified two unquestionably compelling interests: the promotion of public health, and ensuring that women have equal access to health-care services. *See* Defs.' Mem. at 20-23. Plaintiffs do not appear to dispute either of these interests as being compelling. Instead, plaintiffs' argument boils down to their assertion that defendants have no compelling interest as to Grace and Biola specifically. *See* Pls.' Mem. at 17-18. But as defendants explained in their opening brief, strict scrutiny cannot require the government to analyze the impact of and need for the regulations as to each and every employer and employee in America. *See* Defs.' Mem. at 23 n.15 (citing cases). Plaintiffs do not address any of the authority cited by defendants, instead relying on one phrase in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 435 (2006), which, when read in context, does not support plaintiffs' position. In *O Centro*, the Court construed the scope of the requested exemption as encompassing all members of the plaintiff religious sect, not just the individual objector. *See id.* at 433. Similarly, the Court's warning in *O Centro* against "slippery-slope" arguments was a rejection of speculation that providing an exemption to one group will lead to exemptions for other *non*-similarly situated groups. Defendants do not ask the Court to engage in any such speculation.

Rather, defendants merely point out the obvious: that if strict scrutiny truly is not meant to be "fatal in fact," *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), the government is and must be permitted to legislate and regulate with some degree of generality.

In the same vein, the fact that these particular plaintiffs happen to object only to some preventive services is entirely beside the point. Not only would indulging such an argument put employees' rights at the mercy of whatever objections a particular employer happened to have, but it again holds the government to a standard that the law simply does not require. The government has identified a compelling interest in ensuring that women have access to the "*full range* of [FDA]-approved contraception methods." IOM REP. at 10, AR at 308 (emphasis added). This is because some contraceptive methods may be more appropriate than others depending on a woman's personal medical history, and the decision about which form of contraceptive to use is a personal medical decision that is made by a woman in consultation with her doctor. The IOM Report indicates that "[f]or women with certain medical conditions or risk factors, some contraceptive methods may be contraindicated." IOM Rep. at 105, AR at 403. For example, for some women, hormonal contraceptives (like birth control pills) may be contraindicated because of certain risk factors, such as uncontrolled hypertension or coronary artery disease, so the doctor may instead prescribe a copper IUD, which does not contain hormones. Plaintiffs do not dispute this, and it is not, as plaintiffs insist, the government's obligation to identify a compelling interest in a particular person's access to a particular method of contraception.

Beyond that, plaintiffs simply question, repeatedly, whether the regulations will actually further the government's public health goals, and flyspeck the IOM Report to suggest that the regulations will not do so. *See* Pls.' Mem. at 19-21. But the IOM Report and its recommendations are the work of independent experts in the field of public health. After undertaking an extensive science-based review of the available evidence, IOM determined that coverage, without cost-sharing, for the full range of FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive

capacity is necessary for women's health and well-being. The HRSA Guidelines, relying on the IOM's expert, scientific recommendations, are entitled to deference. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *see also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376-77 (1989) (emphasizing that deference is particularly appropriate when an interpretation implicates scientific and technical judgments within the scope of agency expertise).[3]

Moreover, plaintiffs' second guessing of IOM's expert conclusions and HRSA's reliance on them misses the mark. Plaintiffs focus on the purported shortcomings of a single report cited by IOM showing that cost sharing, such as deductibles and copayments, can pose barriers to care and result in reduced use of preventive and primary care services. *See* Pls.' Mem. at 19-20. Plaintiffs contend that the report's conclusions are inapplicable to plaintiffs' employees because the report focused on low-income participants rather than "relatively well-compensated employees of employers like Biola and Grace." *Id.* at 20. Plaintiffs ignore other evidence in the IOM Report, however, showing that "[e]ven small increments in cost sharing have been shown to reduce the use of preventive services" and that, "when out-of pocket costs for contraceptives [are] eliminated or reduced, women [are] more likely to rely on more effective long-acting contraceptive methods." IOM REP. at 109, AR at 407 (citations omitted). The conclusions of IOM on the whole, which are reflected in the HRSA Guidelines and entitled to deference, thus rebut plaintiffs' unsupported suggestions that the regulations benefit only the very poor. And, in any event, the government is not required to analyze the impact or need for the regulations with respect to every employer and employee in America. *See supra* at 13.

Plaintiffs own evidence, moreover, does not call into question the governments' compelling interests. Plaintiffs rely, for instance, on survey data to suggest that contraceptive

[3] Plaintiffs' reliance on articles that are not part of the administrative record should not be considered in the course of the Court's review of agency regulations. *See, e.g., United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963). Plaintiffs had ample opportunity to submit this extra-record material to defendants, and to give defendants the ability to consider and evaluate such articles and studies, prior to the promulgation of the challenged rules, but there is no indication that they did so. This Court should disregard these articles and any other such extra-record material offered by plaintiffs in their briefs and their Statement of Material Facts, ECF No. 70-1.

coverage requirements have no effect on the number of unintended pregnancies, given that, on average, states with such requirements reported a higher percentage of unintended pregnancies than those without in 2006. *See* Pls.' Mem. at 21-22. In addition to being outside the administrative record, and therefore not properly before the Court, *see supra* note 3, the data cited by plaintiffs are incomplete. They do not take into account pre-requirement pregnancy rates, and they do not account for other differences in state populations. Plaintiffs' clumsy attempt to draw conclusions from these data only illustrates the importance of giving proper deference to the public health experts at IOM, who reached science-based recommendations after surveying a wide-range of evidence in the field.

Finally, in their attempt to rebut IOM's conclusions, plaintiffs reframe the government's compelling interests to be only the "reduc[tion] of unintended pregnancies," and then cite studies to suggest that the regulations do not accomplish that goal. Pls.' Mem. at 19-22. Yet, as explained above and in defendants' opening brief, the government's interests are two-fold: the promotion of health *and* ensuring that women have equal access to health services. Plaintiffs' arguments regarding unintended pregnancy reduction, therefore, even if valid (which they are not), look at only a subset of the government's compelling interests.

The challenged regulations are also the least restrictive means of furthering the government's compelling interests, and plaintiffs have not contested any of defendants' arguments. As defendants have explained, 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, and plaintiffs have not even offered an alternative scheme in their most recent brief. Indeed, all they have done is mention, in the course of their substantial burden argument, that contraceptive coverage need not be provided in connection with employer-based plans because "governments provide benefits without involving beneficiaries' employers all the time." Pls.' Mem. at 16. But in implementing the preventive services 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 such a non-employer-based alternative were otherwise feasible, defendants could not have considered it because it would be beyond defendants' statutory authority. To the degree plaintiffs object to the provision of preventive services through the existing employer based system, their objection is to the ACA—a fundamental underpinning of which is that coverage will continue to be provided through the employer-based system—which they do not challenge in this lawsuit, and not the preventive services coverage regulations.

Because plaintiffs' sole proposed alternative is incompatible with the ACA, and well outside of defendants' statutory authority, defendants would be prohibited by law from adopting it. For this reason, plaintiffs' have not identified a less restrictive means. 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 "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.); *Graham v. Comm'r*, 822 F.2d 844, 852 (9th Cir. 1987); *S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1206 (6th Cir. 1990); *Fegans v. Norris*, 537 F.3d 897, 905-06 (8th Cir. 2008); *United States v. Lafley*, 656 F.3d 936, 942 (9th Cir. 2011); *Gooden v. Crain*, 353 F. App'x 885, 888 (5th Cir. 2009); *Adams v. Comm'r of Internal Revenue*, 170 F.3d 173, 180 n.8 (3d Cir. 1999).

Moreover, plaintiffs continue to fail to explain how such an alternative—in addition to being inconsistent with the ACA's continuation of the existing employer-based system of coverage, less effective, and otherwise unworkable, *see* Defs.' Mem. at 27-30—would, in fact, be "less restrictive." As defendants have shown, under plaintiffs' own logic, even assuming defendants could provide contraceptive services directly to plaintiffs' employees, that action would violate plaintiffs' religious beliefs because plaintiffs' refusal to provide or pay for the services to which they object would still "trigger" or "facilitate[e]" their provision or payment. *See* Am. Compl. ¶¶ 153, 155; Pls.' Mem. at 13. Plaintiffs cannot have it both ways, claiming that defendants should have taken a different approach while simultaneously advancing an argument

under which the different approach would be just as objectionable. *See New Life Baptist*, 885 F.2d at 950-51.

B. The Regulations Do Not Violate the Free Exercise Clause

As defendants explained in their opening brief, *see* Defs.' Mem. at 30 n.16 (collecting cases), 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. Plaintiffs ignore this authority in their opposition, perhaps hoping this Court will do the same. It should not.

Plaintiffs contend that the regulations are not generally applicable because they contain exceptions for certain objectively defined categories of entities, like grandfathered plans, small employers, and certain religious employers.[4] But, as defendants pointed out in their opening brief, courts have overwhelmingly held that such categorical exceptions do not negate general applicability. *See* Defs.' Mem. at 31-32; *see also, e.g.*, *Ungar v. N.Y.C. Hous. Auth.*, 363 F. App'x 53, 56 (2d Cir. 2010) (holding exemptions to housing policy did not negate general applicability because they were "only for specified categories" and were available to plaintiffs on same terms as everyone else); *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). Plaintiffs make no effort to distinguish, or even address, those cases in their opposition. Instead, plaintiffs repeatedly cite *Lukumi*. *See* Pls.' Mem. at 23, 24, 26, 27, 29, 30, 31. But that case had nothing to do with categorical exceptions that are available to all on equal terms. It addressed a law for which a single religion (Santeria) "alone was the exclusive legislative concern." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 536 (1993). Contrary to the law at issue in *Lukumi*, under which "few if any killings of animals

[4] As defendants have already explained, the Affordable Care Act's grandfathering provision is not an exemption; it is transitional in effect and is intended to minimize disruption to existing coverage as the Act is implemented. Moreover, small employers that offer non-grandfathered health coverage to their employees are required to provide contraceptive coverage.

[were] prohibited other than Santeria sacrifice," *id*., the regulations challenged here require all non-grandfathered health plans that do not qualify for the religious exemption or accommodations to provide contraceptive coverage, along with other recommended preventive services. Thus, *Lukumi* is simply not on point.[5]

Plaintiffs also suggest that the government has created a system of individual exceptions with respect to the regulations, *see* Pls.' Mem. at 27, 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 unemployment compensation. *Empt. Div., Dep't of Human Res. of Or. 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 criteria for the religious employer exemption and the eligible organization accommodations do not require any subjective inquiry into an organization's basis for opposing contraceptive coverage; the exemption's objective criteria are adopted from long-standing provisions of the tax code. Plaintiffs may not agree with the government's rationale for adopting these criteria, *see* Pls.' Mem. at 25-26, but that disagreement does not morph the categorical criteria into a system of individualized exemptions.[6]

The regulations also are neutral. Indeed, plaintiffs do not contend that the regulations pursue their purpose "only against conduct motivated by religious belief," *Lukumi*, 508 U.S. at 545, or that "the burdens of the [regulations] fall on religious organizations 'but almost no others,'" *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (quoting *Lukumi*, 508 U.S. at 536), as required to establish non-neutrality. Plaintiffs instead object to defendants'

[5] Plaintiffs' reliance on *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), and *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), *see* Pls.' Mem. at 27-29, is similarly misplaced. Those cases addressed policies that created a secular exemption but refused all religious exemptions. *See Fraternal Order of Police*, 170 F.3d at 365; *Blackhawk*, 381 F.3d at 212. The preventive services coverage regulations, in contrast, reflect both secular and religious exemptions. Therefore, 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.

[6] In any event, and as discussed in response to plaintiffs' argument under the Due Process Clause, the 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 those determinations. *See infra* Section I.E.

decision to distinguish between houses of worship and their integrated auxiliaries, which are exempt, and other religious organizations, like non-profit religious charities, universities, and hospitals, which are accommodated. But such distinctions do not violate the Free Exercise Clause. *See also infra* Section I.C (collecting cases). "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. And 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 neutrality principle of the Free Exercise Clause requires no more. The fact that "the [religious employer exemption] does not extend as far as Plaintiffs wish" does not mean that the government is targeting religious conduct. *Grote*, 914 F. Supp. 2d at 953.[7]

C. The Regulations Do Not Violate the Establishment Clause

Plaintiffs maintain that the regulations violate the Establishment Clause because they distinguish between houses of worship and their integrated auxiliaries, which are exempt, and other religious organizations, like religious charities, schools, and hospitals, which are accommodated. This distinction, however, simply does not violate the Establishment Clause.

[7] Plaintiffs maintain that the distinctions drawn by the government have unusual results as applied to plaintiffs because Grace Theological Seminary would qualify for the religious employer exemption if it were not operated by Grace Schools, which qualifies for the accommodations. *See* Pls.' Mem. at 25. Plaintiffs also contend that the government's rationale for distinguishing between houses of worship and their integrated auxiliaries and other non-profit religious organizations does not necessarily apply to plaintiffs' employees, who may be as likely to share the organizations' religious beliefs as the employees of a house of worship or integrated auxiliary. *See id*. Even assuming these assertions are true, it does not render the distinctions drawn by the government—which are based on the general characteristics of houses of worship and integrated auxiliaries as compared to those of other non-profit religious organizations, and not the characteristics of the specific plaintiffs here—unlawful. *See, e.g.*, *Turner Construction Co. v. United States*, 94 Fed. Cl. 561, 571 (Fed. Cl. 2010) (observing that a reviewing court is not to "sift through an agency's rationale with a fine-toothed comb;" instead, the relevant question is whether the agency articulated a rational connection between the facts found and the choice made); *La. Envtl. Society, Inc. v. Dole*, 707 F.2d 116, 122-23 (5th Cir. 1983). Moreover, defendants' decision to incorporate long-standing concepts from the tax code that refer to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order, in an effort to avoid entangling inquiries regarding the religious beliefs of plaintiffs' employees, is reasonable.

Indeed, as defendants explained in their opening brief, every court to have considered an Establishment Clause challenge to the prior version of the regulations—which also included the requirement that, to be exempt, an organization must be an organization as described in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended—has rejected it. Defs.' Mem. at 34-35; *see, e.g.*, *O'Brien*, 894 F. Supp. 2d at 1162; *Conestoga*, 917 F. Supp. 2d at 416-17; *Grote*, 914 F. Supp. 2d at 954. Plaintiffs again ignore this authority, which is overwhelming.

Plaintiffs contend that defendants read *Larson*'s prohibition against denominational preferences as being limited to laws that make "specific reference . . . to denomination." Pls.' Mem. at 32. But defendants do no such thing. Defendants acknowledge that, as in *Larson*, a law that does not expressly name a particular denomination or sect may nonetheless violate the Establishment Clause's prohibition against denominational preferences. *See Larson v. Valente*, 456 U.S. 228 (1982). Where the parties differ is in their view of what types of distinctions the government is permitted to make when accommodating religion. Plaintiffs argue, without citation to any authority that actually supports their position,[8] that the Establishment Clause prohibits the government from distinguishing between types of organizations. Defendants argue, on the other hand, that the Establishment Clause prohibits only distinctions among *denominations*. And *Larson*, along with the other cases cited in defendants' opening brief, fully support the government's position. *See, e.g.*, *Larson*, 456 U.S. at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over

[8] Plaintiffs stretch *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 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 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.").

another."); *id*. at 245-46 (referring to the "constitutional prohibition of denominational preferences" and the "principle of denominational neutrality"); *id*. at 245 ("Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations."); *id*. at 246 ("[T]he government must be neutral when it comes to competition between sects." (citation omitted)); *id*. ("[T]he fullest realization of true religious liberty requires that government . . . effect no favoritism among sects[.]" (citation omitted)); Defs.' Mem. at 33-35 (citing cases).

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." *Larson*, 456 U.S. at 254 (emphasis in original). The provision was drafted to "includ[e] particular religious denominations and exclud[e] others." *Id*.; *see also id*. at 255 (referring to law's capacity "to burden or favor selected religious denominations"). 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. There is no similar discrimination among denominations here. The religious employer exemption and the accommodation for eligible organizations as defined in the challenged regulations are available on equal terms to employers of all denominations.

Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle, 212 F.3d 1084 (8th Cir. 2000), also frames the Establishment Clause's prohibition as one against denominational preferences. In an earlier iteration of the case, the court had struck down a law that exempted Christian Scientists, but members of no other denominations, from the Medicare and Medicaid Acts. *Children's Healthcare*, 212 F.3d at 1088-89. Congress later amended the law to replace the "sect-specific" exception with a "sect-neutral" one, *id*. at 1089, and the court upheld the amended law against an Establishment Clause challenge because it did not differentiate among religious sects. *Id*. at 1090-91. The law at issue in *Wilson v. NLRB*, 920 F.2d 1282, 1285, 1287

(6th Cir. 1990), on which plaintiffs rely, also discriminated among religious denominations, because it favored established denominations—i.e., "a bona fide religion, body, or sect" with historical objections to supporting labor unions—over less established religions.

In short, the case law makes it abundantly clear that the Establishment Clause prohibits the government from drawing distinctions between denominations when accommodating religion, but does not prevent the government from distinguishing between types of religious organizations by exempting houses of worship and their integrated auxiliaries 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. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005); *Liberty Univ., Inc. v. Lew*, __ F.3d__, 2013 WL 3470532, at *17-18 (4th Cir. July 11, 2013); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 468-69 (N.Y. 2006).[9]

D. The Regulations Do Not Violate the Free Speech Clause

Defendants' opening brief demonstrated that the preventive services coverage regulations do not violate plaintiffs' right to free speech or expressive association. Defs.' Mem. at 35-38. Plaintiffs' response only confirms the defects in those claims. As to expressive association, plaintiffs do not dispute in their brief that the claim lacks merit. As to speech, plaintiffs make several assertions that defendants—and other courts—have already addressed and discredited; plaintiffs' brief does not acknowledge, much less effectively respond to, defendants' arguments.

As an initial matter, plaintiffs ignore the unanimous case law rejecting Free Speech challenges to the contraceptive-coverage regulations. *See* Defs.' Mem. at 36 (citing cases).

[9] Plaintiffs' opposition suggests that their Establishment Clause challenge is aimed not at the religious employer exemption generally, which merely refers to long-standing provisions of the Internal Revenue Code that exempt certain entities from filing tax returns, *see* 26 U.S.C. § 6033(a)(3)(A)(i) or (iii), but rather to other Treasury regulations that were last modified in 1995 that define an "[i]ntegrated auxiliar[y] of a church." *See* Pls.' Mem. at 33 (citing 26 C.F.R. § 1.6033-2(h)). Therefore, even if plaintiffs' Establishment Clause claim had merit (and it does not for the reasons explained above), the remedy would be invalidation of the Treasury regulations defining "integrated auxiliary of a church," not invalidation of the contraceptive coverage requirement or the religious employer exemption. The regulations would survive, with integrated auxiliary of a church being given its commonly understood meaning.

Plaintiffs' silence is telling—those cases reject virtually all of plaintiffs' arguments, including their flawed premise that the preventive services coverage regulations concern speech or inherently expressive conduct. *See, e.g.*, *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1165 (E.D. Mo. 2012) (dismissing free speech challenge to the regulations because the regulations do "not compel[] plaintiffs to speak, to subsidize speech, or to subsidize expressive conduct"). Notably, those cases find directly on point the Supreme Court's decision in *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* ("*FAIR*"), 547 U.S. 47 (2006). *See, e.g.*, *MK Chambers Co. v. U.S. Dep't of Health & Human Servs.*, Civil Action No. 13-11379, 2013 WL 1340719, *6 (E.D. Mich. Apr. 3, 2013) ("Like the [law at issue in *FAIR*], the contraceptive requirement regulates conduct, not speech." (quotations omitted)). Plaintiffs do not and cannot effectively distinguish *FAIR*.

Notwithstanding unanimous case law rejecting their position, plaintiffs contend that the regulations violate their speech rights in two ways. First, plaintiffs assert—incorrectly—that the regulations require plaintiffs to cover "speech *in favor of*" preventive services to which they object. Pls.' Mem. at 35 (emphasis added). This is false. The regulations require coverage of "education and counseling for women with reproductive capacity." HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA 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 plaintiffs intend to argue that the covered education and counseling is objectionable because some of the conversations between a doctor and one of plaintiffs' 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*, 2013 WL 140110, at *17; *O'Brien*, 894 F. Supp. 2d at 1166.

Second, plaintiffs note that, if an organization wishes to avail itself of the accommodations, it must self-certify that it meets the definition of "eligible organization." Plaintiffs appear to object to the self-certification to the extent it results in their issuer or TPA making separate payments for contraceptive services for their employees. But execution of the simple self-certification form is "plainly incidental to the . . . regulation of conduct," *FAIR*, 547 U.S. at 62, not speech. Indeed, every court to review a free speech challenge to the contraceptive-coverage regulations has rejected it, in part, because the regulations deal with conduct. *See MK Chambers*, 2013 WL 1340719, at *6; *Briscoe v. Sebelius*, 927 F. Supp. 2d 1109, 1120 (D. Colo. 2013) ("The plaintiffs cite no authority and I am not aware of any authority holding that [preventive services coverage] qualifies as speech so as to trigger First Amendment protection."); *Conestoga*, 917 F. Supp. 2d at 418; *Grote*, 914 F. Supp. at 955; *Autocam*, 2012 WL 6845677, *8; *O'Brien*, 894 F. Supp. 2d at 1165-67; *see also Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 89 (Cal. 2004) ("[A] law regulating health care benefits is not speech."); *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 465. The scheme of accommodations regulates conduct by relieving an eligible organization of the obligation "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. 39,870, 39,874 (July 2, 2013), AR at 6. Plaintiffs concede as much when they refer to the "*conduct* required by the" regulations. Pls.' Mem. at 37 (emphasis added). Plaintiffs' suggestion that the mere act of self-certifying eligibility for a religious accommodation violates their speech rights is baseless. *See FAIR*, 547 U.S. at 61-63.

Furthermore, the conduct required by the regulations is not inherently expressive. *See* Defs.' Mem. at 36-37. Again, plaintiffs' suggestions to the contrary are simply untrue. *See* Pls.' Mem. at 37. As noted above, plaintiffs are not required to cover education and counsel "in favor of" items to which they object. Nor are plaintiffs required to fund objectionable speech or coverage. As defendants explained already, the regulations explicitly prohibit plaintiffs'

issuers/TPAs from imposing any cost sharing, premium, fee, or other charge on plaintiffs or their plans with respect to the separate payments for contraceptive services made by the issuers/TPAs. *See* 78 Fed. Reg. at 39,880, AR at 12. Plaintiffs, therefore, are not funding or subsidizing anything pertaining to contraceptive coverage. And even if plaintiffs played some role in an issuer's or TPA's provision of payments for contraceptive services, making payments for health care services is not the sort of conduct the Supreme Court has recognized as inherently expressive. Defs.' Mem. at 36-37 (citing cases).[10]

E. The Regulations Do Not Violate the Due Process Clause

Plaintiffs fail to address or even acknowledge any of defendants' arguments as to this claim. Defendants' brief thoroughly explained why the regulations that plaintiffs have challenged in this litigation are not unconstitutionally vague and do not lend themselves to discriminatory enforcement, and why summary judgment should therefore be granted to defendants on this count. Instead of responding to those arguments, plaintiffs simply assert that the "statutory authority" granted to defendants under the ACA is "unfettered." Pls.' Mem. at 38-39. But not only is that not true, it is not relevant to the case at bar. Plaintiffs have challenged a set of regulations, and they have been very clear in multiple prior filings that what they call "the Mandate"—the subject of this litigation—refers to that set of regulations. *See* Pls.' Mem. in Supp. of Mot. for Prelim. Inj., ECF No. 56, at 1 (defining "the Mandate" as "a series of regulations"); Am. Compl. ¶ 140 (defining the "Final Mandate" as the final rule issued on June 28, 2013); *see also* Pls.' Opp'n to Defs.' Mot. to Dismiss, ECF No. 31, at 1 (defining "the Mandate" as "final regulations"). Once they have framed their case—repeatedly—plaintiffs

[10] Indeed, the cases plaintiffs cite involving the compelled funding by the plaintiff of a particular message, *e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001), have no bearing here. The regulations do not compel plaintiffs to fund any contraceptive services, and the notion that the regulations require a particular message is entirely plaintiffs' invention. To the extent contraceptive services are paid for by plaintiffs' issuers or TPAs, the required payments involve, not any particular message, but rather an employee's ability to seek out whatever recommended contraceptive services she and her health care provider see fit. *See, e.g.*, *O'Brien*, 894 F. Supp. 2d at 1166 ("[U]nlike the unconstitutional speech subsidies in *United Foods* [and] *Abood* [*v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)], the regulations here do not require funding of one defined viewpoint.").

cannot go on to resist summary judgment, let alone seek summary judgment in their favor, by suddenly trying to change what the case is about.

Plaintiffs still do not even attempt to identify a source of vagueness or confusion in the regulations they challenge, and they still have no apparent difficulty determining what the regulations require of them, which means their vagueness challenge fails. *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2720 (2010). Similarly, they do not even attempt to identify any unconstitutional discretion that exists in the regulations they have challenged. Other actions taken by the government in regard to other, entirely unrelated requirements are of no bearing on this case, which challenges a specific set of regulations and simply purports—or purported—to claim that those regulations violate the Due Process Clause. *See* Am. Compl. ¶¶ 261-64. As defendants explained in their opening brief, the regulations at issue here 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. In sum, there remains no merit to plaintiffs' contention that the regulations violate the Due Process Clause.

F. Plaintiffs' APA Claims Fail

1. The regulations were promulgated in accordance with the APA

Plaintiffs do not dispute that defendants complied with the APA's notice and comment procedures, except to insist that those procedures were not entered into with an open mind. But the three "facts" that plaintiffs contend "confirm" as much, Pls.' Mem. at 40, are neither facts nor confirmation of plaintiffs' assertion. Ultimately, plaintiffs have nothing to support this claim other than their frustration with the fact that defendants, after having considered hundreds of thousands of comments, did not enact regulations entirely in line with plaintiffs' preferences. This, of course, is not evidence of a process failure on defendants' part. The APA's procedural guarantees do not guarantee a commenter the right to a rule that reflects his comment.

First, plaintiffs repeat the misplaced notion that the ACA prohibits the regulations from taking effect until one year after they have existed in final form. As defendants explained, that provision of the ACA, 42 U.S.C. § 300gg-13(b), requires only that there be a minimum interval

of not less than one year between the date on which a recommendation or guideline is issued—here, the HRSA Guidelines—and the plan year for which the coverage of the services included in that recommendation or guideline must take effect. *See* 75 Fed. Reg. 41,726, 41,729 (July 19, 2010), AR at 229. Simply by reading a calendar, there can be no dispute that this requirement is satisfied here: August 1, 2011 (the date on which the HRSA Guidelines were published) is one year before August 1, 2012 (the first date on or after which plans in new plan years had to cover the services included in those Guidelines).

That would be enough to dispose of this claim, but plaintiffs compound their error by acting as if they have caught defendants in a contradiction or an admission that the comment periods were shams when absolutely no such contradiction exists or admission is warranted. To be clear: the requirement to cover the services included in the HRSA Guidelines, which is the only thing to which the one-year delay provision applies, and which complied with that provision, is distinct from the regulations at issue in this litigation. The HRSA Guidelines define what is or is not a recommended women's preventive service; that question was not an issue on which defendants sought comments in the rulemaking at issue here, or about which defendants proposed further administrative action in this rulemaking. Instead, as defendants explained in the NPRM, these regulations were proposed to "exempt group health plans established or maintained by certain religious employers (and group health insurance coverage provided in connection with such plans) with respect to the requirement to cover contraceptive services" and to "establish accommodations for group health plans established or maintained by eligible organizations (and group health insurance coverage offered in connection with such plans), including student health insurance coverage arranged by eligible organizations that are religious institutions of higher education." 78 Fed. Reg. 8456, 8456-8457 (Feb. 6, 2013), AR at 165-166. Removing plaintiffs' erroneous conflation of the HRSA Guidelines and the challenged regulations resolves their alleged inconsistency: the HRSA Guidelines were published in 2011 (which started the one-year clock set out in the ACA), and these regulations are the product of a meaningful consideration of public comments, which were requested about matters *distinct from* those Guidelines. Simply

put, the prior issuance of the Guidelines in no way reveals the comment periods to have been shams because the comment periods were explicitly about different issues.

Second, plaintiffs' discussion of the timing of the original version of the regulations is similarly far from the smoking gun plaintiffs seem to think it is. The prior regulations were issued as interim final rules in August of 2011 in order to be timed appropriately for student health plans, many of which have plan years beginning in August. When those interim final rules were finalized in February of 2012—in fact, in those final regulations themselves—defendants established a temporary enforcement safe harbor for non-profit organizations with religious objections to contraceptive coverage, and committed to undertake a new rulemaking to accommodate such organizations. 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012), AR at 215. Prompted by comments received relating to the interim final rules, that rulemaking process began with the ANPRM and culminated in the regulations challenged here. Given defendants' expressly stated intention to undertake a further rulemaking, and the fact that that rulemaking took place *and resulted in changed rules* designed to accommodate entities such as plaintiffs, plaintiffs' contention that defendants never intended to take that process seriously is baffling.

Finally, plaintiffs close with the statement that somehow the very existence of this rulemaking process illustrates that defendants did not consider comments received in relation to the interim final rules. This is a non-sequitur. Setting aside that the prior interim final rules are not the subject of this litigation, and that any alleged procedural deficiencies relating to them have no bearing on the process leading up to the regulations in question, the rulemaking process that defendants initiated and the temporary enforcement safe harbor that was in place during that process *was* the result of the comments defendants received in relation to the interim final rule. Far from being evidence that defendants had not considered those comments, the subsequent rulemaking process is evidence that defendants *did* consider them. The subsequent rulemaking process was the vehicle through which defendants endeavored to—and, in fact, did—amend the rules to accommodate the religious objections of religious non-profit organizations. Plaintiffs

may not be satisfied with this accommodation, but it cannot be seriously claimed that they were not listened to.

In sum, plaintiffs' claim that defendants did not meaningfully consider the comments received over the past two years fails to recognize that the very rules at issue in this case are the product of meaningful consideration of those comments. The accommodation that plaintiffs challenge represents defendants' efforts to respond to the objections of religious non-profit organizations while at the same time promoting the government's important policy goals.

2. The regulations are neither arbitrary nor capricious

Plaintiffs' claim that the regulations are arbitrary and capricious remains, essentially, a complaint about the content of the regulations themselves. Indeed, in the course of just one paragraph, plaintiffs' 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." Pls.' Mem. at 42. Of course, as plaintiffs' shifting argument seems to recognize, it is undeniable that defendants considered and responded to such comments. *See* 78 Fed. Reg. 39,869, 39,886-88 (July 2, 2013), AR at 18-20 (responding to comments regarding RFRA and other federal law). It is also simply 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, plaintiffs simply dispute defendants' reasoning as "wrong." But this is a merits issue already addressed by, and no different from, plaintiffs' other claims. The APA's "arbitrary and capricious" inquiry is not concerned with whether the government's legal reasoning as to such other claims is ultimately held to be "wrong." If it were, every claim that a regulation violated some federal law or the Constitution would be subsumed within the arbitrary and capricious inquiry, when the statute treats the two separately. *See* 5 U.S.C. § 706(2)(A) (courts may set aside regulations if they are

"arbitrary, capricious, . . . or *otherwise* not in accordance with law") (emphasis added); *id.* § 706(2)(B) (same if regulations are "contrary to constitutional right").

The relevant question, then, 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 disagreeing with the conclusions defendants reached, plaintiffs have not shown otherwise.[11]

3. The regulations do not violate restrictions relating to abortion

Plaintiffs do not respond to defendants' arguments as to why the regulations are not inconsistent with the ACA, the Weldon Amendment, or the Church Amendment. Instead, plaintiffs simply quote statutory text as if the statutes expressly reflected plaintiffs' definition of abortion, and as if the regulations in fact required coverage of abortion. Neither is true. As defendants have already explained, the regulations do not require that any health plan cover abortion as a preventive service, or that it cover abortion at all, as that term is and has long been defined in federal law. Decades of regulatory policy and practice have consistently considered FDA-approved contraception and emergency contraception not to be abortifacient drugs and not to cause abortions, and that determination is entitled to deference. Defs.' Mem. at 43-44; *Bhd. of R.R. Signalmen v. Surface Transp. Bd.*, 638 F.3d 807, 815 (D.C. Cir. 2011) (giving 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

[11] Plaintiffs' sole attempt at showing some arbitrariness in the regulations is their reference to the distinction between integrated auxiliary schools and seminaries, and other schools and seminaries. *See* Pls.' Mem. at 44. But as plaintiffs recognize, this is a distinction that has long been present in the Internal Revenue Code. *Id.*; 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.

Lorillard v. Pons, 434 U.S. 575, 580 (1978)). Because they reflect a settled understanding of FDA-approved contraceptives that is in accordance with existing federal laws, the regulations cannot be deemed contrary to any law dealing with abortion.

III. PLAINTIFFS CANNOT ESTABLISH IRREPARABLE HARM, AND AN INJUNCTION WOULD INJURE THE GOVERNMENT AND THE PUBLIC

As this Court has explained, the standard for granting a permanent injunction is essentially the same as that for a preliminary injunction, except that the moving party must demonstrate *actual*, rather than likely, success on the merits of its claim. *See CFM Majestic, Inc. v. NHC, Inc.*, 93 F. Supp. 2d 942, 958 (N.D. Ind. 2000) (citing *Plummer v. Am. Inst. of Certified Pub. Accountants*, 97 F.3d 220, 229 (7th Cir. 1996). Thus, the Court must consider: (1) success on the merits; (2) whether the movant will suffer irreparable injury absent an injunction; (3) the balance of hardships between the parties; and (4) whether the public interest supports granting the requested injunction. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008).

As demonstrated above and in defendants' opening brief, plaintiffs cannot succeed on the merits of their claims, and, thus, they are not entitled to an injunction for that reason alone. Similarly, even assuming for the sake of argument that a violation of RFRA constitutes an irreparable injury, "for even minimal periods of time," as it does for a First Amendment violation, *Elrod v. Burns*, 427 U.S. 347, 373 (1976), plaintiffs' inability to prevail on their claims means that plaintiffs also cannot satisfy the irreparable injury prong, which in this case depends on acceptance of their merits arguments. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012).

Nor can plaintiffs satisfy the remaining two factors for an injunction: that the balance of the equities tips in their favor or that the public interest would be served by an injunction. With respect to the former, defendants would be "inherentl[y] harm[ed]" by an injunction, because it would prohibit the defendant agencies from implementing duly promulgated regulations that Congress required them to develop and enforce. *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008). With respect to the latter, the public interest also tips in defendants' favor

because a permanent injunction would deprive plaintiffs' employees and covered dependents of the benefits required by the challenged regulations, which include improved healthcare outcomes and reduced disparity in the financial burden of health care costs for women. *See* IOM Rep. at 20, 102-04, AR at 318, 400-02; 77 Fed. Reg. at 8728, AR at 215; *see also* 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009). Even assuming that plaintiffs could succeed on the merits of their claims (which defendants have shown they cannot do), defendants respectfully submit that the balancing of these factors weighs against plaintiffs' request for an injunction.

CONCLUSION

For the foregoing reasons, defendants respectfully ask that the Court grant defendants' motion to dismiss or, in the alternative, for summary judgment, and deny plaintiffs' motion for summary judgment.

Respectfully submitted this 1st day of November, 2013,

STUART F. DELERY
Assistant Attorney General

DAVID A. CAPP
United States Attorney

JENNIFER RICKETTS
Director

SHEILA M. LIEBER
Deputy Director

*_/s/ Michael C. Pollack*_____
MICHAEL C. POLLACK (NY Bar)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW, Room 6143
Washington, DC 20530
Tel: (202) 305-8550
Fax: (202) 616-8470
Email: michael.c.pollack@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

*_/s/ Michael C. Pollack*_____
MICHAEL C. POLLACK