IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-02611-WJM-BNB

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, et al.,

Plaintiffs,

v.

KATHLEEN SEBELIUS, et al.,

Defendants.

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs ask this Court to preliminarily enjoin regulations that are intended to accommodate religious exercise while helping to ensure that women have access to health coverage, without cost-sharing, for preventive services that medical experts deem necessary for women's health and well-being. Subject to an exemption for houses of worship and their integrated auxiliaries, and accommodations for certain other non-profit religious organizations, the regulations that plaintiffs challenge require certain group health plans and health insurance issuers to provide coverage, without cost-sharing (such as a copayment, coinsurance, or a deductible), for, among other things, all Food and Drug Administration (FDA)-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider.

The regulations are the product of a decision by defendants to accommodate concerns expressed by non-profit religious organizations by relieving them of any responsibility to contract, arrange, pay, or refer for contraceptive coverage or services. The regulations also seek to ensure that women who participate in the group health plans of such organizations are not denied access to contraceptive coverage without cost-sharing. To invoke the accommodations, an organization merely needs to certify that it meets the eligibility criteria and share a copy of the

certification with its issuer or third-party administrator (TPA). Once it does so, the organization's issuer or TPA takes on the responsibility to provide separate payments for contraceptive services to the organization's plan participants and beneficiaries. The objecting employer does not bear the cost (if any) of providing contraceptive coverage; nor does it administer, contract for, arrange, or refer for such coverage. While defendants continue to consider potential options to fully and appropriately extend the consumer protections provided by the regulations to self-insured church plans, they acknowledge that, at this time, they lack authority to require the TPAs of self-insured church plans, like plaintiff Christian Brothers Employee Benefit Trust ("Trust"), to make the separate payments for contraceptive services for participants and beneficiaries in such plans under the accommodation.

Plaintiffs' motion for preliminary injunction should be denied for several reasons. At the outset, plaintiffs lack standing to assert their claims. As noted above, because the Trust is a self-insured church plan, the government lacks authority to require any TPA of the Trust to make the separate payments for contraceptive services for participants and beneficiaries in the plan under the accommodation. Because the remaining plaintiffs offer coverage to their employees through the Trust, the injury of which plaintiffs complain—that the regulations somehow require them to facilitate access to contraceptive services to which they object on religious grounds or to contract, arrange, or pay for such services—simply does not apply to the plaintiffs here and, as a result, they lack standing.

For the same reason, even if plaintiffs had standing, their Religious Freedom Restoration Act (RFRA) claim would fail on the merits. Because the government cannot require any TPA of the Trust to provide separate payments for contraceptive services to the participants and beneficiaries of the Trust, the regulations impose absolutely no burden on plaintiffs' religious exercise, much less a substantial burden as required under RFRA. In short, the regulations do not require plaintiffs to facilitate, or act as a trigger for their employees to obtain, contraceptive coverage, even if such a claim could establish a substantial burden under RFRA, which it cannot. Plaintiffs' First Amendment claims are equally meritless. 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. Finally, plaintiffs cannot satisfy the remaining requirements for obtaining a preliminary injunction.

BACKGROUND

Before the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), many Americans did not receive the preventive health care they needed. Due largely to cost, Americans used preventive services at about half the recommended rate. *See* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 19-20, 109 (2011) ("IOM REP."), AR at 317-18, 407.[1] Section 1001 of the ACA seeks to cure this problem by making preventive care accessible and affordable for many more Americans. Specifically, the provision requires all group health plans and health insurance issuers that offer non-grandfathered health coverage to provide coverage for certain preventive services without cost-sharing, including, "[for] women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a)(4).

Because there were no existing HRSA guidelines relating to preventive care and screening for women, the Department of Health and Human Services requested that the Institute of Medicine (IOM) develop recommendations to implement the requirement to provide coverage, without cost-sharing, of preventive services for women. IOM REP. at 2, AR at 300. After conducting an extensive science-based review, IOM recommended that HRSA guidelines include, as relevant here, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id*. at 10-12, AR at 308-10. IOM determined that coverage, without cost-sharing, for these services is necessary to increase access to such services, and thereby reduce unintended pregnancies (and

[1] Where appropriate, defendants have provided parallel citations to the Administrative Record (AR), on file with the Court. *See* ECF No. 28.

the negative health outcomes that disproportionately accompany them) and promote healthy birth spacing. *Id*. at 102-03, AR at 400-01.

On August 1, 2011, HRSA adopted guidelines consistent with IOM's recommendations, subject to an exemption relating to certain religious employers authorized by regulations issued that same day (the "2011 amended interim final regulations"). *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), AR at 283-84. In February 2012, the government adopted in final regulations the definition of "religious employer" contained in the 2011 amended interim final regulations while also creating a temporary enforcement safe harbor for non-grandfathered group health plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage (and any associated group health insurance coverage). *See* 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012), AR at 213-14. The government committed to undertake a new rulemaking during the safe harbor period to adopt new regulations to further accommodate non-grandfathered non-profit religious organizations' religious objections to covering contraceptive services. *Id*. at 8728, AR at 215. The regulations challenged here (the "2013 final rules") represent the culmination of that process. *See* 78 Fed. Reg. 39,870, AR at 1-31; *see also* 77 Fed. Reg. 16,501 (Mar. 21, 2012), AR at 186-93; 78 Fed. Reg. 8456 (Feb. 6, 2013), AR at 165-85.[2]

The 2013 final rules represent a significant accommodation by the government of the religious objections of certain non-profit religious organizations while promoting two important policy goals. The regulations provide women who work for non-profit religious organizations with access to contraceptive coverage without cost sharing, thereby advancing the government's compelling interests in safeguarding public health and ensuring that women have equal access to health care. The regulations do so in a way that does not require non-profit religious organizations with religious objections to contract, arrange, pay, or refer for that coverage.

[2] The 2013 final rules generally apply to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014, except the amendments to the religious employer exemption apply to group health plans and group health insurance issuers for plan years beginning on or after August 1, 2013. *See* 78 Fed. Reg. at 39,871-72, AR at 3-4.

The 2013 final rules simplify and clarify the religious employer exemption by eliminating the first three criteria and clarifying the fourth. Under the 2013 final rules, a "religious employer" is "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended," which refers to churches, their integrated auxiliaries, and conventions or associations of churches, and the exclusively religious activities of any religious order. 45 C.F.R. § 147.131(a).

The 2013 final rules also establish accommodations with respect to the contraceptive coverage requirement for group health plans established or maintained by "eligible organizations." 78 Fed. Reg. at 39,875-80, AR at 7-12. An "eligible organization" is an organization that satisfies the following criteria:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
>
> (2) The organization is organized and operates as a nonprofit entity.
>
> (3) The organization holds itself out as a religious organization.
>
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies.

45 C.F.R. § 147.131(b); *see also* 78 Fed. Reg. at 39,874-75, AR at 6-7.

Under the 2013 final rules, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874, AR at 6. To be relieved of any such obligations, the 2013 final rules require only that an eligible organization complete a self-certification form stating that it is an eligible organization and provide a copy of that self-certification to its issuer or TPA. *Id*. at 39,878-79, AR at 10-11. In the case of a self-insured group health plan that is not a self-insured church plan, the organization's TPA, upon receipt of the self-certification, must provide or arrange separate payments for contraceptive services for participants and beneficiaries in the plan without cost-

sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or its plan. *See id*. at 39,879-80, AR at 11-12. Any costs incurred by the TPA will be reimbursed through an adjustment to Federally-facilitated Exchange (FFE) user fees. *See id.* at 39,880, AR at 12. The regulations do not require the TPAs of self-insured church plans that have not made an election under 26 U.S.C. § 410(d)—like the Trust—to make separate payments for contraceptive services for participants and beneficiaries in such plans under the accommodation. *See* 78 Fed. Reg. at 39,879-39,880, AR at 11-12; 29 U.S.C. § 1003(b)(2).

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

I. PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS

A. Plaintiffs Lack Standing To Challenge The Regulations

Plaintiffs' motion for preliminary injunction should be denied at the outset for lack of standing. "[T]he irreducible constitutional minimum of standing" requires that a plaintiff (1) have suffered an injury in fact, (2) that is caused by the defendant's conduct, and (3) that is likely to be redressed by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). As to the injury prong, a plaintiff must demonstrate that it has "suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id*. at 560 (quotations omitted). Allegations of possible future injury do not suffice; rather, "[a] threatened injury must be certainly impending to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (quotation omitted).

The harm alleged by Little Sisters of the Poor Home for the Aged, Denver, and Little Sisters of the Poor, Baltimore, Inc., (collectively, "Little Sisters Plaintiffs") is that, to avail themselves of the accommodations, the challenged regulations require them to engage in actions

that "facilitate" and/or make them the "trigger" for the provision of payments for contraceptive services by a third party. *See* Compl. ¶¶ 109-146. Christian Brothers Services and the Trust (collectively, "Christian Brothers Plaintiffs") allege that they are injured because the regulations require them to provide payments for contraceptive services or contract or otherwise arrange with a third party for such payments to be made with respect to the participants and beneficiaries of the Trust. *See id*. ¶¶ 147-164. The Trust, however, is a self-insured "church plan" under the Employee Retirement Income Security Act (ERISA) that has not made an election under 26 U.S.C. § 410(d). *Id*. ¶¶ 21-23. And defendants lack regulatory authority to require the TPAs of self-insured church plans that have not made such an election to make the separate payments for contraceptive services for participants and beneficiaries in such plans under the accommodation.

In general, under the challenged regulations, when a TPA receives a copy of the self-certification from an eligible employer that sponsors a self-insured group health plan, that TPA becomes an ERISA Section 3(16), 29 U.S.C. § 1002(16), plan administrator and claims administrator for the purpose of providing the separate payments for contraceptive services. *See* 29 C.F.R. § 2510.3-16(b). Thus, the contraceptive coverage requirements can be enforced against such TPAs through defendant Department of Labor's ERISA enforcement authority. *See* 78 Fed. Reg. 39,870, 39,879-39,880 (July 2, 2013), AR at 11-12. But church plans are specifically excluded from the ambit of ERISA. *See* 29 U.S.C. § 1003(b)(2). Thus, ERISA enforcement authority is not available with respect to the TPAs of self-insured church plans under the accommodation, and the government cannot compel such TPAs under such authority to provide contraceptive coverage to self-insured church plan participants and beneficiaries under the accommodation, including the employees of the Little Sisters Plaintiffs.

The Little Sisters Plaintiffs remain eligible for the accommodations under the final regulation promulgated by defendant Department of the Treasury, 26 C.F.R. § 54.9815-2713A, and therefore need not contract, arrange, pay, or refer for contraceptive coverage.[3] And neither

[3] The same can be said of any other entity that qualifies as an "eligible organization" under the accommodations and participates in the Trust church plan, whether or not that organization is a plaintiff in this action.

the Christian Brothers Plaintiffs nor any TPA of the Trust is required under the regulations to provide separate payments for contraceptive services or to contract or otherwise arrange with a third party for such payments to be made with respect to the participants and beneficiaries of the Trust. In short, under the challenged regulations, there is absolutely no connection between plaintiffs and contraceptive coverage. Thus, the injury of which plaintiffs complain—with respect to the Little Sisters Plaintiffs, that the regulations somehow require them to facilitate access to contraceptive services to which they object on religious grounds or, with respect to the Christian Brothers Plaintiffs, that the regulations require them to contract, arrange, or pay for contraceptive coverage—simply does not apply to plaintiffs here. Because plaintiffs lack standing to assert their claims, their motion for preliminary injunction should be denied.

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

Under RFRA, Pub. L. No. 103-141, 107 Stat. 1488 (1993), the federal government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. 2000bb-1. Importantly, "only substantial burdens on the exercise of religion trigger the compelling interest requirement." *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001). "A substantial burden exists 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.*, 450 U.S. 707, 718 (1981)). "An inconsequential or *de minimis* burden on religious practice does not rise to this level, nor does a burden on activity unimportant to the adherent's religious scheme." *Id.*; *see Garner v. Kennedy*, 713 F.3d 237, 241-42 (5th Cir. 2013).

Plaintiffs cannot possibly show—as they must—that the challenged regulations substantially burden their religious exercise for the same reason that they have not even alleged an injury sufficient for purposes of Article III standing. The Little Sisters Plaintiffs are eligible for the accommodation, and thus, they need not contract, arrange, pay, or refer for contraceptive coverage. Moreover, the government cannot require any TPA of the Trust, which is a self-insured church plan, to provide separate payments for contraceptive services to the participants

and beneficiaries of the Trust, meaning that the Little Sisters Plaintiffs are not "trigger[ing]" or "facilitating" access to contraceptive coverage, Compl. ¶¶ 110, 120, or "provid[ing] designations or certifications that will cause others to provide [contraceptive coverage]" to their employees, Pls.' Br. at 7, ECF No. 15. Finally, because the Trust is a self-insured church plan, the challenged regulations do not require the Christian Brothers Plaintiffs or their TPAs to provide separate payments for contraceptive services or to contract or otherwise arrange with a third party for such payments to be made with respect to the participants and beneficiaries of the Trust. The regulations, therefore, impose absolutely no burden on plaintiffs' religious exercise, let alone a substantial burden.

Plaintiffs contend the Tenth Circuit's decision in *Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), is dispositive of the substantial burden inquiry here, but it is not. *Hobby Lobby* addressed the RFRA claim of for-profit corporations, which, unlike plaintiffs here, are not eligible for the accommodations—and thus are required by the regulations to contract, or otherwise arrange, and pay for, contraceptive coverage for their employees—and do not have a self-insured church plan. The *Hobby Lobby* court had no occasion to consider whether the regulations' accommodations as applied to a self-insured church plan, which relieve eligible non-profit religious organizations like the Little Sisters Plaintiffs of any obligation to contract, arrange, pay, or refer for contraceptive coverage, and do not require church plan TPAs to provide separate payments for contraceptive services, impose a substantial burden on religious exercise. They do not for the reasons discussed above.[4] Because the regulations do not impose a substantial burden on plaintiffs' religious exercise, plaintiffs' motion for preliminary injunction should be denied.

Even if the challenged regulations were deemed to impose a substantial burden on plaintiffs' religious exercise, the regulations satisfy strict scrutiny because they are narrowly

[4] Plaintiffs also rely on *Armstrong v. Sebelius*, 2013 WL 5213640 (D. Colo. Sept. 17, 2013), *Briscoe v. Sebelius*, 2013 WL 4781711 (D. Colo. Sept. 6, 2013), and *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012), *aff'd*, 2013 WL 5481997 (10th Cir. Oct. 3, 2012). But these decisions all hinged on the Tenth Circuit's holding in *Hobby Lobby* and therefore are similarly inapposite here.

tailored to serve compelling governmental interests in public health and gender equality. Defendants recognize that a majority of the en banc Tenth Circuit rejected the government's strict scrutiny argument in *Hobby Lobby*, and that this Court is bound by that decision. Defendants have filed a petition for a writ of certiorari that asks the Supreme Court to review the Tenth Circuit's decision. Defendants raise the argument here merely to preserve it for appeal.

C. Plaintiffs' Free Exercise Claim Is Without Merit

A law that is neutral and generally applicable does not run afoul of the Free Exercise Clause even if it prescribes conduct that an individual's religion proscribes or has the incidental effect of burdening a particular religious practice. *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990). "Neutrality and general applicability are interrelated." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). A law is neutral if it does not target religiously motivated conduct either on its face or as applied. *Id*. at 533. A neutral law has as its purpose something other than the disapproval of a particular religion, or of religion in general. *Id*. at 545. A law is generally applicable so long as it does not selectively impose burdens only on conduct motivated by religious belief. *Id*.

Unlike such selective laws, the challenged regulations are neutral and generally applicable. Indeed, 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.[5] "The regulations were passed, not with the object of interfering with religious practices, but instead to improve women's access to health care and lessen the disparity between men's and women's healthcare costs." *O'Brien*, 894 F. Supp. 2d at 1161. The regulations reflect expert medical recommendations about the medical necessity of contraceptive services, without regard to any religious motivations for or against such services. *See, e.g.*, *Conestoga*, 917 F. Supp. 2d at 410.

[5] *See, e.g., MK Chambers v. U.S. Dep't of Health & Human Servs.*, 2013 WL 1340719, at *5 (E.D. Mich. Apr. 3, 2013); *Conestoga*, 917 F. Supp. 2d at 409-10; *Grote Indus., LLC v. Sebelius*, 914 F. Supp. 2d 943, 952-53 (S.D. Ind. 2012); *Autocam*, 2012 WL 6845677, at *5; *O'Brien*, 894 F. Supp. 2d at 1160-62.

The regulations, moreover, do not pursue their purpose "only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545. The regulations apply to all non-grandfathered health plans that do not qualify for the religious employer exemption or the accommodations for eligible organizations. Thus, "it is just not true . . . 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). The Tenth Circuit, moreover, has made clear that the existence of "express exceptions for objectively defined categories of [entities]," like grandfathered plans and religious employers, does not negate a law's general applicability. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004); *see Grace United Methodist v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006); *Swanson v. Guthrie Indep. Sch.*, 135 F.3d 694, 698, 701 (10th Cir. 1998).[6]

Finally, even if the regulations were not neutral or generally applicable, plaintiffs' free exercise claim still would fail because, as explained above, the regulations do not substantially burden plaintiffs' religious exercise. *See Axson-Flynn*, 356 F.3d at 1294 (explaining that, even where a law is not neutral or generally applicable, strict scrutiny applies only if the law substantially burdens religious exercise); *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002) (same); *Goodall v. Stafford County School Bd.*, 60 F.3d 168, 173 (4th Cir. 1995) (same).

D. Plaintiffs' Establishment Clause Claim Is Without Merit

"The clearest command of the Establishment Clause is that one religious *denomination* cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982)

[6] Plaintiffs seek to undermine the government's rationale for distinguishing between houses of worship, which are exempt, and other non-profit religious organizations, which are accommodated, by opining that because "[t]he employees of the Plaintiffs all work for openly Catholic institutions . . . . [t]here is no reason to believe Plaintiffs' employees are less likely to share their religious beliefs." Pl.'s Br. at 10. Even assuming plaintiffs offered any evidence to support this supposition (and they have not) and even assuming it meant that all of plaintiffs' employees share the organizations' specific religious beliefs regarding the use of contraceptive services, it does not render unlawful the distinctions drawn by the government—which are based on the general characteristics of houses of worship as compared to those of other non-profit religious organizations, like hospitals, universities, and charities, *see* 78 Fed. Reg. at 39,874, 39,887, AR at 6, 19, and not the characteristics of the specific plaintiffs here. *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). 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.

(emphasis added). A law that discriminates among religions by "aid[ing] one religion" or "prefer[ring] one religion over another" is subject to strict scrutiny. *Id*. at 246; *see also Olsen v. DEA*, 878 F.2d 1458, 1461 (D.D.C. 1989). Thus, for example, the Supreme Court has struck down on Establishment Clause grounds a state statute that was "drafted with the explicit intention" of requiring "particular religious denominations" to comply with registration and reporting requirements while excluding other religious denominations. *Larson*, 456 U.S. at 254; *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703-07 (1994) (striking down statute that "single[d] out a particular religious sect for special treatment"). The Court, on the other hand, has upheld a statute that provided an exemption from military service for persons who had a conscientious objection to all wars, but not those who objected to only a particular war. *Gillette v. United States*, 401 U.S. 437 (1971). The Court explained that the statute did not discriminate among religions because "no particular sectarian affiliation" was required to qualify for conscientious objector status. *Id*. at 450-51. "[C]onscientious objector status was available on an equal basis to both the Quaker and the Roman Catholic." *Larson*, 456 U.S. at 247 n.23; *see also Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (upholding RLUIPA because it did not "confer[] . . . privileged status on any particular religious sect" or "single[] out [any] bona fide faith for disadvantageous treatment").

Like the statutes at issue in *Gillette* and *Cutter*, the preventive services coverage regulations do not grant any denominational preference or otherwise discriminate among religions. It is of no moment that the religious employer exemption and accommodations for eligible organizations apply to some employers but not others. "[T]he Establishment Clause does not prohibit the government from [differentiating between organizations based on their structure and purpose] when granting religious accommodations as long as the distinction[s] drawn by the regulations . . . [are] not based on religious affiliation." *Grote*, 914 F. Supp. 2d at 954; *accord O'Brien*, 894 F. Supp. 2d at 1163; *see also, e.g.*, *Droz v. Comm'r of IRS*, 48 F.3d 1120, 1124 (9th Cir. 1995); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 468-69 (Cal. 2004) ("This kind of distinction—not between denominations, but between religious

organizations based on the nature of their activities—is not what Larson condemns."). Here, the distinctions established by the regulations are not so drawn.

The regulations' definitions of religious employer and eligible organization "do[] not refer to any particular denomination." *Grote*, 914 F. Supp. 2d at 954. The exemption and accommodations are available on an equal basis to organizations affiliated with any and all religions. The regulations, therefore, do not discriminate among religions in violation of the Establishment Clause. Indeed, every court to have considered an Establishment Clause challenge to the prior version of the regulations—which also included a requirement that the organization 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. *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.[7]

E. Plaintiffs' Free Speech Claim Is Without Merit

Plaintiffs' free speech claims fare no better. As plaintiffs point out, Pls.' Br. at 11, to avail themselves of the accommodations, the Little Sisters Plaintiffs must self-certify that they meet the definition of "eligible organization." But, contrary to plaintiffs' assertion, the self-certification does not in any sense "trigger payments" for contraceptive services, *id*., as the government cannot require any TPA of the Trust, which is a self-insured church plan, to provide payments for contraceptive services. Completion of the simple self-certification form, moreover, 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 prior contraceptive-coverage regulations has rejected it, in part, because the regulations deal with conduct. *See, e.g.*, *MK Chambers*, 2013 WL

[7] 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, e.g.*, *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.").

1340719, at *6; *Briscoe v. Sebelius*, 927 F. Supp. 2d 1109 (D. Colo. 2013); *Conestoga*, 917 F. Supp. 2d at 418; *Autocam*, 2012 WL 6845677, *8. The accommodations likewise regulate conduct by relieving an eligible organization of any obligation to contract, arrange, pay, or refer for contraceptive coverage to which it has religious objections. Accordingly, plaintiffs' self-certifying their eligibility for an accommodation, which is incidental to the regulation of conduct, does not violate their speech rights. *See FAIR*, 547 U.S. at 61-63.

Similarly flawed is plaintiffs' claim that they are barred from expressing particular views to their TPA. Pls.' Br. at 11. Defendants have been clear that "[n]othing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraception." 78 Fed. Reg. at 39,880 n.41, AR at 12. What the regulations prohibit is an employer's improper attempt to interfere with its employees' ability to obtain contraceptive coverage from a third party by, for example, threatening the TPA with a termination of its relationship with the employer because of the TPA's "arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries." *See* 26 C.F.R. § 54.9815-2713A(b)(1).

As an initial matter, plaintiffs lack standing to assert this claim (for a reason in addition to the one explained above). Because the Trust is a self-insured church plan, the regulations do not require any TPA of the Trust to provide separate payments for contraceptive services or to contract or otherwise arrange with a third party for such payments to be made with respect to Trust participants and beneficiaries. And the Christian Brothers Plaintiffs have alleged that they will not provide contraceptive coverage or pay for contraceptive services because their religious beliefs prohibit them from doing so. *See* Compl. ¶¶ 27, 30. Therefore, any assertion that the non-interference provision will affect the speech of plaintiffs here is far too speculative for purposes of Article III standing. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).

Even if plaintiffs had standing to assert this claim, it would fail on the merits. Addressing an analogous argument in the context of the National Labor Relations Act, the Supreme Court concluded that an employer's threatening statements to its employees regarding the effects of unionization fell outside the protection of the First Amendment because they interfered with

employee rights. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). The Court explained that there was no First Amendment violation because the employer was "free to communicate . . . any of his general views . . . so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Id*.; *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). The same is true here. Because the regulations do not prevent plaintiffs from expressing their views regarding the use of contraceptive services, but rather, protect employees' right to obtain payments for contraceptive services through issuers/TPAs, there is no infringement of plaintiffs' right to free speech.

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

Plaintiffs have not established that they are likely to suffer irreparable harm in the absence of preliminary relief because, as explained above, they have not shown a likelihood of success on the merits of their RFRA or First Amendment claims. *See Hobby Lobby*, 723 F.3d at 1146 (explaining that, in the RFRA and First Amendment context, the merits and irreparable injury prongs of the preliminary injunction analysis merge together, and plaintiffs cannot show irreparable injury without also showing a likelihood of success on the merits). As to the balance of equities and the public interest, "there is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 296 (6th Cir. 1998) (indicating that granting an injunction against the enforcement of a likely constitutional statute would harm the government). Accordingly, plaintiffs have not established the three remaining elements necessary to obtain a preliminary injunction.[8]

[8] In their motion for preliminary injunction, plaintiffs argue that "[t]he benefits of the requested injunction [should] extend beyond the named plaintiffs to encompass all members of the proposed class." Pls.' Br. at 13. Defendants believe entry of preliminary injunctive relief is inappropriate in this case for the many reasons explained above. Nevertheless, if the Court disagrees and concludes that the named plaintiffs have met their burden of establishing jurisdiction and all four elements for obtaining a preliminary injunction, defendants do not object to the scope of the resulting preliminary injunction including the named plaintiffs as well as any members of the class plaintiffs have proposed in their complaint. *See* Compl. ¶ 16. Defendants, however, reserve the right to oppose class certification and the entry of any permanent relief on a class-wide basis.

Dated: November 8, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on November 8, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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

None.

/s/ Michelle R. Bennett
MICHELLE R. BENNETT
Trial Attorney