IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNIVERSITY OF NOTRE DAME, Plaintiff, v. KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, *et al.*, Defendants.	Case No. 3:13-cv-1276-PPS-CAN

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTIONS FOR TEMPORARY RESTRAINING ORDER AND FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff, the University of Notre Dame, asks this Court to enter a temporary restraining order ("TRO") and to preliminarily enjoin regulations that were issued five months ago and that are intended to accommodate religious exercise while helping to ensure that women have access to health coverage, without cost-sharing, for certain preventive services that medical experts deem necessary for women's health and well-being. Because of plaintiff's inexplicable and inexcusable delay, and because it cannot show a likelihood of success on the merits in any event, this Court should deny its motions.

Subject to an exemption for houses of worship and their integrated auxiliaries, and accommodations for certain other non-profit religious organizations, as discussed below, the regulations that plaintiff challenges 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.

When the contraceptive-coverage requirement was first established, in August 2011, certain non-profit religious organizations—including plaintiff here—objected on religious grounds to having to provide contraceptive coverage in the group health plans they offer to their employees. Although, in the government's view, these organizations were mistaken to claim that an accommodation was required under the First Amendment or the Religious Freedom Restoration Act (RFRA), the defendant Departments decided to accommodate the concerns expressed by these organizations. To that end, they established accommodations for the group health plans of eligible non-profit religious organizations, like plaintiff, that relieve plaintiff of the responsibility to contract, arrange, pay, or refer for contraceptive coverage or services, but that also ensure that the women who participate in plaintiff's plan are not denied access to contraceptive coverage without cost-sharing. To be eligible for an accommodation, the organization merely needs to certify that it meets the eligibility criteria, *i.e.*, that it is a non-profit

organization that holds itself out as religious and has a religious objection to providing coverage for some or all contraceptives. Once the organization certifies that it meets these criteria, it need not contract, arrange, pay, or refer for contraceptive coverage or services. If the group health plan of the organization is self-insured—like plaintiff here—its third-party administrator (TPA) has responsibility to arrange contraceptive coverage for the organization's employees and covered dependents. The objecting employer does not bear the cost (if any) of providing contraceptive coverage; nor does it administer such coverage; nor does it contract or otherwise arrange for such coverage; nor does it refer for such coverage.

Remarkably, plaintiff now declares that these accommodations themselves violate its rights under RFRA and the First Amendment. It contends that the mere act of certifying that it is eligible for an accommodation is a substantial burden on its religious exercise because, once it makes the certification, its employees will be able to obtain contraceptive coverage through other parties. This extraordinary contention suggests that plaintiff not only seeks to avoid paying for, administering, or otherwise providing contraceptive coverage itself, but also seek to prevent its employees and students from obtaining such coverage, even if through other parties.

At bottom, plaintiff's position seems to be that any asserted burden, no matter how *de minimis*, amounts to a substantial burden under RFRA. That is not the law. Congress amended the initial version of RFRA to add the word "substantially," and thus made clear that "any burden" would not suffice. Although these regulations require virtually nothing of it, plaintiff claims that the regulations run afoul of its sincerely held religious beliefs prohibiting it from providing or facilitating health coverage for certain contraceptive services, and that the challenged regulations violate RFRA, the First Amendment, and the Administrative Procedure Act (APA).

Plaintiff moves for a TRO and a preliminary injunction on all of its claims. The TRO should be denied at the outset because the alleged "emergency" prompting plaintiff's motion is an action by its TPA which does not appear to be required by the regulations and so is not fairly

traceable to defendants. Moreover, it should be denied, along with the motion for preliminary injunction, because of plaintiff's inexplicable delay in filing and advancing this lawsuit.

Further, plaintiff's motions should be denied because plaintiff has not shown that it is likely to succeed on the merits of any of its claims. With respect to plaintiff's RFRA claim, plaintiff cannot establish a substantial burden on its religious exercise—as it must—because the regulations do not require plaintiff to change its behavior in any significant way. Plaintiff is not required to contract, arrange, pay, or refer for contraceptive coverage. To the contrary, plaintiff is free to continue to refuse to do so, to voice its disapproval of contraception, and to encourage its employees to refrain from using contraceptive services. Plaintiff contends that the need to self-certify in order to obtain the accommodation is itself a burden on its religious exercise. But the challenged regulations require plaintiff *only* to self-certify that it has a religious objection to providing contraceptive coverage and otherwise meet the criteria for an eligible organization, and to share that self-certification with its TPA. In other words, plaintiff is required only to inform its TPA that it objects to providing contraceptive coverage, which it has done or would have to do voluntarily anyway even absent these regulations in order to ensure that it is not responsible for contracting, arranging, paying, or referring for such coverage. Plaintiff can hardly claim that it is a violation of RFRA to require it to do almost exactly what it would do in the ordinary course, absent the regulations.

Plaintiff's First Amendment claims are equally meritless. Indeed, nearly every court to consider similar First Amendment challenges to the prior version of the regulations rejected these claims, and their analysis applies here. Finally, plaintiff cannot satisfy the remaining requirements for obtaining a preliminary injunction.

For these reasons, and those explained below, plaintiff's motions for a TRO and for a preliminary injunction should be denied.

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 to

stay healthy, avoid or delay the onset of disease, lead productive lives, and reduce health care costs. 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."). Section 1001 of the ACA—which includes the preventive services coverage provision relevant here—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 group or individual 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 [(HRSA)]." 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 (HHS) 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.[1] After conducting an extensive science-based review, IOM recommended that HRSA guidelines include, among other things, well-woman visits; breastfeeding support; domestic violence screening; and, 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. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives, and intrauterine devices ("IUDs"). *See id.* at 105. IOM determined that coverage, without cost-sharing, for these services is necessary to increase access to such services, and thereby reduce unintended pregnancies (and the negative health

[1] IOM, which was established by the National Academy of Sciences in 1970, is funded by Congress to provide expert advice to the federal government on matters of public health. IOM REP. at iv.

outcomes that disproportionately accompany unintended pregnancies) and promote healthy birth spacing. *See id.* at 102-03.[2]

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").[3] Group health plans established or maintained by these religious employers (and associated group health insurance coverage) are exempt from any requirement to cover contraceptive services consistent with HRSA's guidelines. *See id.*; 45 C.F.R. § 147.131(a).

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). 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. The regulations challenged here (the "2013 final rules") represent the culmination of that process. *See*

[2] At least twenty-eight states have laws requiring health insurance policies that cover prescription drugs to also provide coverage for FDA-approved contraceptives. *See* Guttmacher Institute, State Policies in Brief: Insurance Coverage of Contraceptives (June 2013).

[3] To qualify for the religious employer exemption contained in the 2011 amended interim final regulations, an employer had to meet the following criteria:

(1) The inculcation of religious values is the purpose of the organization;

(2) the organization primarily employs persons who share the religious tenets of the organization;

(3) the organization serves primarily persons who share the religious tenets of the organization; and

(4) the organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011).

78 Fed. Reg. 39,870 (July 2, 2013); *see also* 77 Fed. Reg. 16,501 (Mar. 21, 2012) (Advance Notice of Proposed Rulemaking (ANPRM)); 78 Fed. Reg. 8456 (Feb. 6, 2013) (Notice of Proposed Rulemaking (NPRM)).

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. First, the regulations provide women who work for non-profit religious organizations with access to contraceptive coverage without cost sharing, thereby advancing the compelling government interests in safeguarding public health and ensuring that women have equal access to health care. Second, the regulations advance these interests in a narrowly tailored fashion that does not require non-profit religious organizations with religious objections to providing contraceptive coverage to contract, pay, arrange, or refer for that coverage.

The 2013 final rules simplify and clarify the religious employer exemption by eliminating the first three criteria and clarifying the fourth criterion. *See supra* note 3. 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 changes made to the definition of religious employer in the 2013 final rules are intended to ensure "that an otherwise exempt plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer hires or serves people of different religious faiths." 78 Fed. Reg. at 39,874.

The 2013 final rules also establish accommodations with respect to the contraceptive coverage requirement for group health plans established or maintained by "eligible organizations" (and group health insurance coverage provided in connection with such plans). *Id.* at 39,875-80; 45 C.F.R. § 147.131(b). 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.

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. 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. Its participants and beneficiaries, however, will still benefit from separate payments for contraceptive services without cost sharing or other charge. *Id.* at 39,874. In the case of an organization with a self-insured group health plan—such as plaintiff here—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; again, 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. Any costs incurred by the TPA will be reimbursed through an adjustment to Federally-facilitated Exchange (FFE) user fees. *See id.* at 39,880.

The 2013 final rules generally apply to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014, *see id.* at 39,872, except that 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 id.* at 39,871.

STANDARD OF REVIEW

"A temporary restraining order is an extraordinary and drastic remedy that should not be granted unless the movant carries the burden of persuasion by a clear showing of (1) reasonable likelihood of success on the merits, (2) no adequate remedy at law, (3) irreparable harm absent injunctive relief outweighing irreparable harm if injunctive relief is granted, and (4) no harm to the public interest." *Dirig v. Wilson*, No. 3:12-CV-549-WL, 2013 WL 2898276, at *1 (N.D. Ind. June 12, 2013).

Similarly, a preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff "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." *Id.* at 20; *see also, e.g., United States v. NCR Corp.*, 688 F.3d 833, 837 (7th Cir. 2012).[4]

ARGUMENT

I. PLAINTIFF IS NOT ENTITLED TO A TEMPORARY RESTRAINING ORDER

At the outset, plaintiff's motion for a temporary restraining order (TRO) should be denied because the alleged emergency occasioning plaintiff's motion is not of defendants' creation. Plaintiff alleges that its TPA has claimed that it plans to begin sending a "Contraceptive Prescription ID Card" to plaintiff's employees beginning Wednesday, December 11 or Thursday, December 12, and that a TRO is justified for that reason. *See* Pl.'s Mot. for TRO, ECF No. 7, Dec. 9, 2013. Neither the regulations nor defendants require any such thing. The regulations only require that an eligible organization that seeks to avail itself of the accommodations complete its self-certification and deliver that self-certification to its issuer or TPA by the beginning of the

[4] While the Seventh Circuit has applied the "'sliding scale' analysis," Mem. of Law in Supp. of Pl.'s Mot. for TRO and Mot. for Prelim. Inj. ("Pl.'s Br.") at 10, ECF No. 11-1, after *Winter*, *see, e.g., Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010), and defendants acknowledge that this Court is bound by the Seventh Circuit on this issue, the government reserves the right to argue that the "sliding scale" analysis is inconsistent with *Winter* and subsequent Supreme Court precedent. In any event, the "sliding scale" analysis does not relieve plaintiff of its burden to show that it is likely to succeed on the merits. *See Judge*, 612 F.3d at 546; *NCR Corp.*, 688 F.3d at 837.

first plan year on or after January 1, 2014. Because plaintiff's next plan year begins on January 1, 2014, all that the regulations require of plaintiff is to deliver that self-certification to its TPA by January 1, 2014. How a given TPA chooses to administer the benefit is up to that TPA, and nothing in the regulations requires that a TPA issue an "ID Card," or that it do so by or on any particular date. At bottom, then, plaintiff would have this Court issue a TRO now as to regulations that defendants are not presently enforcing against plaintiff, simply because plaintiff's TPA has allegedly decided to take a certain action—not required by the regulations—in advance of the date on which defendants will enforce the regulations against plaintiff. Plaintiff is thus more than a bit misleading when it uses the passive voice to allege that "Notre Dame has been given a deadline of a matter of days" and that "Notre Dame will be required prior to [January 1, 2014]" to sign the self-certification, Pl.'s Br. at 1, 48, since that alleged deadline and requirement are nowhere in the regulations, and are in no way a part of any requirement imposed by defendants. The causal link between the emergency that plaintiff claims and any action by defendants is simply absent, and plaintiff's extraordinary request for a TRO should therefore be denied.[5]

Moreover, these regulations have been in existence for over five months, and plaintiff has been well aware of them. Indeed, plaintiff had sued to challenge a prior version of the regulations, and its suit was dismissed for lack of standing and lack of ripeness. *See Univ. of Notre Dame v. Sebelius*, No. 3:12-cv-253-RLM, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012). And plaintiff's counsel filed another nearly identical suit and motion for preliminary injunction regarding these very regulations, in this very district, three months ago. *See Diocese of Fort Wayne v. Sebelius*, No. 1:12-cv-159-JD-RBC, ECF Nos. 73 & 74 (N.D. Ind.) (complaint challenging 2013 regulations and motion for preliminary injunction both filed September 6, 2013). As such, plaintiff does not even contend that the regulations themselves have created any

[5] This misalignment is evident from plaintiff's proposed order granting its motion for TRO, which would enjoin defendants from enforcement of the regulations against it or its TPA. But neither defendants nor the regulations require anything of plaintiff or of plaintiff's TPA at this time, and the regulations never require the TPA to take the action plaintiff claims it will soon take. There is nothing for the Court to restrain defendants from doing.

sort of emergency justifying the extraordinary relief of a TRO, because they plainly have not. Similarly, however, plaintiff's request for preliminary injunctive relief as to the regulations—which plaintiff does not claim to have been occasioned by its TPA's alleged actions—is fatally flawed because plaintiff has sat on its alleged rights for months. Plaintiff's inexplicable and inexcusable delay in filing and advancing this lawsuit militates strongly against any emergency relief at all. There is absolutely no reason plaintiff could not have done so, and the recent advent of plaintiff's alleged TPA-created emergency must not distract from plaintiff's own failure to have prosecuted its case in a timely fashion. If plaintiff had filed this lawsuit sooner, this Court could have already resolved a preliminary injunction motion, or at least be well on its way toward doing so, rather than being faced with emergency motions for immediate relief. "Expedited consideration is not for parties that create the need for prompt action by delaying a filing that could reasonably have been brought earlier." Order, *Autocam Corp. v. Sebelius*, No. 1:12-cv-01096-RJJ, ECF No. 12 (W.D. Mich. Oct. 12, 2012).

II. PLAINTIFF'S CLAIMS LACK MERIT

A. Plaintiff's Religious Freedom Restoration Act Claim Is Without Merit

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

Under RFRA, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb-1 *et seq.*), 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) (emphasis added). "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. of the Ind. Emp't Sec. Div.*, 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." *Kaemmerling*, 553 F.3d at 678; *see also Braunfeld v. Brown*, 366 U.S. 599, 606 (1961); *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 262 (3d Cir. 2008) (Scirica, C.J., concurring).

Plaintiff cannot show—as it must—that the challenged regulations substantially burden its religious exercise. Plaintiff relies heavily on the Seventh Circuit's decision in *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013) as if it were dispositive of this issue, *see, e.g.*, Pl.'s Br. at 14, but it is not. *Korte* addressed the RFRA claims of for-profit corporations, which, unlike plaintiff here, are not eligible for the accommodations and thus are required by the regulations to contract, arrange, and pay for contraceptive coverage for their employees. The court had no occasion to consider whether these regulations' accommodations, which relieve eligible non-profit religious organizations like plaintiff of any obligation to contract, arrange, pay, or refer for contraceptive coverage, impose a substantial burden on religious exercise. They do not for the reasons discussed below.[6]

The regulations do not impose a substantial burden on plaintiff because they do not require plaintiff to modify its behavior in any meaningful way. To put this case in its simplest terms, plaintiff challenges regulations that require it to do next to nothing, except what it would have to do even in the absence of the regulations. Plaintiff, as an eligible organization, is not required to contract, arrange, pay, or refer for contraceptive coverage. To the contrary, it is free to continue to refuse to do so, to voice its disapproval of contraception, and to encourage its employees and students to refrain from using contraceptive services. Plaintiff needs only to fulfill the self-certification requirement and provide the completed self-certification to its TPA. It need not provide payments for contraceptive services to its employees or students. Instead, a third party—plaintiff's TPA—provides payments for contraceptive services at no cost to plaintiff. In short, with respect to contraceptive coverage, plaintiff need not do anything more than it did prior to the promulgation of the challenged regulations—that is, to inform its TPA that

[6] Similarly, the district court in *Zubik v. Sebelius*, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013), was wrong to rely on cases involving claims of for-profit employers. For all the reasons set out in this brief, the *Zubik* court's conclusion that the regulations at issue in that case (and in this one) impose a substantial burden on the plaintiffs in that case—a conclusion that was rendered without citation to any legal authority, *id.*at *24-27—is simply unpersuasive.

it objects to providing contraceptive coverage in order to ensure that plaintiff is not responsible for contracting, arranging, paying, or referring for such coverage. Thus, the regulations do not require plaintiff "to significantly modify [its] religious behavior." *Garner*, 713 F.3d at 241. The Court's inquiry should end here. A law cannot be a substantial burden on religious exercise when "it involves no action or forbearance on [plaintiff's] part, nor . . . otherwise interfere[s] with any religious act in which [plaintiff] engage[s]." *Kaemmerling*, 553 F.3d at 679.

Because the regulations place no burden *at all* on plaintiff, they plainly place no cognizable burden on plaintiff's religious exercise. Plaintiff's contrary argument rests on an unprecedented and sweeping theory of what it means for religious exercise to be burdened. Not only does plaintiff want to be free from contracting, arranging, paying, or referring for contraceptive coverage for its employees and students—which, under these regulations, it is—but plaintiff would also prevent *anyone else* from providing such coverage to its employees and students, who might not subscribe to plaintiff's religious beliefs. That this is the *de facto* impact of plaintiff's stated objections is made clear by its assertion that RFRA is violated whenever plaintiff "triggers" a third party's provision to plaintiff's employees of services to which plaintiff objects. *See, e.g.*, Pl.'s Br. at 8, 9. This theory would mean, for example, that even the government would not realistically be able to provide contraceptive coverage to plaintiff's employees, because such coverage would be "trigger[ed]" by plaintiff's objection to providing such coverage itself. But RFRA is a shield, not a sword, *see O'Brien v. HHS*, 894 F. Supp. 2d 1149, 1158-60 (E.D. Mo. 2012), and accordingly it does not prevent the government from providing alternative means of achieving important statutory objectives once it has provided 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.").

Plaintiff's RFRA challenge is similar to the claim that the D.C. Circuit rejected in *Kaemmerling*. There, a federal prisoner objected to the FBI's collection of his DNA profile. 553 F.3d at 678. In concluding that this collection did not substantially burden the prisoner's

religious exercise, the court reasoned that "[t]he extraction and storage of DNA information are entirely activities of the FBI, in which Kaemmerling plays no role and which occur after the BOP has taken his fluid or tissue sample (to which he does not object)." *Id*. at 679. In the court's view, "[a]lthough the government's activities with his fluid or tissue sample after the BOP takes it may offend Kaemmerling's religious beliefs, they cannot be said to hamper his religious exercise because they do not pressure [him] to modify his behavior and to violate his beliefs." *Id*. (internal citation and quotation marks omitted). The same is true here, where the provision of contraceptive services is "entirely [an] activit[y] of [a third party], in which [plaintiff] plays no role." *Id*. As in *Kaemmerling*, "[a]lthough the [third party]'s activities . . . may offend [plaintiff's] religious beliefs, they cannot be said to hamper [its] religious exercise." *Id*.

Perhaps understanding the tenuous ground on which their RFRA claim rests, given that the regulations do not require plaintiff to contract, arrange, pay, or refer for contraceptive services, plaintiff attempts to circumvent this problem by advancing the novel theory that the regulations require it to somehow "facilitate" access to contraception coverage, Pl.'s Br. at 11, 16, and that it is this facilitation that violates plaintiff's religious beliefs. But under the challenged regulations plaintiff needs only to self-certify that it objects to providing coverage for contraceptive services and that it otherwise meets the criteria for an eligible organization, and to share that self-certification with its TPA. In other words, plaintiff must inform its TPA that it objects to providing contraceptive coverage, which it has done or would have to do voluntarily anyway even absent these regulations in order to ensure that it is not responsible for contracting, arranging, paying, or referring for contraceptive coverage. The sole difference is that plaintiff must inform its TPA that its objection is for religious reasons—a statement which it has already made repeatedly in this litigation and elsewhere. Any burden imposed by the purely administrative self-certification requirement—which should take plaintiff a matter of minutes—is, at most, *de minimis*, and thus cannot be "substantial" under RFRA.[7]

[7] RFRA's legislative history makes clear that Congress did not intend 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

Contrary to plaintiff's suggestion, the mere fact that plaintiff claims that the self-certification requirement imposes a substantial burden on their religious exercise does not make it so. *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."). Under RFRA, plaintiff is entitled to its sincere religious beliefs, but it is not entitled to decide what does and does not impose a substantial burden on such beliefs. Although "[c]ourts are not arbiters of scriptural interpretation," *Thomas*, 450 U.S. at 716, "RFRA still requires the court to determine whether the burden a law imposes on a plaintiff's stated religious belief is 'substantial.'" *Conestoga*, 917 F. Supp. 2d at 413. Plaintiff would limit the Court's inquiry to two prongs: first, whether plaintiff's religious objection to the challenged regulations is sincere, and second, whether the regulations apply significant pressure to plaintiff to comply. But plaintiff ignores a critical third criterion of the "substantial burden" test, which gives meaning to the term "substantial": whether the challenged regulations actually require plaintiff to modify its behavior in a significant—or more than *de minimis*—way. *See Living Water Church of God v. Charter Twp. of Meridian*, 258 Fed. App'x 729, 734-36 (6th Cir. 2007) (reviewing cases); *see also, e.g., Garner*, 713 F.3d at 241; *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348-49 (2d Cir. 2007).

The Seventh Circuit's decision in *Korte* is not to the contrary. Because the for-profit corporation plaintiffs in that case were not eligible for the accommodations (and thus were required to contract, arrange, and pay for contraceptive coverage), the court did not address whether an accommodation that requires a plaintiff to do nothing beyond satisfying a purely administrative self-certification requirement imposes a substantial burden on religious exercise. Indeed, the *Korte* court concluded that the regulations applicable to for-profit corporations imposed a substantial burden on those corporations and their owners because the regulations

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the act" apply "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).

require that the corporations "purchase the required contraception coverage" rather than "refrain from putting this coverage in place," and that they "arrange for their companies to provide" such coverage. 735 F.3d at 668, 683. And the *Korte* court likewise recognized that a substantial burden exists when the government "put[s] substantial pressure on an adherent to *modify his behavior* and to violate his beliefs." *Id.* at 682 (citing *Thomas*, 450 U.S. at 718)) (emphasis added).[8] Here, as opposed to in *Korte*, plaintiff is *not* itself required to contract, arrange, or pay for contraceptive coverage. Instead, plaintiff's complaint is that, in spite of its religious objection, someone else (its TPA) will provide payments for contraceptive services to its employees. This is insufficient to state a claim under RFRA.

Because the challenged regulations require that plaintiff take the *de minimis* step that they would have to take even in the absence of the regulations, the regulations do not impose a substantial burden on plaintiff's religious exercise. Plaintiff has therefore failed to establish a likelihood of success on the merits of its RFRA claim, and its motions for a TRO and for a preliminary injunction should be denied.

The challenged regulations also do not impose a substantial burden on plaintiff's religious exercise because any burden is indirect and too attenuated to be substantial. The ultimate decision of whether to use contraception "rests not with [the employers], but with [the] employees" in consultation with their health care providers. *Conestoga*, 917 F. Supp. 2d at 414-15; *see e.g.*, *Autocam Corp. v. Sebelius*, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012) ("The incremental difference between providing the benefit directly, rather than indirectly, is unlikely to qualify as a substantial burden on the Autocam Plaintiffs."). Moreover, even if the challenged regulations were deemed to impose a substantial burden on plaintiff's religious

[8] Similarly, the Tenth Circuit in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), on which plaintiff also relies and on which the *Korte* court relied, itself relied heavily on *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010), which makes clear that, for a law to impose a substantial burden, it must require some actual change in religious behavior—either forced participation in conduct or forced abstention from conduct. *See Hobby Lobby*, 723 F.3d at 1138 ("[A] government act imposes a 'substantial burden' on religious exercise if it: (1) '*requires participation* in an activity prohibited by a sincerely held religious belief,' (2) '*prevents participation in conduct* motivated by a sincerely held religious belief,' or (3) 'places substantial pressure on an adherent . . . *to engage in conduct* contrary to a sincerely held religious belief." (emphasis added) (citing *Abdulhaseeb*, 600 F.3d at 1315)).

exercise, the regulations satisfy strict scrutiny because they are narrowly tailored to serve compelling governmental interests in public health and gender equality. Defendants recognize that a majority of the Seventh Circuit rejected these arguments in *Korte*, and that this Court is bound by that decision. Defendants raise the arguments here merely to preserve them for appeal.

B. The Regulations Do Not Violate the Free Exercise Clause

The Supreme Court has made clear that 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., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990); *see also Lukumi*, 508 U.S. at 531-32. "Neutrality and general applicability are interrelated." *Lukumi*, 508 U.S. at 531. 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 preventive services coverage 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.[9] "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.*,

[9] *See MK Chambers Co. v. U.S. Dep't of Health & Human Servs.*, No. 13-cv-11379, 2013 WL 1340719, at *5 (E.D. Mich. Apr. 3, 2013); *Eden Foods*, 2013 WL 1190001, at *5; *Conestoga*, 917 F. Supp. 2d at 409-10; *Grote*, 914 F. Supp. 2d at 952-53; *Autocam*, 2012 WL 6845677, at *5; *Korte*, 912 F. Supp. 2d at 744-47; *Hobby Lobby*, 870 F. Supp. 2d at 1289-90, *rev'd on other grounds*, 2013 WL 3216103; *O'Brien*, 894 F. Supp. 2d at 1160-62; *see also Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468-69 (N.Y. 2006) (rejecting similar challenge to state law); *Catholic Charities of Sacramento*, 85 P.3d at 81-87 (same). *But see Sharpe Holdings, Inc. v. HHS*, 2012 WL 6738489, at *5 (E.D. Mo. Dec. 31, 2012); *Geneva Coll. v. Sebelius*, 2013 WL 838238, at *24-*26 (W.D. Penn. Mar. 6, 2013).

Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 410 (E.D. Pa. 2013) ("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."); *Grote Industries, LLC v. Sebelius*, 914 F. Supp. 2d 943, 952-53 (S.D. Ind. 2012) ("[T]he purpose of the regulations is a secular one, to wit, to promote public health and gender equality.").

The regulations, moreover, do not pursue their purpose "only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545; *see United States v. Amer*, 110 F.3d 873, 879 (2d Cir. 1997) (concluding law that "punishe[d] conduct within its reach without regard to whether the conduct was religiously motivated" was generally applicable). 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) (quoting *Lukumi*, 508 U.S. at 536); *see O'Brien*, 894 F. Supp. 2d at 1162; *Autocam Corp. v. Sebelius*, 2012 WL 6845677, at *5 (W.D. Mich. Dec. 24, 2012); *Grote*, 914 F. Supp. 2d at 953.

The existence of express exceptions or accommodations for objectively defined categories of entities, like grandfathered plans, religious employers, and eligible organizations, "does not mean that [the regulations do] not apply generally." *Autocam*, 2012 WL 6845677, at *5. "General applicability does not mean absolute universality." *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008); *accord Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004); *Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 960-61 (9th Cir. 1991) (concluding employer verification statute was generally applicable even though it exempted independent contractors, household employees, and employees hired prior to November 1986 because exemptions "exclude[d] entire, objectively-defined categories of employees"); *Intercommunity Ctr. for Justice & Peace v. INS*, 910 F.2d 42, 44 (2d Cir. 1990) (same). "Instead, exemptions undermining 'general applicability' are those tending to suggest disfavor of

religion." *O'Brien*, 894 F. Supp. 2d at 1162. The exception for grandfathered plans is available on equal terms to all employers, whether religious or secular. And the religious employer exemption and eligible organization accommodations serve to accommodate religion, not to disfavor it. *Id.*; *see also Conestoga*, 917 F. Supp. 2d at 410; *Grote*, 914 F. Supp. 2d at 953. Thus, these categorical exceptions and accommodations do not trigger strict scrutiny.[10]

"[C]arving out an exemption for defined religious entities [also] does not make a law non neutral as to others." *Grote*, 914 F. Supp. 2d at 953 (quotation omitted). Indeed, the religious employer exemption "presents a strong argument in favor of neutrality" by "demonstrating that the object of the law was not to infringe upon or restrict practices because of their religious motivation." *O'Brien*, 894 F. Supp. 2d at 1161 (quotations omitted); *see Conestoga*, 917 F. Supp. 2d at 410 ("The fact that exemptions were made for religious employers . . . . shows that the government made efforts to accommodate religious beliefs, which counsels in favor of the regulations' neutrality."). The regulations are not rendered unlawful "merely because the [religious employer exemption] does not extend as far as Plaintiffs wish." *Grote*, 914 F. Supp. 2d at 953.

Plaintiff's reliance on *Lukumi*, 508 U.S. 520, is of no help, as this case is a far cry from *Lukumi*, where the legislature specifically targeted the religious exercise of members of a single church (Santeria) by enacting ordinances that used terms such as "sacrifice" and "ritual," *id*. at 533-34, and prohibited few, if any, animal killings other than Santeria sacrifices, *id*. at 535-36. Here, there is no indication that the regulations are anything other than an effort to increase women's access to and utilization of recommended preventive services. *See O'Brien*, 894 F. Supp. 2d at 1161; *Conestoga*, 917 F. Supp. 2d at 410; *Grote*, 914 F. Supp. 2d at 952-53. And it cannot be disputed that defendants have made extensive efforts—through the religious employer exemption and the eligible organization accommodations—to accommodate religion in ways that

[10] Plaintiff's reliance on *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), is misplaced. That case addressed policies that created a secular exemption but refused all religious exemptions. *See id.* at 365. The preventive services coverage regulations, in contrast, contain both secular and religious exemptions. Thus, there is simply no basis in this case to infer "discriminatory intent" on the part of the government. *Id.*

will not undermine the goal of ensuring that women have access to coverage for recommended preventive services without cost sharing.

Finally, plaintiff maintains that the challenged regulations are subject to strict scrutiny under a "hybrid rights" theory because they also infringe on plaintiff's freedom of speech and association. The Supreme Court, however, has never invoked this so-called "hybrid rights theory" to justify applying strict scrutiny to a free exercise claim. *See Lukumi*, 508 U.S. at 567 (Souter, J., concurring in part and concurring in the judgment) (noting the hybrid rights exception would either swallow the *Smith* rule or be entirely unnecessary). And several circuits have specifically rejected the theory. *See Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001); *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993).[11] Nevertheless, assuming arguendo that the hybrid rights theory is valid, it applies only where the plaintiff's non-free-exercise claims are "independently viable." *Mahoney v. District of Columbia*, 662 F. Supp. 2d 74, 95 n.12 (D.D.C. 2009). Here, plaintiff alleges that the preventive services coverage provision violates both the right to free exercise of religion and their rights to free speech and free association. Plaintiff does not even assert a separate free association claim in this case and, as explained shortly, their free speech claims are meritless. "'[A] plaintiff does not allege a hybrid rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right.'" *Civil Liberties for Urban Believers*, 342 F.3d at 765 (quoting *Miller v. Reed*, 176 F.3d 1202, 1207-08 (9th Cir. 1999)); *see also Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001) ("[T]he combination of two untenable claims" does not "equal[] a tenable one."). Thus, even if the hybrid rights theory were valid, it would not trigger strict scrutiny in this case.

For these reasons, plaintiff is unlikely to succeed on its free exercise claim.

[11] Although the Seventh Circuit has discussed the hybrid rights theory, *see Civil Liberties for Urban Believers*, 342 F.3d at 764-65, the government is not aware of any case in which the Seventh Circuit has invoked it to justify the application of strict scrutiny.

C. The Regulations Do Not Violate the Free Speech Clause

Plaintiff's free speech claims are not likely to fare any better. The right to freedom of speech "prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 61 (2006). But the preventive services coverage regulations do not compel speech—by plaintiff or any other person, employer, or entity—in violation of the First Amendment. Nor do they limit what plaintiff may say. Plaintiff remains free under the regulations to express whatever views it may have on the use of contraceptive services (or any other health care services) as well as its views about the regulations. Plaintiff, moreover, may encourage its employees not to use contraceptive services.

First, as plaintiff points out, *see* Pl.'s Br. at 39, in order to avail itself of an accommodation, an organization must self-certify that it meets the definition of "eligible organization." But completion 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 prior contraceptive-coverage regulations has rejected it, in part, because the regulations deal with conduct. *See MK Chambers Co. v. U.S. Dep't of Health & Human Servs.*, No. 13-cv-11379, 2013 WL 1340719, at *6 (E.D. Mich. Apr. 3, 2013) ("Like the [law at issue in *FAIR*], the contraceptive requirement regulates conduct, not speech." (quotations omitted)); *Briscoe v. Sebelius*, 927 F. Supp. 2d 1109 (D. Colo. 2013) ("The plaintiffs cite no authority and I am not aware of any authority holding that such conduct 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*, 85 P.3d at 89; *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 465 (N.Y. 2006). The accommodations likewise regulate 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. at 39,874. Plaintiff's suggestion that self-certifying its eligibility for an accommodation, which is incidental to the regulation of conduct, violates its speech rights lacks merit. *See FAIR*, 547 U.S. at 61-63.

The regulations also do not require plaintiff to subsidize any conduct that is "inherently expressive." *FAIR*, 547 U.S. at 66; *see also United States v. O'Brien*, 391 U.S. 367, 376 (1968) (recognizing that some forms of "symbolic speech" are protected by the First Amendment). As an initial matter, the regulations explicitly prohibit plaintiff's TPA from imposing any cost sharing, premium, fee, or other charge on plaintiff with respect to the separate payments for contraceptive services made by the TPA. Plaintiff, therefore, is not funding or subsidizing anything pertaining to contraceptive coverage. Moreover, even if plaintiff played some role in its TPA's provision of payments for contraceptive services (and it does not), making payments for health care services is not the sort of conduct the Supreme Court has recognized as inherently expressive. *See Conestoga*, 917 F. Supp. 2d at 418; *Grote*, 2012 WL 6725905, at *10; *Autocam*, 2012 WL 6845677, at *8; *O'Brien*, 894 F. Supp. 2d at 1166-67; *Catholic Charities of Sacramento*, 85 P.3d at 89; *Diocese of Albany*, 859 N.E.2d at 465; *see also FAIR*, 547 U.S. at 65-66 (making space for military recruiters on campus is not conduct that indicates colleges' support for, or sponsorship of, recruiters' message).

Furthermore, plaintiff is wrong when it contends that the regulations require plaintiff to "support 'counseling' that encourages, promotes, or facilitates" the use of preventive services to which it objects. Pl.'s Br. at 38. The regulations simply require coverage of "education and counseling for women with reproductive capacity." HRSA Guidelines. There is no requirement that such education and counseling "encourage" any particular contraceptive service, or even in support of contraception in general. The conversations that may take place between a patient and her doctor cannot be known or screened in advance and may cover any number of options. To the extent that plaintiff intends to argue that the covered education and counseling is objectionable because some of the conversations between a doctor and one of plaintiff's employees *might* be supportive of contraception, accepting this theory would mean that the First Amendment is violated by the mere possibility of an employer's disagreement with a potential subject of discussion between an employee and her doctor, and would extend to all such interactions, not just those that are the subject of the challenged regulations. The First

Amendment does not require such a drastic result. *See, e.g., Conestoga*, 2013 WL 140110, at *17.

Finally, plaintiff's claim that the regulations impose a so-called "gag order" that interferes with their free-speech rights, *see* Pl.'s Br. at 39-40, is wholly without merit. 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. 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)(iii); 29 C.F.R. § 2590.715-2713A(b)(1)(iii). 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) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." (quotation omitted)). The same is true here. Because the regulations do not prevent plaintiff from expressing its views regarding the use of contraceptive services, but, rather, protect employees' right to obtain payments for contraceptive services through a TPA, there is no infringement of plaintiff's right to free speech.

Accordingly, the regulations do not violate the Free Speech Clause, and plaintiff is not likely to succeed on its related claims.

D. The Regulations Do Not Violate the Establishment Clause

"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) (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*, 878 F.2d at 1461. 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 created special school district for religious enclave of Satmar Hasidim because it "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 against Establishment Clause challenge 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.*, *Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1090-93 (8th Cir. 2000); *Droz v. Comm'r of IRS*, 48 F.3d 1120, 1124 (9th Cir. 1995); *Diocese of Albany*, 859 N.E.2d at 468-69. 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 has rejected it. *See, e.g.*, *O'Brien*, 894 F. Supp. 2d at 1162 (upholding prior version of religious employer exemption because it did "not differentiate between religions, but applie[d] equally to all denominations"); *Conestoga*, 917 F. Supp. 2d at 416-17 (same); *Grote*, 914 F. Supp. 2d at 954 (same); *see also Liberty Univ., Inc. v. Lew*, 2013 WL 3470532, at *18 (4th Cir. July 11, 2013) (upholding another religious exemption contained in the ACA against an Establishment Clause challenge).[12]

[12] Plaintiff stretches *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 Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987) ("There is ample room under the Establishment Clause for 'benevolent' neutrality which will permit religious exercise to exist without sponsorship and without interference."); *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."). Moreover, the manner in which the law at issue in *Weaver* was administered required the government to make intrusive inquiries into a school's religious beliefs and practices by, for example, reading syllabi to determine if the theology courses offered by the school were likely to convince students of religious truths. *See* 534 F.3d at 1261-62. The religious employer exemption requires no such inquiry. Qualification for the religious employer exemption does not require the government to make any determination, much less an unconstitutionally intrusive one.

"As the Supreme Court has frequently articulated, there is space between the religion clauses, in which there is 'room for play in the joints;' government may encourage the free exercise of religion by granting religious accommodations, even if not required by the Free Exercise Clause, without running afoul of the Establishment Clause." *O'Brien*, 894 F. Supp. 2d at 1163 (citations omitted). Accommodations of religion are possible because the type of legislative line-drawing to which the plaintiff objects in this case is constitutionally permissible. *Id*.; *Conestoga*, 917 F. Supp. 2d at 417; *see, e.g.*, *Walz v. Tax Commission of New York*, 397 U.S. 664, 666 (1970); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987) (upholding Title VII's exemption for religious organizations).

Plaintiff also claims that the regulations' definition of religious employer violates the Establishment Clause because, more than thirty-five years ago, the Internal Revenue Service (IRS) developed a non-exhaustive list of fourteen facts and circumstances that may be considered, in addition to "any other facts and circumstances which may bear upon the organization's claim for church status," in assessing whether an organization is a church. *See Found. of Human Understanding v. Comm'r of Internal Rev. Serv.*, 88 T.C. 1341, 1357-58 (1987); Internal Revenue Manual (IRM) 7.26.2.2.4. Although plaintiff does not appear to have ever before challenged the constitutionality of this non-exhaustive list, it now contends that the list acts to require the government to make impermissible "judgments regarding religious beliefs, practices, and organizational structure." Pl.'s Br. at 44. This claim fails for numerous reasons.

As an initial matter, the claim is not ripe and therefore should be dismissed for lack of jurisdiction. The non-exhaustive list that plaintiff seeks to challenge is not set out in any statute, regulation, or other binding source of law. It is instead contained in the IRM, which serves as a source of guidance for the internal administration of the IRS and is not binding on the IRS or courts. *United States v. Will*, 671 F.2d 963, 967 (6th Cir. 1982); *Capital Fed. Sav. & Loan Ass'n v. Comm'r of Internal Revenue*, 96 T.C. 204, 216-17 (1991). A party can challenge such guidance "only if and when the directive has been applied specifically to them." *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987); *see also, e.g.*, *Home Builders Ass'n of Greater*

Chicago v. U.S. Army Corps of Eng'rs, 335 F.3d 607, 619 (7th Cir. 2003) (concluding general statement of policy was not ripe for review). Plaintiff does not challenge any determination by the IRS that was based on this IRM provision. Because defendants have not applied a similar non-exhaustive list of facts and circumstances to plaintiff, plaintiff's challenge is not ripe.

Indeed, qualification for the religious employer exemption does not require the government to make any determination, whether as a result of the application of the non-exhaustive list or otherwise. If an organization "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," it qualifies for the exemption, without any government action whatsoever. 45 C.F.R. § 147.131(a). Plaintiff, moreover, has no difficulty determining whether it qualifies for the exemption. Compl. ¶ 43. Any claim—which plaintiff does not in fact make—that the government will dispute these allegations and therefore need to undertake any sort of intrusive inquiry into whether plaintiff qualifies for the exemption is entirely speculative and thus unripe for this reason as well.

Finally, even assuming plaintiff could mount a facial challenge to a non-exhaustive list of facts and circumstances that the defendant agencies have never applied to plaintiff, any such challenge would be meritless. Any interaction between the government and religious organizations that may be necessary to enforce the religious employer exemption is not so "comprehensive," *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971), or "pervasive," *Agostini*, 521 U.S. at 233, as to result in excessive entanglement. The Supreme Court has upheld laws that require government monitoring that is more onerous than any monitoring that may be required to enforce the religious employer exemption. *See Bowen v. Kendrick*, 487 U.S. 589, 615-617 (1988) (no excessive entanglement where the government reviewed and monitored programs and materials); *Roemer v. Board of Public Works of Md.*, 426 U.S. 736, 764–765 (1976) (no excessive entanglement where the state conducted annual audits); *see also United States v. Corum*, 362 F.3d 489, 496 (8th Cir. 2004). And every court to address the issue upheld the prior version of the religious employer exemption, which contained the same requirement that the

organization be one that is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended, against an entanglement challenge. *See Conestoga*, 917 F. Supp. 2d at 417; *O'Brien*, 894 F. Supp. 2d at 1164-65; *Geneva Coll. v. Sebelius*, 2013 WL 838238, at *28.[13] For all of these reasons, plaintiff is unlikely to succeed on its Establishment Clause claim.

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

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Even assuming arguendo that same rule applies to a statutory claim under RFRA, plaintiff has not shown that the challenged regulations violate its First Amendment or RFRA rights, so there has been no "loss of First Amendment freedoms" for any period of time, *id.* In this respect, the merits and irreparable injury prongs of the preliminary injunction analysis merge together, and plaintiff cannot show irreparable injury without also showing a likelihood of success on the merits, which it cannot do. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012).

Moreover, plaintiff waited until 29 days before the regulations will apply to it to even bring this lawsuit in the first place, even though the regulations were issued five months earlier, and then waited another six days to seek emergency relief. As discussed above, even setting aside the fatal flaws with plaintiff's TRO motion, plaintiff's inexplicable delay and lack of diligence in protecting its alleged rights militates against a finding of irreparable harm. *See Ty, Inc. v. Jones Group Inc.*, 237 F.3d 891, 903 (7th Cir. 2001); *see also Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 603 (8th Cir. 1999); *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995); *Oakland Tribune, Inc. v. Chronicle Publ'g*

[13] Even if this Court were to conclude that it had jurisdiction to adjudicate a facial challenge to the non-exhaustive list of facts and circumstances set forth in IRM 7.26.2.2.4 and that such nonbinding guidance violates the Establishment Clause, the remedy would be invalidation of the list, not invalidation of the contraceptive coverage requirement or the religious employer exemption. The regulations would survive, with the religious employer exemption being available to any organization that is organized and operates as a nonprofit entity and is a church, integrated auxiliary of a church, convention or association of churches, or the exclusively religious activities of any religious order, as those terms are specifically defined under section 6033 or commonly understood.

Co., 762 F.2d 1374, 1377 (9th Cir. 1985); *Independent Bankers Ass'n v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980) ("[E]quity aids the vigilant, not those who slumber on their rights[.]"); *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (denying preliminary injunction and noting that delay of forty-four days after final regulations were issued was "inexcusable"). Indeed, this delay alone shows that plaintiff has not established irreparable harm. *See* Order, *Triune Health Grp. v. U.S. Dep't of Health & Human Servs.*, No. 1:12-cv-6756, ECF No. 45 (N.D. Ill. Dec. 26, 2012) (denying TRO because plaintiffs "have failed to offer any explanation for [their] delay" and because plaintiffs' dilatory conduct "undermines their argument that they will suffer irreparable harm").

As to the final two preliminary injunction factors—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). Enjoining the preventive services coverage regulations as to plaintiff would undermine the government's ability to achieve Congress's goals of improving the health of women and newborn children and equalizing the coverage of preventive services for women and men.

It would also be contrary to the public interest to deny plaintiff's employees, thousands of students, and their dependents the benefits of the preventive services coverage regulations. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) ("[C]ourts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."). Many of plaintiff's employees and students may not share plaintiff's religious beliefs. Those employees and students should not be deprived of the benefits of payments provided by a third party that is not their employer or university for the full range of FDA-approved contraceptive services, as prescribed by a health care provider, on the basis of plaintiff's religious objection to those services. Many women do not use contraceptive services because they are not covered by their health plan or require costly copayments, coinsurance, or

deductibles. IOM REP. at 19-20, 109; 77 Fed. Reg. at 8727; 78 Fed. Reg. at 39,887. As a result, in many cases, both women and developing fetuses suffer negative health consequences. *See* IOM REP. at 20, 102-04; 77 Fed. Reg. at 8728. And women are put at a competitive disadvantage due to their lost productivity and the disproportionate financial burden they bear in regard to preventive health services. 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009); *see also* IOM REP. at 20.

Enjoining defendants from enforcing, as to plaintiff, the preventive services coverage regulations—the purpose of which is to eliminate these burdens, 75 Fed. Reg. at 41,733; *see also* 77 Fed. Reg. at 8728—would thus inflict a very real harm on the public and, in particular, a readily identifiable group of individuals. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). Plaintiff employs over 5,000 people and serves more than 11,500 students, Compl. ¶¶ 23, 24, and the scope of its health plan additionally includes covered dependents. Accordingly, even assuming plaintiff was likely to succeed on the merits (which it is not for the reasons explained above), any potential harm to plaintiff resulting from its offense at a third party providing payment for contraceptive services at no cost to, and with no administration by, plaintiff would be outweighed by the significant harm an injunction would cause these employees, students, and their families.

CONCLUSION

For the foregoing reasons, defendants respectfully ask that the Court deny plaintiff's motions for a TRO and for a preliminary injunction.

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 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