**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

THE ROMAN CATHOLIC ARCHDIOCESE OF ATLANTA, *et al.*,

Plaintiffs,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, *et al.*,

Defendants.

Case No. 1:12-cv-03489-WSD

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

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## INTRODUCTION

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

Plaintiffs' arguments fail for several reasons. First, the regulations impose no more than *de minimis* requirements on plaintiffs. The Archdiocese of Atlanta

and the Diocese of Savannah are entirely exempt from the regulations. And, ultimately, the remaining plaintiffs object to the fact that their religious opposition to providing contraceptive coverage to their employees no longer has the effect of preventing their employees from receiving such coverage. But the scheme of separate payments for contraceptive services under the accommodations does not amount to a substantial burden under RFRA. In plaintiffs' view, RFRA is violated whenever they believe that the requirements of a law violate their religious beliefs, as long as those requirements are enforced with substantial penalties. In other words, plaintiffs attempt to convert the "substantial burden" standard into a "substantial pressure" standard. But in determining whether an alleged burden is substantial, courts look not only to the magnitude of the penalty imposed, but also to the *objective* character of the actions required by the challenged law and the magnitude of the burden imposed by those requirements. Despite plaintiffs' insistence to the contrary, defendants do not themselves undertake, nor do they ask this Court to undertake, a theological inquiry of any kind. The Court need not doubt the sincerity or centrality of plaintiffs' religious beliefs, parse the content of those beliefs, or make a value judgment about those beliefs. Instead, the Court must examine the alleged burden imposed by the challenged regulations on plaintiffs' religious exercise as a legal matter, outside the context of their religious beliefs—that is, from the perspective of an objective observer.

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

Plaintiffs' other claims also lack merit. Plaintiffs' free exercise claim fails because the regulations are neutral and generally applicable. And plaintiffs' other First Amendment claims are also unsupported. Indeed, nearly every court to consider similar First Amendment challenges to the prior version of the regulations rejected the claims, and their analysis applies here. Plaintiffs' delegation argument fails as a matter of law, and plaintiffs forfeit their APA claim. Finally, plaintiffs

cannot satisfy the remaining requirements for obtaining a permanent injunction.

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

## ARGUMENT

### I. PLAINTIFFS' CLAIMS LACK MERIT

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

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

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

As defendants explained in their opening brief, in determining whether a law imposes a substantial burden on a plaintiff's religious exercise under RFRA, courts must determine (1) whether the plaintiff's religious objection to the challenged law is sincere, (2) whether the law applies significant pressure to comply, and (3) whether the challenged regulations actually require plaintiffs to modify their behavior in a significant—or more than *de minimis*—way. *See* Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Prelim. Inj. ("Defs.' PI Br.") at 18, ECF No. 63.

Plaintiffs seem to reject the third prong of this test, and continue to describe the RFRA substantial burden inquiry as if it involves only the first two prongs. *See, e.g.*, Pls.' Br. at 5, 13. They cite no authority for the proposition that a plaintiff may challenge a law under RFRA even without identifying a modification of behavior required by the law, and courts have been clear that "[a] substantial burden exists when government action puts 'substantial pressure on an adherent *to modify his behavior* and to violate his beliefs.'" *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981) (emphasis added)).

In any event, plaintiffs do not appear to contest that, for a law to impose a substantial burden on them, it must compel them to act. *See* Pls.' Br. at 5. Plaintiffs thus go on to contend that the regulations do require them to "take actions that violate their religious beliefs." Pls.' Br. at 7. But the regulations do not require plaintiffs to modify their religious behavior. The Archdiocese of Atlanta and the Diocese of Savannah are entirely exempt from the contraceptive coverage requirement, and the Atlanta Plan is grandfathered. Even if the Atlanta Plan were not grandfathered, the non-diocese plaintiffs, as eligible organizations, are not required to contract, arrange, pay, or refer for such coverage. To the contrary, these plaintiffs are free to continue to refuse to do so, to voice their disapproval of contraceptive use, and to encourage their employees to refrain from using

contraceptive services. The non-diocese plaintiffs need only fulfill the self-certification requirement and provide a copy to their TPAs. Plaintiffs need not provide payments for contraceptive services for their employees. Instead, third parties—plaintiffs' TPAs—provide separate payments for contraceptive services on behalf of plaintiffs' employees, at no cost to plaintiffs.[1] In short, with respect to contraceptive coverage, plaintiffs need do what they did prior to the promulgation of the challenged regulations—that is, to convey to their TPAs that they do not wish to provide contraceptive coverage in order to ensure that they are not contracting, arranging, paying, or referring for such coverage. Thus, the regulations do not require plaintiffs "to modify [their] religious behavior in any way." *Kaemmerling*, 553 F.3d at 679. The Court's inquiry should end here. A law cannot be a substantial burden on religious exercise when "it involves no action or forbearance on [plaintiffs'] part, nor . . . otherwise interfere[s] with any religious act in which [plaintiffs] engage[]." *Id.*; *see also Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003) (holding, in the context of the Religious Land Use and Institutionalized Persons Act (RLUIPA), that "a

[1] Plaintiffs' suggestion that it is "likely" that plaintiffs' "funds will subsidize the provision of these services," Pls.' Br. at 8 n.3, is baseless. As defendants have explained, the regulations specifically prohibit TPAs from passing on the costs of payments for contraceptive services. Defs.' PI Br. at 20 & 21 n.10. Plaintiffs' accusation that their TPAs are somehow "likely" to violate this provision is wholly speculative and should not be entertained, nor should the notion that the regulations thereby impose a substantial burden on plaintiffs' religious exercise.

substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable").[2]

Plaintiffs argue that the regulations do in fact require them to take certain actions. Specifically, plaintiffs allege that they must "identify[] a third party [the TPA] willing to provide the very services they deem objectionable" and "enter[] into a contract with that party that will result in the provision of those services." Pls.' Br. at 8; *see also id.* at 14 ("Under the Mandate, Plaintiffs must now enter into contracts that *will* result in the provision of the objectionable coverage."). But these activities—locating and entering into a contract with a TPA—are not attributable to the regulations, but instead are activities that plaintiffs, which are self-insured, already engage in in order to provide health coverage to their employees. Each of the plaintiffs is already in an existing relationship with at least

[2] Plaintiffs' insistence that this case is "indistinguishable" from *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), Pls.' Br. at 8, is plainly false, as defendants have already explained, *see, e.g.*, Defs.' PI Br. at 18 n.8. Most notably, the plaintiffs in *Hobby Lobby*—unlike plaintiffs here—are not eligible for the accommodations. The same is true regarding the plaintiffs in *Korte v. Sebelius*, __ F.3d ___, 2013 WL 5960692 (7th Cir. Nov. 8, 2013), and *Gilardi v. U.S. Dep't of Health & Human Servs.*, __ F.3d __, 2013 WL 5854246 (D.C. Cir. Nov. 1, 2013) (holding only that owners of for-profit corporation were likely to succeed in their RFRA challenge, but not the corporation). In any event, the government believes that *Hobby Lobby*, *Korte*, and *Gilardi* were wrongly decided, *see, e.g.*, *Korte*, 2013 WL 5960692, at *27-67 (Rovner, J., dissenting), and notes that they are not binding on this Court.

one TPA, *see* Am. Compl. ¶¶ 52, 54, which is presumably governed by a contract between the plaintiff and the TPA. Plaintiffs do not need to find new TPAs, nor do they need to modify their existing contracts with their current TPAs. Once plaintiffs satisfy the self-certification requirement, their TPAs will provide separate payments for contraceptive services for plaintiffs' employees.

Nor does the self-certification requirement itself impose a substantial burden. The non-diocese plaintiffs need *only* self-certify that they are non-profit religious organizations with a religious objection to providing contraceptive coverage and to share that self-certification with their TPAs. Thus, plaintiffs are required to convey to their TPAs that they do not intend to cover or pay for contraceptive services, which they presumably have done or would have to do voluntarily anyway even absent these regulations in order to ensure that they are not contracting, arranging, paying, or referring for contraceptive coverage. The sole difference in the communication is that they must inform their TPAs that their intention not to cover contraceptive services is due to their religious objections—a statement which they have already made repeatedly in this litigation and elsewhere. Any burden imposed by this purely administrative self-certification requirement is, at most, *de minimis*, and thus cannot be "substantial" under RFRA. *See* Defs.' PI Br. at 16-17; *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007); *Kaemmerling*, 553 F.3d at 678

("An inconsequential or *de minimis* burden on religious practice does not rise to this level [of a substantial burden]."); *Washington v. Klem*, 497 F.3d 272, 279-81 (3d Cir. 2007); *McEachin v. McGuinnis*, 357 F.3d 197, 203 n.6 (2d Cir. 2004); *Civil Liberties for Urban Believers*, 342 F.3d at 761; *see also Tony & Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290, 303-04 (1985) (noting that application of the challenged law would "work little or no change in [the plaintiffs'] situation").

In short, plaintiffs' behavior need not change in any significant way as a result of the regulations. Ultimately, plaintiffs' complaint is that their informing their TPAs of their intention not to provide contraceptive coverage to their employees no longer has the effect of preventing their employees from receiving such coverage. Prior to the adoption of the challenged regulations, plaintiffs' refusal to provide contraceptive coverage to their employees effectively meant that those employees went without it. In effect, plaintiffs had a veto over the health coverage that their employees received. Now, plaintiffs no longer exercise such a veto over their employees' health coverage. In other words, plaintiffs' religious objection to offering and funding contraceptive coverage remains effective as to them, but their employees will receive such coverage from another source. But contrary to plaintiffs' argument, the fact that their employees will now receive contraceptive coverage does not mean that plaintiffs are put in the position of "authorizing," Pls.' Br. at 8, or in any other way condoning, the provision of such

coverage to their employees. Plaintiffs' employees will receive coverage for contraceptive services from another source *despite* plaintiffs' religious objections, not *because* of those objections.

To put it another way, plaintiffs seem to object to the fact that, while the regulations do not require them to substantially change their behavior, the *consequences* of their behavior have changed because their employees will now receive contraceptive coverage from a third party. But this objection only serves to illustrate the problem with plaintiffs' argument. Plaintiffs have not alleged that they have any inherent religious objection to the self-certification requirement—their objection stems entirely from the actions of *other* parties once plaintiffs satisfy the self-certification requirement.[3]

[3] The nature of plaintiffs' objection distinguishes this case from the other examples offered by plaintiffs. *See* Pls.' Br at 15-16; *see also infra* Section II.A.1.b. For example, a law that forced an Orthodox Jew "to flip a light switch (contrary to religious doctrine) on the Sabbath," Pls.' Br. at 15, would likely impose a substantial burden on religious exercise because it would require the religious adherent to engage directly in an activity that he or she finds inherently objectionable. Similarly, in *Thomas*, 450 U.S. 707 (1981), the plaintiff had an inherent objection to the direct production of armaments, as opposed to the production of material that would eventually be used to fabricate armaments. *See id.* at 710-11. Indeed, plaintiffs' illustrate as much in their effort to distinguish *Kaemmerling*. *See* Pls.' Br. at 9. In *Kaemmerling*, like this case and unlike plaintiffs' examples, the plaintiff did not object to the action in the abstract (the collection of DNA or, here, the signing of a self-certification form), but only to its consequences. That was insufficient to amount to a substantial burden in *Kaemmerling*, and it is insufficient here.

Instead, not only do plaintiffs want to be free from contracting, arranging, paying, or referring for contraceptive coverage for their employees—which, under these regulations, they are—but plaintiffs also want to prevent *anyone else* from providing such coverage to their employees, who might not subscribe to plaintiffs' religious beliefs. They thus want to project their personal religious exercise onto third parties to dictate the third parties' conduct. That this is the *de facto* impact of plaintiffs' stated objections is made clear by their assertion that RFRA is violated whenever they are the "but-for cause of the provision of the objectionable products and services." Am. Compl. ¶ 12. This theory would mean, for example, that even if the government could realistically provide contraceptive coverage to plaintiffs' employees directly (as plaintiffs elsewhere suggest), such benefits would be impermissible because they would be "trigger[ed]," *id.*, by plaintiffs' refusal to provide such coverage themselves. In fact, under plaintiffs' theory, the government would be unable to provide any benefit to employees of an entity with religious objections to that benefit in an effort to accommodate the religious beliefs of the entity, which would leave the employees with only those benefits that their employers do not to object to. But RFRA is a shield, not a sword, *see O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1158-60 (E.D. Mo. 2012), *appeal pending*, No. 12-3357 (8th Cir.), and it does not give religious objectors both the right to a religious accommodation *and* the right to demand that

no one else fill in any gaps left by that accommodation. The government remains able to provide alternative means of achieving important statutory objectives once it has provided such a religious accommodation. *Cf. Bowen v. Roy*, 476 U.S. 693, 699 (1986) ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.").[4]

Plaintiffs' alternative argument is similarly flawed. In short, plaintiffs contend that, even if the regulations require only a *de minimis* change in behavior on their part, this would be sufficient for purposes of the RFRA substantial burden inquiry. *See* Pls.' Br. at 10. In plaintiffs view, if they sincerely believe that these actions violate their religious beliefs, the Court's inquiry is limited to the

[4] Plaintiffs contend that *Bowen* supports their argument, because "[a] majority of the Court would have held that" the requirement that the plaintiff "provide the government with his daughter's social security number in order for her to receive benefits . . . imposed a substantial burden on his exercise of religion." Pls.' Br. at 9 n.5. But plaintiffs misread *Bowen*. Although the record is somewhat uncertain on this point, the plaintiffs in *Bowen* objected not only to providing their daughter's social security number because of the *consequences* of doing so (*i.e.*, that it would then be used by the government), but appeared also to have "an independent religious objection to the requirement that *they* provide a social security number for their daughter." 476 U.S. at 714 (Blackmun, J., concurring in part); *see also id.* at 718 (Stevens, J., concurring in part and concurring in the result). It is not at all clear that a majority of the Court would have found a substantial burden in *Bowen* absent this "independent objection."

magnitude of the penalty imposed by the challenged regulations—if this penalty is "substantial," then so is the burden. *See id.* at 11-12.

This is not how RFRA works. In determining whether an alleged burden is substantial, courts look not only to the magnitude of the penalty imposed, but to the character of the actions required by the challenged law and the magnitude of the burden imposed by those requirements. *See, e.g.*, *Church of Scientology of Ga., Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328, 1353-54 (N.D. Ga. 2012); *Living Water Church of God*, 258 F. App'x at 734-36; *Kaemmerling*, 553 F.3d at 678; *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 997 (7th Cir. 2006); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348-49 (2d Cir. 2007); *Klem*, 497 F.3d at 279-81; *McEachin*, 357 F.3d at 203 n.6; *Civil Liberties for Urban Believers*, 342 F.3d at 761; *Alamo Found.*, 471 U.S. at 303-04. It is telling that plaintiffs attempt to re-label the "substantial burden" test as the "substantial pressure" test. *See, e.g.*, Pls.' Br. at 6, 14. If plaintiffs were correct that the only relevant question under RFRA is whether the challenged law imposes substantial pressure on the religious adherent, then one would expect court opinions in RFRA cases to focus primarily on the magnitude of the penalty imposed by the law. But they do not. For example, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the plaintiffs were fined $5 for failure to comply with Wisconsin's compulsory school-attendance law. *See id.* at 207-08. Although the Court noted

that this fine was a criminal sanction, it spent virtually no time on the question of whether the magnitude of the penalty was sufficient to amount to a substantial burden, *see id.* at 218—the only relevant question in plaintiffs' view. Instead, the Court focused on the character of the burden imposed by the challenged law. *See id. Yoder* and other cases make clear that, under RFRA, plaintiffs must show not only that the challenged regulations exert substantial *pressure—i.e.* a penalty of sufficient magnitude—but also that the *burden* imposed on plaintiffs' religious exercise is more than *de minimis*.

Under plaintiffs' alternative theory, the mere fact that plaintiffs claim that they sincerely believe that the challenged regulations violate their religious beliefs, *see* Pls' Br. at 5, 10-11, would be sufficient to amount to a substantial burden on their religious exercise under RFRA. Courts would play virtually no role in determining whether an alleged burden is "substantial"—as long as a plaintiff's religious belief is sincere, that would be the end of the inquiry. Courts have rejected such a hollow interpretation of the substantial burden standard. *See Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 413 (E.D. Pa. 2013) ("[W]e reject the notion . . . that a plaintiff shows a burden to be substantial simply by claiming that it is."), *aff'd*, 724 F.3d 377 (3d Cir. 2013); *Autocam Corp. v. Sebelius*, No. 1:12-cv-1096, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012) ("The Court does not doubt the sincerity of Plaintiff Kennedy's decision to

draw the line he does, but the Court still has a duty to assess whether the claimed burden—no matter how sincerely felt—really amounts to a substantial burden on a person's exercise of religion."), *aff'd*, 730 F.3d 618 (6th Cir. 2013). "If every plaintiff were permitted to unilaterally determine that a law burdened their religious beliefs, and courts were required to assume that such burden was substantial, simply because the plaintiff claimed that it was the case, then the standard expressed by Congress under the RFRA would convert to an 'any burden' standard." *Conestoga*, 917 F. Supp. 2d at 413-14; *see also Autocam*, 2012 WL 6845677, at *7; *Mersino Mgmt. Co. v. Sebelius*, No. 13-cv-11296, 2013 WL 3546702, at *16 (E.D. Mich. July 11, 2013).[5]

Contrary to plaintiffs' suggestions, *see* Pls.' Br. at 14-19, the inquiry that the government asks this Court to undertake is not a theological one. The Court need not doubt the sincerity or centrality of plaintiffs' religious beliefs, parse the content of plaintiffs' beliefs, or make a value judgment about those beliefs. Instead, the Court must examine the alleged burden imposed by the challenged regulations *as a*

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

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

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

*b. Even if the regulations were found to impose some more than* de minimis *burden on plaintiffs' exercise of religion, any such burden would be far too attenuated to be "substantial" under RFRA*

In their opening brief, defendants also argued that, even if the regulations were found to impose some burden on plaintiffs' religious exercise, any such burden would be too attenuated to amount to a *substantial* burden under RFRA. *See* Defs.' PI Br. at 21-24. As defendants explained, a burden cannot be substantial when it is attenuated. Cases that find a substantial burden uniformly involve an alleged burden that applies more directly to the plaintiff than the alleged burden in this case. *See, e.g.*, *Potter v. Dist. of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009); *Conestoga*, 917 F. Supp. 2d at 413-14; *Autocam*, 2012 WL 6845677, at *7.

Here, not only are plaintiffs separated from the use of contraception by "a series of events" that must occur before the use of contraceptive services to which plaintiffs object would "come into play," *Conestoga*, 917 F. Supp. 2d at 414-15, but plaintiffs are also further insulated by the fact that a third party—plaintiffs' TPAs—and *not* plaintiffs, will make separate payments for such services, at no cost to plaintiffs, and thus plaintiffs are in no way subsidizing or arranging for (much less paying for)—even indirectly—the use of preventive services that they

find objectionable. Under plaintiffs' theory, their religious exercise is substantially burdened when one of their employees and her health care provider make an independent determination that the use of certain contraceptive services is appropriate, and such services are paid for exclusively by plaintiffs' TPAs, with none of the cost being passed on to plaintiffs, and no administration of the payments by plaintiffs, solely because plaintiffs self-certified and informed their TPAs that they have religious objections to providing contraceptive coverage.

Plaintiffs' only response to this argument is to argue, again, that the government asks this Court to engage in impermissible line drawing regarding plaintiffs' religious beliefs. Pls.' Br. at 14-15. Not so. Defendants understand that plaintiffs have a religious objection to what they view as their "complicity" in providing contraceptive products and services to which they object. *Id.* at 17-18. The Court need not question the nature of these beliefs nor their sincerity. But the Court must determine whether the alleged burden is too indirect and attenuated—viewed from the perspective of an objective observer—and therefore fails to rise to the level of "substantial." *See, e.g.*, *Conestoga*, 917 F. Supp. 2d at 414-15; *Autocam*, 2012 WL 6845677, at *6; *O'Brien*, 894 F. Supp. 2d at 1158-60; *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013) (Rovner, J., dissenting); *Eden Foods, Inc. v. Sebelius*, No. 13-cv-11229, 2013 WL 1190001, at *4 (E.D. Mich. Mar. 22, 2013); *Annex Medical, Inc. v. Sebelius*, No. 12-cv-2804, 2013 WL 101927, at *4-*5 (D.

Minn. Jan. 8, 2013), *appeal pending*, No. 13-1118 (8th Cir.).

The cases cited by plaintiffs all involve far more direct burdens than the burden alleged in this case, and involve a significant alteration of plaintiffs' own conduct as the means to avoid a large economic penalty. *See Conestoga*, 917 F. Supp. 2d at 415 (explaining that the indirect nature of any burden imposed by the regulations distinguished them from the statutes challenged in *Yoder*, *Sherbert*, *Thomas*, and *O Centro*). Plaintiffs rely substantially on *Thomas*. *See, e.g.*, Pls.' Br. at 13. But in *Thomas*, the alleged burden was not attenuated, as the plaintiff objected to his actual participation in the manufacture of armaments. *See supra* note 3, 450 U.S. at 710-11. To be sure, the Supreme Court recognized that "a compulsion may certainly be indirect and still constitute a substantial burden, such as the denial of a benefit found in *Thomas*." *Conestoga*, 917 F. Supp. 2d at 415 n.15. But that is not so where the burden itself is too attenuated—that is, where the plaintiff's objection is not inherent to the act allegedly required by the challenged law, but is inextricably intertwined with the actions of a third party. *See id.* Similarly, in *United States v. Lee*, 455 U.S. 252 (1982), on which plaintiffs also rely, *see* Pls.' Br. at 16, the plaintiff had an inherent objection to filing social security tax returns, withholding social security taxes from his employees' pay, and paying his share of social security taxes. *See Lee*, 455 U.S. at 254-55; *see also id.* at 257 (noting that "both payment and receipt of social security benefits is

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

Finally, plaintiffs object to the government's observation that the impact of the challenged regulations is even less direct than plaintiffs' payment of salaries to their employees, which those employees can also use to purchase contraceptives if they are so inclined. *See* Pls.' Br. at 17; *see also* Defs.' PI Br. at 21, 24. Again, plaintiffs suggest that the government is engaging in impermissible religious line drawing, *see* Pls.' Br. at 17, and again, plaintiffs are wrong. Defendants do not question plaintiffs' assertion that the challenged regulations violate their religious beliefs while the payment of wages does not. But as explained above, that is not the end of the inquiry. Because the Court must determine whether the alleged burden imposed by the challenged regulations is attenuated—and thus not substantial—it can properly consider the fact that plaintiffs voluntarily engage in behavior that is objectively less attenuated than anything required by the

regulations.

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

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

Defendants have identified two unquestionably compelling interests: the promotion of public health, and ensuring that women have equal access to health-care services. *See* Defs.' PI Br. at 25-28. Although plaintiffs attempt to portray these interests as too "generalized" or "broadly formulated" to be characterized as compelling, Pls.' Br. at 19-20, plaintiffs ignore that the regulations promote those interests even with respect to plaintiffs' employees specifically by ensuring that plaintiffs' thousands of employees have access to the clinically recommended contraceptive services to which plaintiffs—but not necessarily plaintiffs' employees—object. The contraceptive coverage requirement furthers the government's compelling interest in promoting public health by "expanding access to and utilization of recommended preventive services for women," including plaintiffs' employees (and covered dependents), and in promoting gender equality

by helping to assure that plaintiffs' employees (and covered dependents) "have equal access to health care services." 78 Fed. Reg. at 39,887, AR at 19. The government has shown with "particularity," therefore, that these interests "would be adversely affected by granting an exemption," as plaintiffs' employees would not enjoy the full range of recommended preventive services coverage if not for the challenged regulations. *Yoder*, 406 U.S. at 236.

Furthermore, as defendants explained in their opening brief, strict scrutiny cannot require the government to analyze the impact of and need for the regulations as to each and every employer and employee in America. *See* Defs.' PI Br. at 28 n.15 (citing cases). Plaintiffs rely on *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 435 (2006), *see* Pls.' Br. at 21-22, but in *O Centro*, the Court construed the scope of the requested exemption as encompassing all members of the plaintiff religious sect, not just the individual objector. *See* 546 U.S. at 433. Similarly, the Court's warning in *O Centro* against "slippery-slope" arguments was a rejection of speculation that providing an exemption to one group will lead to exemptions for other *non*-similarly situated groups. Defendants do not ask the Court to engage in any such speculation. Rather, defendants merely point out the obvious: that if strict scrutiny truly is not meant to be "fatal in fact," *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), the government is and must be permitted to legislate and regulate with some degree of generality.

The government's compelling interests, moreover, are not undermined by any of the so-called "exemptions" that plaintiffs point to. An exemption undermines an allegedly compelling interest only if "it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993). But the "exemptions" relied on by plaintiffs—unlike the exemption that plaintiffs seek—do no appreciable damage to the government's compelling interests. *See* Defs.' PI Br. at 29-33. In fact, aside from the religious employer exemption, the "exemptions" referred to by plaintiffs are not specific exemptions from the contraceptive coverage requirement at all, but are instead provisions of the ACA that exclude individuals and entities from various requirements imposed by the ACA. They reflect the government's attempt to balance other significant interests supporting the complex administrative scheme created by the statute. *See Lee*, 455 U.S. at 259; *United States v. Winddancer*, 435 F. Supp. 2d 687, 695-98 (M.D. Tenn. 2006).

Plaintiffs focus on the grandfathering provision of the ACA to suggest that the government's interests cannot be truly compelling. *See* Pls.' Br. at 23-24. That provision is transitional in effect and was adopted for reasons relating to the entire ACA and not just preventive care services in general or contraceptive coverage in particular. Unlike the relief that plaintiffs seek, grandfathering does not effect a permanent exemption to the regulations. While plaintiffs may prefer to focus only

on the present for their own purposes, as a practical matter, fewer and fewer group health plans will be grandfathered over time, mitigating any perceived effect on the government's compelling interests. *See* 78 Fed. Reg. at 39,887 n. 49, AR at 19; 75 Fed. Reg. 34,540, 34,542 (June 17, 2010).[6] And plaintiffs continue to cite nothing to suggest that, in order for an interest to be compelling, the government must achieve its goals immediately. To the contrary, such a holding would undermine any rational attempt to phase in important and large-scale government programs over time, "perversely encourag[ing] Congress in the future to require immediate and draconian enforcement of all provision of similar laws, without regard to pragmatic considerations, simply in order to preserve 'compelling interest' status." *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 994 (W.D. Mich. 2012); *cf. Heckler v. Mathews*, 465 U.S. 728, 746-48 (1984) (noting that "protection of reasonable reliance interests is . . . a legitimate governmental objective" that Congress may permissibly advance through phased implementation of regulatory requirements).[7]

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[6] The fact that the number of grandfathered plans is projected to decrease is not inconsistent with the fact that a plan may retain its grandfathered status indefinitely as a matter of legal right. *See* Pls.' Br. at 24 n.17. The expectation that fewer and fewer plans will be grandfathered over time is not based on any legal requirement but rather on practical realities.

[7] Plaintiffs also accuse the government of "minimiz[ing]" the significance of the fact that small employers are not subject to the employer responsibility provision of the ACA. Pls.' Br. at 24 n.19. Plaintiffs ignore entirely, however, that the ACA encourages small employers to provide health insurance coverage to their employees through a system of tax incentives. *See* 26 U.S.C. § 45R. The

Similarly, contrary to plaintiffs' assertions, the government's one-year delay in enforcement of the employer responsibility provision of the ACA does not undermine the government's compelling interests. Here again, plaintiffs ignore the important difference between the permanent exemption that they seek and a pragmatic step to usher in a complex statute over time. Moreover, even though large employers will not be subject to assessable payments until 2015 for declining to offer health insurance to their employees, there has been no such delay with respect to the preventive services coverage regulations themselves, meaning that employees whose employers offer health care coverage will reap the benefits of those regulations in their upcoming plan year.

Finally, despite seeking a much broader exemption, plaintiffs perversely insist that the narrow existing exemption for religious employers undermines the government's interests in promoting public health and gender equality. But such a conclusion, as defendants have pointed out, would discourage the government from attempting to accommodate religion for fear that its actions would then cause its regulations to fail strict scrutiny. *See* Defs.' PI Br. at 32. It would also undermine defendants' ability to administer the regulatory scheme in any rational

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government's compelling interests are not diminished merely because Congress chose a different mechanism—incentives rather than assessable payments—to promote the competing interest in promoting small businesses. *See United States v. Wilgus*, 638 F.3d 1274, 1290-94 (10th Cir. 2011); *Winddancer*, 435 F. Supp. 2d at 695-98.

manner. *See O Centro*, 546 U.S. at 435. Although plaintiffs attempt to elide the distinction between houses of worship and their integrated auxiliaries that are exempted under the regulations and eligible organizations that are accommodated under (but not exempted from) the regulations, this distinction is a perfectly rational one. Employees of a house of worship, for example, would surely be less likely as a group to use contraceptive services, even if such services were covered under the plan, than would be the employees of a large religious institutional provider of health care services that employs thousands of people, including a large number of medical professionals. *See* 78 Fed. Reg. at 39,874, 39,887, AR at 19. Given the rational distinction between these two types of entities, plaintiffs' argument that the religious employer exemption must be extended to eligible organizations must fail.

Plaintiffs also question whether the regulations will actually further the government's public health goals, and they flyspeck the IOM Report to suggest that the regulations will not do so. *See* Pls.' Br. at 26-31. But the IOM Report and its recommendations are the work of independent experts in the field of public health. After undertaking an extensive science-based review of the available evidence, IOM determined that coverage, without cost-sharing, for the full range of FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity is necessary for

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

Plaintiffs' second guessing of IOM's expert conclusions, moreover, misses the mark. For example, plaintiffs cite data that suggest that approximately five percent of women have an unintended pregnancy each year for the proposition that access to contraception not "an actual problem." Pls.' Br. at 26. But plaintiffs' characterization of this problem as "modest," *id.* at 28, is just that: their characterization. The IOM—which, unlike plaintiffs, is an expert scientific body—reached the opposite conclusion. Plaintiffs fail to mention the IOM's findings that, based on 2001 data, "an estimated 49 percent of all pregnancies in the United States were unintended," and that "[u]nintended pregnancy is highly prevalent in the United States" and "[t]he unintended pregnancy rate is much lower in other developed countries." IOM REP. at 102, AR at 400. Similarly, plaintiffs claim that other studies cited by the IOM "reveal that cost is not the primary reason why women fail to use contraception, even among the most at-risk populations." Pls.' Br. at 30-31. But again, this flies in the face of the IOM's conclusions based on a

review of the literature. And the only "studies" that plaintiffs cite for this dubious proposition are a law review article—which, of course, is a poor substitute for the scientific studies relied on by the IOM—and a study that was not part of the administrative record and that actually suggests that financial barriers *are* one reason that some women forgo contraceptive use. *See* R. Jones, *et al.*, *Contraceptive Use Among U.S. Women Having Abortions*, 34 Perspectives on Sexual and Reproductive Health at 294-303 (Nov./Dec. 2002).[8] Furthermore, this

[8] Plaintiffs' reliance on material that is not part of the administrative record is inappropriate, and such material should not be considered in the course of the Court's review of agency regulations. *See, e.g.*, *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963); *see also* Defs.' Br. at 30 n.16. Plaintiffs had ample opportunity to submit this extra-record material to defendants, and to give defendants the ability to consider and evaluate such articles and studies, prior to the promulgation of the challenged rules, but there is no indication that they did so. This Court should disregard these articles and any other such extra-record material offered by plaintiffs in their briefs and/or in their Statement of Material Facts, ECF No. 78-2, including the deposition of Gary M. Cohen (cited to in plaintiffs' Statement of Facts), taken in a different case. Finally, plaintiffs' suggestion that such materials are properly before the Court, Pls.' Br. at 30 n.24, is belied by the very cases they cite. Those cases merely support the proposition that a court "may consider additional *affidavits* which were not before the agency upon administrative review." *Nat'l Med. Enters., Inc. v. Shalala*, 826 F. Supp. 558, 565 n.11 (D.D.C. 1993) (quoting *Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990) (emphasis added)). Defendants have not raised any objection to the affidavits that plaintiffs have submitted. A law review article that advocates a conclusion contrary to the agency's scientific analysis, on the other hand, is not properly before the Court in review of regulations based on the administrative record, nor is a study that plaintiffs could have submitted to defendants during the rulemaking process.

study shows that one of the primary reasons for underuse of contraception is widespread misunderstanding of contraceptive methods and their proper use. Of course, this is one of the problems that the contraceptive coverage regulations—and in particular, the education and counseling component of the regulations—are designed to address. *See* IOM REP. at 107, AR at 405 ("Education and counseling are important components of family planning services because they provide information about the availability of contraceptive options, elucidate method-specific risks and benefits for the individual woman, and provide instruction in effective use of the chosen method."). In sum, plaintiffs' clumsy attempts to draw conclusions from their cherry-picked data only illustrates the importance of giving proper deference to the public health experts at IOM, who were able to reach science-based recommendations after surveying a wide-range of evidence in the field.

The challenged regulations are also the least restrictive means of furthering the government's compelling interests. As defendants have explained, to satisfy the least restrictive means test, the government need not refute every conceivable alternative to a regulatory scheme; rather, it need only "refute the alternative schemes offered by the challenger." *Wilgus*, 638 F.3d at 1289-95. Defendants have done so here.

Plaintiffs incorrectly argue that RFRA requires defendants to have considered non-employer-based alternatives that are inconsistent with the relevant statutory structure. Pls.' Br. at 33-37. In implementing the preventive services coverage provision of the ACA, defendants were required to work within the statutory framework established by Congress, which built on the existing system of employment-based health care coverage. Thus, even if plaintiffs' non-employer-based alternatives were otherwise feasible, defendants could not have considered them because they were beyond defendants' statutory authority. Plaintiffs' attempt to rebut this common-sense point is unsuccessful. If Congress were to pass a statute requiring law enforcement agents to conduct warrantless searches, the appropriate course would be to challenge the statute itself; it would not be to fault the law enforcement officers for exercising their duties under the law. The same logic applies here. To the degree that plaintiffs object to the provision of preventive services coverage through the existing employer-based system, their objection is to the ACA—a fundamental underpinning of which is that coverage will continue to be provided through the employer-based system—which they do not challenge in this lawsuit, and not the preventive services coverage regulations.

Because plaintiffs' proposed alternatives are incompatible with the ACA, and well outside of defendants' statutory authority, defendants would be prohibited by law from adopting them. For this reason, all of plaintiffs' proposed alternatives

are not feasible, and therefore do not constitute less restrictive means. A proposed alternative scheme is not an adequate alternative—and thus not a viable less restrictive means to achieve the compelling interest—if it is not "workable." *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2420 (2013); *see also, e.g.*, *New Life Baptist Church Acad. v. Town of E. Longmeadow*, 885 F.2d 940, 947 (1st Cir. 1989) (Breyer, J.); *Graham v. Comm'r*, 822 F.2d 844, 852 (9th Cir. 1987); *S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1206 (6th Cir. 1990); *Fegans v. Norris*, 537 F.3d 897, 905-06 (8th Cir. 2008); *United States v. Lafley*, 656 F.3d 936, 942 (9th Cir. 2011); *Gooden v. Crain*, 353 F. App'x 885, 888 (5th Cir. 2009); *Adams v. Comm'r Internal Revenue*, 170 F.3d 173, 180 n.8 (3d Cir. 1999).

Plaintiffs' suggestion that it would be simple for the government to "build on the vast federal machinery that already exists for providing health care subsidies on a massive scale," Pls.' Br. at 33, is based on a fundamental misunderstanding of how existing federal programs work. For example, plaintiffs suggest that the government could just "tweak" or make a "minor adjustment" to the Medicaid program "to provide coverage for contraception services for women who cannot obtain such coverage through their employers." *Id.* Medicaid is a joint federal-state program that provides coverage of specified medical and health-related care and services to individuals who meet certain financial and non-financial eligibility

criteria. *See* 42 U.S.C. § 1396. One of the major reasons that expansion of Medicaid would not be a feasible alternative is that the Medicaid program does not cover a large portion of the women whose employers elect not to provide contraceptive coverage.

Plaintiffs' invocation of the Medicaid program also illustrates the fact that plaintiffs continue to fail to explain how their proposed alternatives—in addition to being inconsistent with the ACA, less effective, and otherwise unworkable—would, in fact, be "less restrictive." As defendants have shown, under plaintiffs' own logic, even assuming defendants could provide contraceptive services directly to plaintiffs' employees—through the Medicaid program or some other mechanism—that action would violate plaintiffs' religious beliefs because plaintiffs' refusal to provide or pay for the services to which they object would still "trigger" or "facilitate" their provision or payment. Plaintiffs insist that they would not have a religious objection to "a scheme that does not mandate their participation." Pls.' Br. at 39.[9] But the government would, of course, have to verify employment and/or dependent beneficiary status with the eligible organization.

[9] Plaintiffs note that they only said they would object to their proposed alternatives "as a matter of policy," Pls.' Br. at 39 n.35, apparently to suggest that they would not claim those alternatives violated RFRA if they were enacted. Yet plaintiffs are still careful not to commit to that position, instead merely saying that their policy objection does not necessarily "impl[y]" a RFRA objection. *Id.* But as defendants have shown, the logic behind plaintiffs' objection here applies equally to their proposed alternatives. The Court need not blind itself to that fact.

The current accommodations are thus likely to require less of plaintiffs' involvement than would be required under a government program that would separately provide contraceptive coverage for their employees and dependents. Plaintiffs cannot have it both ways, claiming that defendants should have taken a different approach while simultaneously saying that the different approach would still be objectionable. *See New Life Baptist*, 885 F.2d at 950-51.

Plaintiffs attempt to evade this conclusion by asserting that their logic—by which the regulations at issue are too restrictive but government provision of contraceptive services to plaintiffs' employees is not—is beyond question as a matter of theology. Pls.' Br. at 39. But when it comes to the legal conclusion about whether a proposed alternative is actually "less restrictive," the Court is obligated to evaluate for itself whether that is so. Even if plaintiffs could decide for themselves what constitutes a substantial burden under RFRA and what does not—which they cannot—that does not give them license to *also* decide for themselves what would be a less restrictive alternative and what would not. The Court should reject plaintiffs' attempt to transform the entire RFRA analysis—all the way from threshold through strict scrutiny—into a theological inquiry that leaves no room for a court, or the government, to independently evaluate the arguments at hand and to decide whether, as a matter of law, a proposed alternative is truly less restrictive.

As defendants have shown, notwithstanding plaintiffs' protestations, plaintiffs' proposed alternatives are not less restrictive, in addition to not being feasible.

### B. The Regulations Do Not Violate the Free Exercise Clause

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.[10] This Court should do the same.

Plaintiffs contend that the regulations are not generally applicable because they contain exceptions for certain objectively defined categories of entities, like grandfathered plans and religious employers. But, as defendants pointed out in their opening brief, such categorical exceptions do not negate general applicability.

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[10] *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 *4-*5; *Conestoga*, 917 F. Supp. 2d at 409-10; *Grote Indus., LLC v. Sebelius*, 914 F. Supp. 2d 943, 952-53 (S.D. Ind. 2012), *rev'd on other grounds sub nom. Korte v. Sebelius*, __ F.3d ___, 2013 WL 5960692 (7th Cir. Nov. 8, 2013); *Autocam*, 2012 WL 6845677, at *5; *Korte v. U.S. Dep't of Health & Human Servs.*, 912 F. Supp. 2d 735, 744-47 (S.D. Ill. 2012), *rev'd on other grounds sub nom. Korte v. Sebelius*, __F. 3d __, 2013 WL 5960692 (7th Cir. Nov. 8, 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1289-90 (W.D. Okla. 2012), *rev'd on other grounds*, 723 F.3d 1114; *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, Inc. v. Superior Court*, 85 P.3d 67, 81-87 (Cal. 2004) (same). *But see Sharpe Holdings, Inc. v. HHS*, 2012 WL 6738489, at *5 (E.D. Mo. Dec. 31, 2012); *Geneva Coll. v. Sebelius*, No. 2:12–cv–00207, 2013 WL 838238, at *24-26 (W.D. Pa. Mar. 6, 2013).

*See* Defs.' PI Br. at 39-40. In *Ungar v. N.Y.C. Hous. Auth.*, 363 F. App'x 53, 56 (2d Cir. 2010), for example, the plaintiffs, orthodox Jews, challenged a city housing authority's policy of acting on tenant applications on a first-come, first-served basis. The plaintiffs argued that the policy violated the Free Exercise Clause because it made exceptions for certain individuals, like victims of domestic violence and individuals living in substandard housing, but refused to exempt the plaintiffs based on religious hardship. The Second Circuit rejected this argument, concluding that the exceptions, which were "only for specified categories" and were available to the plaintiffs on the same terms as everyone else, did not negate general applicability. *Ungar*, 363 F. App'x at 56; *see also Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 698, 701 (10th Cir. 1998) (concluding school district's attendance policy was generally applicable despite exemptions for "strict categories of students," such as fifth-year seniors and special education students); *Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 961 (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, 45 (2d Cir. 1990) (same). Defendants cited many of these cases

in their opening brief, *see* Defs.' PI Br. at 39-40, and plaintiffs make no effort to distinguish, much less address, them in their opposition.

The regulations also are neutral, as explained in defendants' opening brief. Plaintiffs' 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, e.g.*, *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 will not undermine the goal of ensuring that women have access to coverage for recommended preventive services without cost sharing.[11]

[11] *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), on which plaintiffs also rely (Pls.' Br. at 40, 41), addressed a policy that created a secular exemption but refused all religious exemptions. The preventive services coverage regulations, in contrast, contain an exemption and accommodations that specifically seek to accommodate religion. Thus, unlike in *Fraternal Order*, there is simply no basis here to infer a discriminatory object behind the regulations. *See Conestoga*, 917 F. Supp. 2d at 409-10.

Plaintiffs posit that the regulations must have been designed to target plaintiffs' religious practice of refusing to facilitate access to contraception because, prior to the promulgation of the regulations, "more than 85 percent of health plans already provided coverage for contraception." Pls.' Br. at 42. As an initial matter, this 85 percent figure represents only large employers, not small employers (only 62 percent of which covered contraception prior to issuance of the regulations) or plans on the individual market. IOM REP. at 109, AR at 407. More importantly, many of the plans that covered contraceptive services imposed cost-sharing requirements that often resulted in women forgoing preventive care. *Id*. at 19-20, 109. The regulations eliminate that cost-sharing. Finally, even if plaintiffs could show that the regulations have a disproportionate effect on them (and they have not), it would not destroy the regulations' neutrality. *See O'Brien*, 894 F. Supp. 2d at 1161 (rejecting identical argument). "[A] neutral and perfectly constitutional law may have a disproportionate impact upon religiously inspired behavior . . . . The Free Exercise Clause is not violated even though a group motivated by religious reasons may be more likely to engage in the proscribed conduct." *Id*. (citing cases). Indeed, by plaintiffs' logic, the government also was "specifically target[ing]," Pls.' Br. at 39, those with religious objections to vaccinations, as a similar or even greater percentage of health plans covered

vaccinations prior to promulgation of the challenged regulations. *See* 75 Fed. Reg. 41,726, 41,732 (July 19, 2010), AR at 232.

### C. The Regulations Do Not Violate the Free Speech Clause

Defendants explained in their opening brief that the preventive services coverage regulations do not violate the Free Speech Clause. Defs.' PI Br. at 40-42. Plaintiffs contend that the regulations violate their free speech rights in three ways, none of which has merit.

First, plaintiffs are simply wrong to assert that the regulations require plaintiffs to support counseling "promoting the use of contraceptives." Pls.' Br. at 44. The regulations require coverage of "education and counseling for women with reproductive capacity." HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), AR at 283-84. There is no requirement that such education and counseling be "promoting" any particular contraceptive service, or even promoting contraception in general. The conversations that may take place between a patient and her health care provider cannot be known or screened in advance and may cover any number of approaches to women's health. To the extent that plaintiffs intend to argue that the covered education and counseling is objectionable because some of the conversations between a doctor and one of plaintiffs' employees *might* be supportive of contraception, this theory would extend to all interactions between an employee

and her health care provider based on the mere possibility of an employer's disagreement with a potential subject of discussion, and would allow the employer to impose a prior restriction on any doctor-patient dialogue. The First Amendment does not require such a drastic result. *See, e.g.*, *Conestoga*, 2013 WL 140110, at *17; *O'Brien*, 894 F. Supp. 2d at 1166.

Plaintiffs respond by arguing that the counseling must be intended to encourage the use of contraception, or else it would not advance the government's compelling interests. But this argument is based on an overly simplistic understanding of the compelling interests underlying the regulations. The intent of the regulations is to improve health outcomes for women and newborns. *See* 78 Fed. Reg. at 39,872, AR at 4. Improved access to preventive services, including contraception, is certainly an important means to achieving this end, but it is not the only means. While contraception might be appropriate for some women, "[i]t is for a woman and her health care provider in each particular case to weigh any risks against the benefits in deciding whether to use contraceptive services in general or any particular contraceptive service." *See id.* The purpose of the "related" education and counseling provided by the preventive services coverage regulations is not to encourage every woman to use contraception, but to facilitate conversations between each woman and her health care providers about how best to meet her particular health care needs in light of her specific circumstances. *See*

IOM REP. at 107, AR at 405. Thus, plaintiffs' suggestion that the regulations require a "pro-contraceptive" viewpoint, Pls.' Br. at 44, is misguided.

Furthermore, the argument that the education and counseling component of the regulations somehow compels plaintiffs to speak at all, *id.* at 44-45, is simply incorrect. It is not plaintiffs, but their employees and their health care providers, who are engaged in speech. The challenged regulations do not require plaintiffs—or any other person, employer, or entity—to say anything. Nor is the conduct required by the regulations "inherently expressive," *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 66 (2006), such that it is entitled to First Amendment protection. *See, e.g.*, *Autocam*, 2012 WL 6845677, at *8 ("Including contraceptive coverage in a health care plan is not inherently expressive conduct."); *O'Brien*, 894 F. Supp. 2d at 1166-67 ("Giving or receiving health care is not a statement in the same sense as wearing a black armband or burning an American flag." (internal citations omitted)). In fact, under the accommodations, plaintiffs are not even *subsidizing* education and counseling, as it is their TPAs that will make separate payments for these services. In short, this case is a far cry from the circumstances in the cases plaintiffs cite, in which the laws at issues mandated that specific messages be posted on conspicuous signs throughout an organization's building, be printed prominently in any advertisements, and be delivered to the organization's clients. *See* Pls.' Br. at 44

n.38 (citing *Evergreen Ass'n v. City of New York*, 801 F. Supp. 2d 197 (S.D.N.Y. 2011), and *Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 2d 456 (D. Md. 2011)).

Similarly, execution of the simple self-certification form is "plainly incidental to the . . . regulation of conduct," *FAIR*, 547 U.S. at 62, not speech. In fact, 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, 1120 (D. Colo. 2013) ("The plaintiffs cite no authority and I am not aware of any authority holding that [preventive services coverage] qualifies as speech so as to trigger First Amendment protection."); *Conestoga*, 917 F. Supp. 2d at 418; *Grote*, 914 F. Supp. at 955; *Autocam*, 2012 WL 6845677, *8; *O'Brien*, 894 F. Supp. 2d at 1165-67; *see also Catholic Charities of Sacramento*, 85 P.3d at 89 ("[A] law regulating health care benefits is not speech."); *Diocese of Albany*, 859 N.E.2d at 465. The scheme of accommodations regulates conduct by relieving an eligible organization of the obligation "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874, AR at 6. Plaintiffs' suggestion

that the mere act of self-certifying their eligibility for that accommodation violates their speech rights is baseless. *See FAIR*, 547 U.S. at 61-63.[12]

Finally, defendants have already refuted plaintiffs' claim that the regulations impose a so-called "gag order." *See* Defs.' PI Br. at 41-42. Defendants have made clear, for example, that "[n]othing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraception." 78 Fed. Reg. at 39,880 n.41, AR at 12. The "non-interference" provision of the regulations merely prohibits an employer's improper attempt to interfere with its employees' ability to obtain contraceptive coverage (to which they are entitled) from a third party by, for example, threatening a 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); Defs.' PI Br. at 41. In other words, plaintiffs may not interfere with the TPA's compliance with its legal obligations under the regulations.[13] Because the regulations do not

[12] For this reason, plaintiffs' attempt to equate this case to *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011), *see* Pls.' Br. at 46, is unavailing. *Arizona Free Enterprise* involved campaign contributions, which are speech under the Supreme Court's jurisprudence. *See* 131 S. Ct. at 2817. The self-certification, on the other hand, is incidental to the regulation of conduct.

[13] Plaintiffs' suggestion that TPAs are not economically dependent on their clients defies common sense. Pls.' Br. at 46 (attempting to distinguish *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-19 (1969)).

prevent plaintiffs from expressing their views regarding the use of contraceptive services, but, rather, protect employees' right to obtain separate payments for contraceptive services through TPAs, there is no infringement of plaintiffs' right to free speech.[14]

### D. The Regulations Do Not Violate the Establishment Clause

Plaintiffs attempt to re-write Establishment Clause jurisprudence by arguing that the Clause prohibits the government from making not only denominational preferences but also any distinctions based on an organization's structure and purpose. This is simply not the law. The Establishment Clause prohibits laws that "officially prefer[]" "one religious *denomination*" over another, *Larson v. Valente*, 456 U.S. 228, 244 (1982) (emphasis added); it does not prohibit the government from distinguishing between different types of organizations—based on an organization's structure and purpose—when the government is attempting to accommodate religion. *See* Defs.' Mem. in Supp. of Mot. to Dismiss or for Summ. J., ECF No. 64-1 (Defs.' MTD Br.), at 3-5; *see also Liberty Univ., Inc. v. Lew*, 2013 WL 3470532, at *17-18 (4th Cir. July 11, 2013) (upholding another religious exemption contained in the ACA against an Establishment Clause challenge

[14] Furthermore, even if the Court were to find, over the government's objection, that the non-interference provision violates the First Amendment, the appropriate remedy would be to strike down that particular provision, not the regulations in their entirety.

because the exemption "makes no explicit and deliberate distinctions between sects" (quotation omitted)); *Droz v. Comm'r of IRS*, 48 F.3d 1120, 1124 (9th Cir. 1995) (concluding exemption did not violate the Establishment Clause even though "some individuals receive exemptions, and other individuals with identical beliefs do not"); *Grote*, 914 F. Supp. 2d at 954 ("[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."); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 468-69 (N.Y. 2006) ("[T]his kind of distinction—not between denominations, but between religious organizations based on the nature of their activities—is not what *Larson* condemns."). Indeed, the problem in *Larson*, on which plaintiffs rely, was not that the challenged statute distinguished between types of organizations based on their structure and purpose, but rather that it "was drafted with the explicit intention of including particular religious *denominations* and excluding others." *Larson*, 456 U.S. at 254 (emphasis added).[15] The same is not true here. The

[15] The same can be said of the hypotheticals in *Grossbaum v. Indianapolis-Marion County Building Authority*, 100 F.3d 1287, 1298 n.10 (7th Cir. 1996), and *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993), on which plaintiffs also rely. *See* Pls.' Br. at 49. The hypothetical regulations in those cases would not be considered generally applicable because of "the narrowness of [their] design and [their] hugely disproportionate effect on" a particular sect. *Grossbaum*, 100 F.3d at 1298 n.10.

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

Plaintiffs' effort to recast the religious employer exemption as distinguishing between "'houses of worship' or 'religious orders' and denominations that primarily rely on them" and "groups that exercise their faith by other means," Pls.' Br. at 48, is baseless. Plaintiffs are all Catholic entities. *See* Am. Compl. ¶ 1. Therefore, the fact that some plaintiffs are exempt while others are accommodated, *see id.* ¶ 12, does not amount to discrimination among *denominations*.

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 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.").

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). This court should do the same.

### E. The Regulations Do Not Interfere with Church Governance

Plaintiffs claim that, by requiring them to facilitate practices in violation of their religious beliefs, the regulations interfere with plaintiffs' "internal church governance" in violation of the Religion Clauses. *See* Pls.' Br. at 49-51. But, as defendants noted in their opening brief, *see* Defs.' PI Br. at 42-43, that is merely a restatement of plaintiffs' substantial burden theory, which fails for reasons

explained already. Nor, as plaintiffs appear to suggest, is this case about any law that regulates the structure of the Catholic Church; plaintiffs may choose whatever organizational structure they wish.[16]

### F. Plaintiffs' Delegation Claim Fails

Plaintiffs have narrowed their delegation claim to argue specifically and only that the regulations are "the result" of a statute that contains "no standard" regarding what constitutes "preventive care." Pls.' Br. at 52, 54. As defendants explained in their opening brief, the ACA was enacted to improve Americans' access to affordable and quality health care and health coverage, and the Women's Health Amendment was intended to fill significant gaps relating to women's health that existed in the other preventive care guidelines identified in the ACA. 42 U.S.C. § 300gg-13(a)(4); *see* 155 Cong. Rec. S12021-02, S12025 (daily ed. Dec. 1,

[16] For this reason, plaintiffs' reliance on *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), and *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), is misplaced. *Kedroff* involved a state law that expressly sought to transfer control of St. Nicholas Cathedral from one church authority to another, when use and occupancy of the Cathedral depended upon the church's "choice of its hierarchy," a purely ecclesiastical issue. 344 U.S. at 119. Similarly, *Watson* involved a dispute over control of church property that turned, in part, on matters "strictly and purely ecclesiastical in character." 80 U.S. at 733. Unlike *Kedroff* and *Watson*, this case does not involve any regulation of church property or purely ecclesiastical issues. Similarly, *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 698 (1976), is inapposite because it involved the purely ecclesiastical issue of who would be the bishop of a particular diocese, according to "the internal regulations" of the church.

2009) (statement of Sen. Boxer); 155 Cong. Rec. S12265-02, S12271 (daily ed. Dec. 3, 2009) (statement of Sen. Franken). This cannot seriously be disputed, and plaintiffs do not appear to dispute it.

Instead, plaintiffs go one step deeper, and contend that the Constitution requires that the ACA set out standards to which HRSA would have had to adhere when it decided what constitutes preventive care that should be covered by health plans. This level of specificity is simply not required by the doctrine, and plaintiffs have provided no support for the notion that it is. Instead, plaintiffs rely on *Whitman*, which instead only illustrates defendants' point. The standard contained in the Clean Air Act, and deemed sufficient by the Court, was the "protect[ion] of public health." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465 (2001). The fact that the Clean Air Act required EPA to base its determinations on information contained in "criteria" documents, Pls.' Br. at 54, is of no help to plaintiffs, because the "criteria" that the statute listed are no more specific: factors that "may alter the effects on public health or welfare," may "produce an adverse effect on public health or welfare," and "any known or anticipated adverse effects on welfare." 42 U.S.C. § 7408(a)(2).

At bottom, then, the ACA is not distinguishable from the statute upheld in *Whitman*. It would be both impractical and inconsistent with the operation of the nondelegation doctrine—under which the Court has only found two statutes

unconstitutional in its entire history, *see Whitman*, 531 U.S. at 474—if Congress had to tell those expert entities to which it routinely and permissibly delegates scientific questions precisely *how* they ought to go about answering those questions, as plaintiffs seem to suggest, Pls.' Br. at 55. *See Mistretta v. United States*, 488 U.S. 361, 372–73 (1989) (recognizing that "Congress simply cannot do its job absent an ability to delegate power under broad general directives," and upholding "Congress' ability to delegate power under broad standards"). The doctrine requires an "intelligible principle," *Whitman*, 531 U.S. at 472, and the ACA plainly contains such a principle, which is why the only court to have considered this question in this context rejected such an argument. *See Grote*, 914 F. Supp. 2d at 956.[17]

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

The standard for granting a permanent injunction is essentially the same as that for a preliminary injunction, except that the moving party must demonstrate *actual*, rather than likely, success on the merits of its claim. *See KH Outdoor, LLC*

[17] Finally, in their complaint, plaintiffs also claimed that the regulations violated the APA because they conflict with the Weldon Amendment. Defendants moved to dismiss or for summary judgment on that claim, *see* Defs.' MTD Br. at 12-15, and plaintiffs have not responded. Defendants' motion should therefore be granted on that count.

*v. City of Trussville*, 458 F.3d 1261, 1268 (11th Cir. 2006) (citing *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987)). Thus, the Court must consider: (1) success on the merits; (2) whether the movant will suffer irreparable injury absent an injunction; (3) the balance of hardships between the parties; and (4) whether the public interest supports granting the requested injunction. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008).

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

Nor can plaintiffs satisfy the remaining two factors for an injunction: that the balance of the equities tips in their favor or that the public interest would be served by an injunction. With respect to the former, defendants would be "inherent[ly] harm[ed]" by an injunction, because it would prohibit the defendant agencies from

implementing duly promulgated regulations that Congress required them to develop and enforce. *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008).

Finally, the public interest also tips in defendants' favor because a permanent injunction would deprive the non-diocese plaintiffs' employees of the benefits required by the challenged regulations, which include improved healthcare outcomes and reduced disparity in the financial burden of health care costs for women. *See* IOM Rep. at 20, 102-04, AR at 318, 400-02; 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012), AR at 215; *see also* 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009). Plaintiffs ignore this harm to the public interest, but the Court must consider the very real harm that would befall these employees as a result of an injunction and weigh that harm against the burden on the non-diocese plaintiffs—if any—of having a third party provide separate payments for contraceptive services for the non-diocese plaintiffs' employees. Even assuming that plaintiffs could succeed on the merits of their claims (which defendants have shown they cannot do), defendants respectfully submit that the balancing of these factors weighs against plaintiffs' request for an injunction.[18]

[18] Defendants also note that they have *not* "consented to injunctions in similar cases" involving challenges to the regulations at issue in this case. Pls.' Reply Br. in Supp. of Mot. for Prelim. Inj., ECF No. 83, at 4 n.3. Cases in which defendants have consented to preliminary injunctions are cases involving for-profit entities not eligible for the accommodation, and in circuits in which motions panels either granted injunctions pending appeal as to those regulations in similar cases, or ruled on the merits in such cases that an injunction is warranted.

## CONCLUSION

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

Respectfully submitted this 18th day of November, 2013,

STUART F. DELERY
Assistant Attorney General

SALLY QUILLIAN YATES
United States Attorney

JENNIFER RICKETTS
Director

SHEILA M. LIEBER
Deputy Director

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

*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 18, 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