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 PRELIMINARY INJUNCTION

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INTRODUCTION

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

These regulations are the product of a decision by the defendant Departments to accommodate concerns expressed by non-profit religious organizations. First, defendants established an exemption for the group health plans of houses of worship and their integrated auxiliaries. Two of the plaintiffs—the Archdiocese of Atlanta and the Diocese of Savannah—qualify for this exemption. In addition, defendants established accommodations for the group health plans of eligible non-profit religious organizations, like the remaining

plaintiffs here (and any associated group health insurance coverage), that relieve them of responsibility to contract, arrange, pay, or refer for contraceptive coverage or services, but that also ensure that the women who participate in these plans 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. Once the organization does so, 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 those of plaintiffs here—its third-party administrator (TPA) will arrange for 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, plaintiffs now declare that these accommodations themselves violate their rights under RFRA and the First Amendment. They contend that the mere act of certifying that they are eligible for an accommodation is a substantial burden on their religious exercise because, once they make the certification, their employees will be able to obtain contraceptive coverage through other parties. This extraordinary contention suggests that plaintiffs not only object to contracting, arranging, paying, or referring for contraceptive coverage themselves, but also seek

to prevent the women who work for their organizations from obtaining such coverage, even if through other parties.

At bottom, plaintiffs' 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 them, plaintiffs claim that the regulations run afoul of their sincerely held religious beliefs. Plaintiffs' motion for preliminary injunction should be denied because plaintiffs have not shown that they are likely to succeed on the merits of these claims.

With respect to plaintiffs' RFRA claim, plaintiffs cannot establish a substantial burden on their religious exercise—as they must—because the regulations do not require plaintiffs to change their behavior in any significant way. Plaintiffs are not required to contract, arrange, pay, or refer for contraceptive coverage. To the contrary, plaintiffs are free to continue to refuse to do so, to voice their disapproval of contraception, and to encourage their employees to refrain from using contraceptive services. Plaintiffs are required only to inform their TPAs that they do not intend to cover contraceptive services, which they have done or would have to do voluntarily even absent these regulations in order to ensure that that they are not responsible for contracting, arranging, paying, or referring for

such coverage. Plaintiffs can hardly claim that it is a violation of RFRA to require them to do almost exactly what they would do in the ordinary course.

Furthermore, plaintiffs' challenge rests largely on the theory that even the extremely attenuated connection between them and the independent provision by TPAs of payments for contraceptive services to which plaintiffs object on religious grounds—but for which plaintiffs pay nothing—amounts to a substantial burden on their religious exercise. This cannot be. Regardless of how plaintiffs frame their religious beliefs, courts must independently consider whether a given law imposes a substantial burden on those beliefs. *See Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012), *aff'd*, No. 12-2673, 2013 WL 5182544 (6th Cir. Sept. 17, 2013). The regulations impose, at most, only the most *de minimis* burden on plaintiffs' religious exercise—one too slight and attenuated to be "substantial" under RFRA, and little different from plaintiffs' payment of salaries to their employees, which those employees can use to purchase contraceptive services if they so choose.

Moreover, 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: improving the health of women and newborn children, and equalizing the provision of preventive care for women and men.

Plaintiffs' First Amendment claims are equally meritless. Indeed, nearly every court to consider similar First Amendment challenges to the prior version of the regulations rejected the claims, and their analysis applies here. Finally, plaintiffs cannot satisfy the remaining requirements for obtaining a preliminary injunction. For these reasons, and those explained below, plaintiffs' motion 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. Due largely to cost, Americans used preventive services at about half the recommended rate. *See* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 19-20, 109 (2011) ("IOM REP."), AR at 317-18, 407.[1] Section 1001 of the ACA seeks to cure this problem by making preventive care accessible and affordable for many more Americans. Specifically, the provision requires all group health plans and health insurance issuers that offer non-grandfathered 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

[1] Where appropriate, defendants have provided parallel citations to the Administrative Record (AR), on file with the Court. *See* ECF Nos. 58, 59.

[(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, AR at 300.[2] 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, AR at 308-10. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices ("IUDs"). *See id.* at 105, AR at 403. 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 outcomes that disproportionately accompany them) and promote healthy birth spacing. *Id.* at 102-03, AR at 400-01.

On August 1, 2011, HRSA adopted guidelines consistent with IOM's

[2] 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, AR at 289.

recommendations, subject to an exemption relating to certain religious employers authorized by regulations issued that same day (the "2011 amended interim final regulations"). *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), AR at 283-84.[3] Group health plans established or maintained by these religious employers, and associated coverage, are exempt from any requirement to cover contraceptive services consistent with HRSA's guidelines. *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

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[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), AR at 220.

group health plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage (and any associated group health insurance coverage). *See* 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012), AR at 213-14. The government committed to undertake a new rulemaking during the safe harbor period to adopt new regulations to further accommodate non-grandfathered non-profit religious organizations' religious objections to covering contraceptive services. *Id.* at 8728, AR at 215. The regulations challenged here (the "2013 final rules") represent the culmination of that process. *See* 78 Fed. Reg. 39,870, AR at 1-31; *see also* 77 Fed. Reg. 16,501 (Mar. 21, 2012) (Advance Notice of Proposed Rulemaking (ANPRM)), AR at 186-93; 78 Fed. Reg. 8456 (Feb. 6, 2013) (Notice of Proposed Rulemaking (NPRM)), AR at 165-85.[4]

The 2013 final rules represent a significant accommodation by the government of the religious objections of certain non-profit religious organizations while promoting two important policy goals. The regulations provide women who work for non-profit religious organizations with access to contraceptive coverage without cost sharing, thereby advancing the government's compelling interests in safeguarding public health and ensuring that women have equal access to health

[4] 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, AR at 4, except the amendments to the religious employer exemption apply to group health plans and group health insurance issuers for plan years beginning on or after August 1, 2013, *see id.* at 39,871, AR at 3.

care. The regulations do so in a narrowly tailored way 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 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, AR at 7-12; 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, AR at 6-7.

Under the 2013 final rules, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874, AR at 6. To be relieved of any such obligations, the 2013 final rules require only that an eligible organization complete a self-certification form stating that it is an eligible organization and provide a copy of that self-certification to its issuer or TPA. *Id.* at 39,878-79, AR at 10-11. Its participants and beneficiaries, however, will still benefit from separate payments for contraceptive services without cost sharing or other charge. *Id.* at 39,874, AR at 6. In the case of an organization with a self-insured group health plan—such as plaintiffs here—the organization's TPA, upon receipt of the self-certification, will provide or arrange separate payments for contraceptive services for participants and beneficiaries in the plan without cost-sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or its plan. *See id.* at 39,879-80, AR at 11-12. Any costs incurred by the TPA will be reimbursed through an adjustment to Federally-facilitated Exchange (FFE) user fees. *See id.* at

39,880, AR at 12.

STANDARD OF REVIEW

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.

ARGUMENT

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

A. Plaintiffs' RFRA Claim Is Without Merit

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

Under RFRA, 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).

For two reasons, plaintiffs cannot show that the challenged regulations substantially burden their religious exercise.[5] First, because the regulations require virtually nothing of plaintiffs, and certainly do not require plaintiffs to modify their behavior in any meaningful way, the regulations cannot be deemed to impose any more than a *de minimis* burden on plaintiffs—let alone a substantial one. Second, even if this Court were to find that the regulations impose some burden on

[5] Plaintiffs refer to cases involving for-profit companies that object to the contraceptive coverage regulations. *See, e.g.*, Pls.' Br. at 16, 21-22. But those cases are inapposite because for-profit corporations—unlike plaintiffs—do not qualify for the religious employer exemption or the accommodations for eligible organizations. Furthermore, plaintiffs disregard the substantial body of opinions in the government's favor. *See, e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641 (2012) (Sotomayor, J., in chambers) (denying application for injunction pending appellate review); *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013); *Autocam Corp. v. Sebelius*, __ F.3d __, 2013 WL 5182544 (6th Cir. Sept. 17, 2013).

plaintiffs' religious exercise, any such burden would be far too attenuated to be substantial.

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

To put this case in its simplest terms, plaintiffs challenge regulations that require them to do next to nothing, except what they would have to do even in the absence of the regulations. The Archdiocese and the Diocese are entirely exempt from the contraceptive coverage requirement.[6] And the remaining plaintiffs (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 contraception, and to encourage their employees to refrain from using contraceptive services. The non-diocese plaintiffs need only fulfill the self-certification requirement and provide the completed self-certification to their TPAs. Plaintiffs need not provide payments for contraceptive services to their employees. Instead, third parties—plaintiffs'

[6] Plaintiffs state that the scope of the religious employer exemption adopted in the 2013 final rules is narrower than that contemplated in the ANPRM. *See* Pls.' Br. at 3, 7-8. This contention is both false, *see* 77 Fed. Reg. at 16,502 (explaining that a school that *also* met the definition of a religious employer would be exempt), AR at 187; 78 Fed. Reg. at 8467 (expressly "propos[ing] to make the accommodation or the religious employer exemption available on an employer-by-employer basis"), AR at 176, and irrelevant, as policy development is the very purpose of the rulemaking process. *See, e.g.*, *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951 (D.C. Cir. 2004).

TPAs—provide payments for contraceptive services, at no cost to plaintiffs. In short, with respect to contraceptive coverage, plaintiffs need not do anything more than they did prior to the promulgation of the challenged regulations—that is, to inform their TPAs that they object to providing contraceptive 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 RLUIPA, that "a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable").

Because the regulations place no burden *at all* on plaintiffs, they plainly place no cognizable burden on their religious exercise. Plaintiffs' contrary argument rests on an unprecedented and sweeping theory of what it means for religious exercise to be burdened. Not only do plaintiffs want to be free from contracting, arranging, paying, or referring for contraceptive services for their employees—which, under these regulations, they are—but plaintiffs would also prevent *anyone else* from providing such coverage to their employees, who might

not subscribe to plaintiffs' religious beliefs. 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 providing the objectionable coverage." Second Am. Compl. ¶ 13, ECF No. 56. This theory would mean, for example, that even the government would not realistically be able to provide contraceptive coverage to plaintiffs' employees (as plaintiffs elsewhere suggest), because it would be "trigger[ed]," *id.*, by plaintiffs' objection to providing such coverage themselves. But RFRA is a shield, not a sword. *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1158-60 (E.D. Mo. 2012); *Kaemmerling*, 553 F.3d at 679 ("Although the [third party]'s activities . . . may offend [plaintiffs'] religious beliefs, they cannot be said to hamper [their] religious exercise.").

Perhaps understanding the tenuous ground on which their RFRA claim rests given that the regulations do not require them to contract, arrange, pay, or refer for contraceptive services, plaintiffs attempt to circumvent this problem by advancing the novel theory that the regulations require them to somehow "facilitate access" to such coverage, and that it is this "facilitation" that violates plaintiffs' religious beliefs. *See, e.g.*, Pls.' Br. at 1. But the challenged regulations do not require the Archdiocese and the Diocese to do anything, and require the non-diocese plaintiffs *only* to self-certify that they object to providing coverage for contraceptive services and that they otherwise meet the criteria for an eligible organization, and to share

that self-certification with their TPAs. In other words, plaintiffs are required to inform their TPAs that they do not intend to cover or pay for contraceptive services, which they have done or would have to do voluntarily anyway.

Furthermore, any burden imposed by the purely administrative self-certification requirement—which should take plaintiffs a matter of minutes—is, at most, *de minimis*, and thus cannot be "substantial" under RFRA. The substantial burden hurdle is a high one. *Living Water Church of God v. Charter Twp. of Meridian*, 258 Fed. App'x 729, 734 (6th Cir. 2007); *see also 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. Indeed, if this is not a *de minimis* burden, it is hard to see what would be. In fact, plaintiffs' alternative proposals only confirm that the alleged "burden" of self-certification is *de minimis*. They contend that, as an alternative to the accommodations developed by the Departments, the federal government should somehow expand Medicaid or some other public program so as to provide contraceptive coverage to the women who participate in plaintiffs' group health plans. RFRA plainly does not require defendants to expand or create government programs, particularly where, as here, there is no statutory authority to do so. *See infra* at Section I.A.2.b. But, in any

event, plaintiffs' own proposals would entail the same putative "burden" as the existing accommodations, or an even greater burden: one way or another, plaintiffs would have to certify that they are eligible for an accommodation and that they object to providing contraceptive coverage, and the result would be that the women who participate in their plan would get contraceptive coverage through another source such as Medicaid.[7]

Contrary to plaintiffs' suggestion, the mere fact that plaintiffs claim 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."), *aff'd*, 2013 WL 3845365 (3d Cir. July 26, 2013). Under RFRA, plaintiffs are entitled to their sincere religious beliefs, but they are not entitled to decide what does and does not impose a substantial burden on such beliefs. Although "[c]ourts are not

[7] Plaintiffs state that for self-insured eligible organizations, the self-certification form acts "as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879, AR at 11; *see also* Pls.' Br. at 10. It is not clear what legal significance plaintiffs attach to this statement, but what is clear is that self-insured entities are subject to the same self-certification requirement as third-party-insured entities; they will use the same self-certification form, on which they will state only that they are non-profit religious organizations with a religious objection to providing contraceptive coverage—nothing more. As discussed above, this self-certification requirement is, at most, a *de minimis* administrative burden.

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. Plaintiffs would limit the Court's inquiry to two prongs: first, whether plaintiffs' religious objection to the challenged regulations are sincere, and second, whether the regulations apply significant pressure to plaintiffs to comply. But plaintiffs ignore a critical third criterion of the "substantial burden" test, which gives meaning to the term "substantial": whether the challenged regulations actually require plaintiffs to modify their behavior in a significant—or more than *de minimis*—way. *See Living Water Church of God*, 258 Fed. App'x at 734-36 (reviewing cases); *see also, e.g.*, *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348-49 (2d Cir. 2007); *Church of Scientology of Ga., Inc. v. City of Sandy Springs, Ga.*, 843 F. Supp. 2d 1328, 1353-54 (N.D. Ga. 2012). As plaintiffs themselves appear to recognize, a "law 'substantially burdens' an exercise of religion if it compels one 'to *perform acts* undeniably at odds with fundamental tenets of [one's] religious beliefs,'" Pls.' Br. at 20 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)) (emphasis added), "or 'put[s] substantial pressure on an adherent to *modify his behavior* and to violate his beliefs.'" *Id.* (quoting *Thomas*, 450 U.S. at 717-18) (emphasis added).[8]

[8] In *Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), a bare majority of the en banc Tenth Circuit concluded that, in determining whether a

Under plaintiffs' alternative interpretation of 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. Plaintiffs would thus be allowed to evade RFRA's threshold by simply asserting that the burden on their religious exercise is "substantial," thereby paradoxically reading the term "substantial" out of RFRA. *See Gilardi v. Sebelius*, 926 F. Supp. 2d 273, 282 (D.D.C. 2013), *appeal pending sub nom. Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069 (D.C. Cir.); *Autocam*, 2012 WL 6845677, at *6-7; *see also Grote Indus., LLC v. Sebelius*, 914 F. Supp. 2d 943, 949, 952 (S.D. Ind. 2012), *appeal pending*, No. 13-1077 (7th Cir.). "If every plaintiff were permitted to unilaterally determine that a law burdened their religious beliefs, and courts were required to assume that such burden was substantial, simply because the plaintiff claimed that it was the case, then the standard expressed by Congress

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burden is substantial, a court's "only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." *Id.* at 1137. The government believes that the majority's ruling in *Hobby Lobby* was wrong on this and many other points. However, even if this Court were inclined to agree with the Tenth Circuit, the majority proceeded to rely on *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010), which makes clear that in order 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 (citing *Abdulhaseeb*, 600 F.3d at 1315). The *Hobby Lobby* substantial burden analysis is also inapposite because for-profit corporations are not eligible for the accommodations.

under the RFRA would convert to an 'any burden' standard." *Conestoga*, 917 F. Supp. 2d at 413-14.[9] The result would be to subject every act of Congress to strict scrutiny every time any plaintiff could articulate a sincerely held religious objection to compliance with that law. The "most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), would thus be transformed into a norm against which Congress must always legislate.

Finally, plaintiffs seem to suggest that the regulations will actually require them to fund or subsidize access to contraceptive coverage because their TPAs will find a way to pass on the costs of such coverage to plaintiffs. *See, e.g.*, Second Am. Compl. ¶ 14; Pls.' Br. at 23-24. But the regulations specifically prohibit plaintiffs' TPAs from charging any premium or otherwise passing on any costs to plaintiffs with respect to the TPAs' payments for contraceptive services. *See* 78 Fed. Reg. at 39,880, AR at 12. Any suggestion that plaintiffs' TPAs will violate the law is purely speculative, and boils down to the baseless argument that the regulations impose a substantial burden because a third party might violate those same

[9] 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" 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).

regulations.[10]

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*

Although the regulations do not require plaintiffs to contract, arrange, pay, or refer for contraceptive coverage, plaintiffs' complaint appears to be that the regulations require plaintiffs to indirectly facilitate conduct on the part of their employees that they find objectionable (*i.e.*, the use of certain contraceptives). But this complaint has no limits. An employer provides numerous benefits, including a salary and other fringe benefits, to its employees and by doing so in some sense facilitates whatever use its employees make of those benefits. Plaintiffs not only seek to be free from the requirement to contract, arrange, pay, or refer for contraceptive coverage themselves—which they are under these regulations—but also seek to prevent anyone else from providing such coverage to their employees.

Indeed, courts have held that claims raised by for-profit companies challenging the contraceptive coverage regulations, which require them to provide the relevant coverage themselves, are too attenuated to amount to a substantial

[10] Plaintiffs' discussion about cost neutrality, Pls.' Br. at 24-25, is irrelevant as to self-insured health plans like plaintiffs', for which any costs incurred by TPAs will be reimbursed through an adjustment to FFE user fees. In any event, as discussed, the regulations expressly prohibit TPAs from passing on to plaintiffs any costs associated with providing contraceptive coverage.

burden under RFRA. For example, the district court in *Conestoga* reasoned that the ultimate decision of whether to use contraception "rests not with [the employer], but with [the] employees" and that "any burden imposed by the regulations is too attenuated to be considered substantial." 917 F. Supp. 2d at 414-15. The *Conestoga* district court further explained that the indirect nature of any burden imposed by the regulations distinguished them from the statutes challenged in *Yoder*, *Sherbert*, *Thomas*, and *Gonzales*. *See Conestoga*, 917 F. Supp. 2d at 415; *see, e.g.*, *Autocam*, 2012 WL 6845677, at *6; *O'Brien*, 894 F. Supp. 2d at 1158-60.[11]

Here, any burden on plaintiffs, which are eligible for the religious employer exemption or the accommodations, is even more attenuated and so is *a fortiori* not substantial. 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 they are also further insulated by the fact that a third party—plaintiffs' TPAs—and *not* plaintiffs, will actually contract, arrange, pay, and refer for such services. Plaintiffs are thus in no way subsidizing—even indirectly—the use of preventive services that they find objectionable. Even still, plaintiffs ask the Court to conclude

[11] *See also Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013) (Rovner, J., dissenting); *Eden Foods, Inc. v. Sebelius*, No. 13-cv-11229, 2013 WL 1190001, at *4 (E.D. Mich. Mar. 22, 2013); *Annex Medical, Inc. v. Sebelius*, No. 12-cv-2804, 2013 WL 101927, at *4-*5 (D. Minn. Jan. 8, 2013), *appeal pending*, No. 13-1118 (8th Cir.); *Grote*, 914 F. Supp. 2d at 949-52.

that 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 when 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 that they have religious objections to providing contraceptive coverage and so informed their TPAs.

But a burden simply cannot be "substantial" under RFRA when it is attenuated. Cases that find a substantial burden uniformly involve a direct burden on the plaintiff rather than a burden imposed on another entity. *See, e.g.*, *Potter v. Dist. of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009); *see also Grote*, 914 F. Supp. 2d at 951-52; *Conestoga*, 917 F. Supp. 2d at 413-14. A plaintiff cannot establish a substantial burden on his religious exercise by invoking this type of trickle-down theory; to constitute a substantial burden within the meaning of RFRA, the burden must be imposed on the plaintiff himself. *See Conestoga*, 917 F. Supp. 2d at 411, 413; *Korte v. U.S. Dep't of Health & Human Servs.*, 912 F. Supp. 2d 735, 748 (S.D. Ill. 2012), *appeal pending*, No. 12-3841 (7th Cir.); *Autocam*, 2012 WL 6845677, at *7; *Grote*, 914 F. Supp. 2d at 950-51; *O'Brien*, 894 F. Supp. 2d at 1160 (rejecting RFRA claim because the regulations were "several degrees

removed from imposing a substantial burden on [plaintiffs]").[12] Here, of course, there is no such direct burden. In fact, given that any payment for contraceptive services is made by plaintiffs' TPAs, the regulations have even less impact on plaintiffs' religious exercise than plaintiffs' payment of salaries to their employees, which those employees can use to purchase contraceptives. *See O'Brien*, 894 F. Supp. 2d at 1160; *see also Conestoga*, 917 F. Supp. 2d at 414; *Grote*, 708 F.3d at 861 (Rovner, J., dissenting); *Autocam*, 2012 WL 6845677, at *6.

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 them

a. The regulations significantly advance compelling governmental interests in public health and gender equality

[12] *Thomas* is not to the contrary. In *Thomas*, the Supreme Court recognized that "a *compulsion* may certainly be indirect and still constitute a substantial burden," *Conestoga*, 917 F. Supp. 2d at 415 n.15, but that is not so where the *burden* itself is indirect, as it is here, *see id.*; *Gilardi*, 926 F. Supp. 2d at 283. As previously explained, in *Hobby Lobby*, 723 F.3d 1114, a bare majority of the en banc Tenth Circuit concluded that the word "substantial" in RFRA refers to the "intensity of coercion" rather than to the directness or indirectness of the burden, if any, on a plaintiff's religious exercise. *Id.* at 1137-40. The Tenth Circuit's conclusion that the substantial burden requirement relates to the intensity of the coercion, however, is inconsistent with *Kaemmerling*, discussed above, as well as other decisions that have analyzed "substantial burden" in terms of the degree to which the challenged law directly imposes a requirement or prohibition on religious practice. *See* 553 F.3d at 678-79; *Living Water Church of God*, 258 F. App'x at 734; *McEachin*, 357 F.3d at 203 n.6; *Civil Liberties for Urban Believers*, 342 F.3d at 761.

Even if plaintiffs were able to demonstrate a substantial burden on their religious exercise, they would not prevail because the challenged regulations are justified by two compelling governmental interests, and are the least restrictive means to achieve those interests. First, the promotion of public health is unquestionably a compelling governmental interest. *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011); *see also, e.g.*, *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir. 1998); *Dickerson v. Stuart*, 877 F. Supp. 1556, 1559 (M.D. Fla. 1995). And the challenged regulations further this compelling interest by "expanding access to and utilization of recommended preventive services for women." 78 Fed. Reg. at 39,887, AR at 19.

The primary predicted benefit of the preventive services coverage regulations is that "individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of disease." 75 Fed. Reg. 41,726, 41,733 (July 19, 2010), AR at 233. "By expanding coverage and eliminating cost sharing for recommended preventive services, [the regulations are] expected to increase access to and utilization of these services, which are not used at optimal levels today." 75 Fed. Reg. at 41,733, AR at 233; *see also* 78 Fed. Reg. at 39,873, AR at 5.[13]

[13] Plaintiffs miss the point, therefore, when they attempt to minimize the magnitude of these interests by arguing that contraception is widely available. *See* Pls.' Br. at 28. Although a majority of employers cover FDA-approved contraceptives, *see*

Increased access to FDA-approved contraceptive services is a key part of these predicted health outcomes, as unintended pregnancies have proven in many cases to have negative health consequences for women and developing fetuses. *See* 78 Fed. Reg. at 39,872, AR at 4. As IOM concluded in identifying services recommended to "prevent conditions harmful to women's health and well-being," unintended pregnancy may delay "entry into prenatal care," prolong "behaviors that present risks for the developing fetus," and cause "depression, anxiety, or other conditions." IOM REP. at 20, 103-04, AR at 318, 401-02. Contraceptive coverage further helps to avoid "the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." *Id.* at 103, AR at 401; *see also* 78 Fed. Reg. at 39,872, AR at 4. And "[c]ontraceptives also have medical benefits for women who are contraindicated for pregnancy, and there are demonstrative preventive health benefits from contraceptives relating to conditions other than pregnancy (for example, prevention of certain cancers, menstrual disorders, and acne." 78 Fed. Reg. at 39,872, AR at 4; *see* IOM Rep. at 103-04, AR at 401-02.

Closely tied to this interest is a related, but separate, compelling interest that is furthered by the regulations: assuring that women have equal access to health

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IOM Rep. at 109, AR at 407, many women forgo preventive services because of cost-sharing imposed by their health plans, *see id.* at 19-20, 109, AR at 317-18, 407. The challenged regulations eliminate that cost-sharing. 78 Fed. Reg. at 39,873, AR at 5.

care services. 78 Fed. Reg. at 39,872, 39,887, AR at 4, 19. As the Supreme Court explained in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), there is a fundamental "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." *Id.* at 626. Thus, "[a]ssuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests." *Id.* By including in the ACA preventive health services for women, Congress made clear that the goals and benefits of effective preventive health care apply equally to women, who might otherwise be excluded from such benefits if their unique health care needs were not taken into account in the ACA. As explained by members of Congress, "women have different health needs than men, and these needs often generate additional costs. Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009) (statement of Sen. Feinstein); 78 Fed. Reg. at 39,887, AR at 19; IOM REP. at 19, AR at 317. These costs result in women often forgoing preventive care and place women in the workforce at a disadvantage compared to their male coworkers. *See, e.g.*, 155 Cong. Rec. S12265-02, S12274 (daily ed. Dec. 3, 2009) (statement of Sen. Murray); 78 Fed. Reg. at 39,887, AR at 19; IOM REP. at 20, AR at 318. Congress's attempt to equalize the provision of preventive health care services, with the

resulting benefit of women being able to contribute to the same degree as men as healthy and productive members of society, furthers a compelling governmental interest. *Cf. Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 92-93 (Cal. 2004).[14]

[14] Plaintiffs suggest the government must separately analyze the impact of and need for the regulations as to each and every employer and employee in America. *See* Pls.' Br. at 26. But this level of specificity would be impossible to establish and would render this regulatory scheme—and potentially every regulatory scheme that is challenged due to religious objections—completely unworkable. *See United States v. Lee*, 455 U.S. 252, 259-60 (1982). In practice, courts have not required the government to analyze the impact of a regulation on the single entity seeking an exemption, but have conducted the inquiry with respect to all similarly situated individuals or organizations. *See, e.g.*, *id*. at 260 (considering the impact on the tax system if all religious adherents—not just the plaintiff—could opt out); *United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001) (per curiam) ("Oliver has argued a one-man exemption should be made, however, there is nothing so peculiar or special with Oliver's situation which warrants an exception. There are no safeguards to prevent similarly situated individuals from asserting the same privilege and leading to uncontrolled eagle harvesting."); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990). *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 435 (2006), is not to the contrary. To be sure, the Court rejected "slippery-slope" arguments for refusing to accommodate a particular claimant. *See* 546 U.S. at 435-36. But it construed the scope of the requested exemption as encompassing all members of the plaintiff religious sect. *See id.* at 433. Similarly, the exemption in *Yoder*, 406 U.S. 205, encompassed *all* Amish children; and the exemption in *Sherbert v. Verner*, 374 U.S. 398 (1963), encompassed *all* individuals who had a religious objection to working on Saturdays. *See O Centro*, 546 U.S. at 431. The Court's warning in *O Centro* against "slippery-slope" arguments was a rejection of arguments by analogy—that is, speculation that providing an exemption to one group will lead to exemptions for other *non*-similarly situated groups. It was not an invitation to

Although the challenged regulations further these two compelling governmental interests, while simultaneously accommodating the religious objections of eligible organizations, plaintiffs maintain that the interests underlying the regulations cannot be considered compelling when millions of people are not protected by the regulations at the moment. Pls.' Br. at 26-29. But this is not a case where underinclusive enforcement of a law suggests that the government's "supposedly vital interest" is not really compelling. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993). Many of the "exemptions" referred to by plaintiffs are not exemptions from the preventive services coverage regulations at all, but are instead provisions of the ACA that exclude individuals and entities from other requirements imposed by the ACA. Or they reflect the government's attempts to balance the compelling interests underlying the challenged regulations against other significant interests supporting the complex administrative scheme created by the ACA. *See United States v. Lee*, 455 U.S. 252, 259 (1982) ("The Court has long recognized that balance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions."); *United States v. Winddancer*, 435 F. Supp. 2d 697, 695-98 (M.D. Tenn. 2006) (recognizing that the regulations governing access to eagle

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ignore the reality that an exemption for a particular claimant might necessarily lead to an exemption for an entire category of similarly situated entities.

parts "strike a delicate balance" between competing interests). And the existing exceptions do not undermine the government's interests in a significant way. *See Lukumi*, 508 U.S. at 547; *S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1208-09 (6th Cir. 1990); 78 Fed. Reg. at 39,887, AR at 19.

For example, the grandfathering of certain health plans with respect to certain provisions of the ACA is not specifically limited to the preventive services coverage regulations. *See* 42 U.S.C. § 18011; 45 C.F.R. § 147.140. In fact, the effect of grandfathering is not really a permanent "exemption," but rather, over the long term, a transition in the marketplace with respect to several provisions of the ACA, including the preventive services coverage provision. *See* 78 Fed. Reg. at 39,887 n.49, AR at 19. The grandfathering provision reflects Congress's attempts to balance competing interests—specifically, the interest in spreading the benefits of the ACA, including those provided by the preventive services coverage provision, and the interest in maintaining existing coverage and easing the transition into the new regulatory regime established by the ACA—in the context of a complex statutory scheme. *See* 75 Fed. Reg. 34,540, 34,546 (June 17, 2010).

This incremental transition does nothing to call into question the compelling interests furthered by the preventive services coverage regulations. Even under the grandfathering provision, it is projected that more group health plans will transition to the requirements under the regulations as time goes on. Defendants have

estimated that a majority of group health plans will have lost their grandfather status by the end 2013. *See* 75 Fed. Reg. 34,538, 34,552 (June 17, 2010); *see also* Kaiser Family Foundation and Health Research & Educational Trust, Employer Health Benefits 2012 Annual Survey at 7-8, 190, AR at 663-64, 846. Thus, any purported adverse effect on the compelling interests underlying the regulations will be quickly mitigated, which is in stark contrast to the *permanent* exemption plaintiffs seek. Plaintiffs would have this Court believe that an interest cannot truly be "compelling" unless Congress is willing to impose it on everyone all at once despite competing interests, but plaintiffs offer no support for such an untenable proposition. *See Legatus v. Sebelius*, 901 F. Supp. 2d 980, 994 (E.D. Mich. 2012) ("[T]he grandfathering rule seems to be a reasonable plan for instituting an incredibly complex health care law while balancing competing interests.").

Moreover, small employers are not exempt from the preventive services coverage regulations. *See* 42 U.S.C. § 300gg-13(a); 78 Fed. Reg. at 39,887 n.49, AR at 19. Instead, employers with fewer than fifty full-time equivalent employees are exempt from the employer responsibility provision, meaning that, starting in 2015, such employers are not subject to the possibility of assessable payments if they do not provide health coverage to their full-time employees and their dependents. *See* 26 U.S.C. § 4980H(c)(2). Small businesses that *do* offer non-grandfathered health coverage to their employees are required to provide coverage

for recommended preventive services, including contraceptive services, without cost-sharing. 78 Fed. Reg. at 39,887 n.49, AR at 19.

The only true exemption from the preventive services coverage regulations is the exemption for the group health plans of religious employers. 45 C.F.R. § 147.131(a). But there is a rational distinction between this narrow exception and the expansion plaintiffs seek. Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers, including organizations eligible for the accommodations, to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan. *See* 78 Fed. Reg. at 39,874, 39,887, AR at 6, 19. In any event, it would be perverse to hold that the government's provision of a limited religious exemption eliminates its compelling interest in the regulation, thus effectively extending the same exemption to anyone else who wants it under RFRA. Such a reading of RFRA would *discourage* the government from accommodating religion.

Granting plaintiffs the much broader exemption they request would undermine defendants' ability to enforce the regulations in a rational manner. *See O Centro*, 546 U.S. at 435. We are a "cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld*, 366 U.S. at 606; *see*

also S. Ridge Baptist Church, 911 F.2d at 1211, and many people object to various medical services. If any organization with a religious objection were able to claim an exemption from the operation of the preventive services coverage regulations—even where the regulations require virtually nothing of the organization—it is difficult to see how defendants could administer the regulations in a manner that would achieve Congress's goals of improving the health of women and newborn children and equalizing the coverage of preventive services for women. *See United States v. Israel*, 317 F.3d 768, 772 (7th Cir. 2003) (recognizing that plaintiff's RFRA logic "would lead to significant administrative problems for the [government] and open the door to a . . . proliferation of claims"). Indeed, women who receive their health coverage through employers like plaintiffs would face negative health and other outcomes because they had obtained employment with an organization that objects to its employees' use of contraceptive services, even when those services are paid for, administered, and otherwise provided by a third party. *See id.* (noting consequences "for the public and the government"); 77 Fed. Reg. at 8728, AR at 215; 78 Fed. Reg. at 39,887, AR at 19.

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

When determining whether a particular regulatory scheme is the "least restrictive," the appropriate inquiry is whether the individual or organization with

religious objections, and those similarly situated, can be exempted from the scheme—or whether the scheme can otherwise be modified—without undermining the government's compelling interests. *See, e.g.*, *United States v. Schmucker*, 815 F.2d 413, 417 (6th Cir. 1987); *United States v. Wilgus*, 638 F.3d 1274, 1289-95 (10th Cir. 2011). The government is not required "to do the impossible—refute each and every conceivable alternative regulation scheme." *Wilgus*, 638 F.3d at 1289. Instead, the government need only "refute the alternative schemes offered by the challenger." *Id.*

Instead of explaining how plaintiffs and similarly situated eligible organizations could be exempted from the regulations without significant damage to the government's compelling interests, plaintiffs conjure up, without any statutory support, several brand new statutory and regulatory schemes—most of which would require the government to pay for contraceptive coverage—that they claim would be less restrictive. *See* Pls.' Br. at 29-31. Yet plaintiffs fail to recognize that such alternatives would be incompatible with the fundamental statutory scheme set forth in the ACA, which plaintiffs do not challenge in this lawsuit. Congress did not adopt a single (government) payer system financed through taxes and instead opted to build on the existing system of employment-based coverage. *See* H.R. Rep. No. 111-443, pt. II, at 984-86 (2010). Plaintiffs point to no statutory authority for any of their proffered less restrictive alternatives.

Nor is there any indication that Congress would have contemplated that agency action could be invalidated under RFRA because the agency, in discharging its statutorily delegated authority, failed to adopt an alternative scheme for which it lacked statutory authority. Thus, even if defendants wanted to adopt one of plaintiffs' non-employer-based alternatives, they would be constrained by the statute from doing so. *See* 78 Fed. Reg. at 39,888, AR at 20.

Furthermore, plaintiffs themselves indicate that they "oppose many of the[] alternatives" that they put forth. Pls.' Br. at 30 n.31. Indeed, as noted above, it is not clear why the government's provision of contraceptive coverage to women based upon their employer's objection to providing it would not be subject to exactly the same RFRA claim that plaintiffs advance here. By their own admission then, plaintiffs' proposals would do little—if anything—to satisfy their religious objections, and therefore should not be considered viable less restrictive alternatives. *See New Life Baptist Church Acad. v. Town of E. Longmeadow*, 885 F.2d 940, 950-51 (1st Cir. 1989) (Breyer, J.) (considering the limited extent to which an alternative would alleviate a religious burden in rejecting it as a "less restrictive alternative," even though the plaintiff had expressed a preference for the alternative over the challenged requirements). An eligible organization's objection to providing or paying for contraceptive coverage would still "facilitate" its availability—in this case, by the government—and the eligible organization would

likely be called upon to verify or certify matters such as the non-provision of contraceptive coverage, and employment or plan beneficiary status.

Finally, even if plaintiffs would be satisfied by their proposed alternatives, just because plaintiffs can devise an entirely new legislative and administrative scheme does not make that scheme a feasible less restrictive means, *see Wilgus*, 638 F.3d at 1289; *Adams v. Comm'r of Internal Revenue*, 170 F.3d 173, 180 n.8 (3d Cir. 1999), particularly where such alternatives would come at enormous administrative and financial cost to the government. A proposed alternative scheme is not an adequate alternative—and thus not a viable less restrictive means to achieve a compelling interest—if it is not feasible. *See, e.g.*, *New Life Baptist*, 885 F.2d at 947; *Graham*, 822 F.2d at 852. In determining whether a proposed alternative scheme is feasible, courts often consider the additional administrative and fiscal costs of the scheme. *See, e.g.*, *S. Ridge Baptist Church*, 911 F.2d at 1206; *Fegans v. Norris*, 537 F.3d 897, 905-06 (8th Cir. 2008); *United States v. Lafley*, 656 F.3d 936, 942 (9th Cir. 2011); *New Life Baptist*, 885 F.2d at 947. Defendants considered plaintiffs' alternatives and determined that they were not feasible because the agencies lacked statutory authority to implement them, they would impose considerable new costs and other burdens on the government, and they would otherwise be impractical. *See* 78 Fed. Reg. at 39,888, AR at 20; *see also, e.g.*, *Lafley*, 656 F.3d at 942; *Gooden v. Crain*, 353 F. App'x 885, 888 (5th

Cir. 2009); *Adams*, 170 F.3d at 180 n.8.

Nor would the proposed alternatives be equally effective in advancing the government's compelling interests. *See* 78 Fed. Reg. at 39,888, AR at 20; *see also, e.g.*, *Kaemmerling*, 553 F.3d at 684 (finding that means was least restrictive where no alternative means would achieve compelling interests); *Murphy v. State of Ark.*, 852 F.2d 1039, 1042-43 (8th Cir. 1988) (same). As discussed above, Congress determined that the best way to achieve the goals of the ACA, including expanding preventive services coverage, was to build on the existing employer-based system, and the anticipated benefits of the regulations are attributable in part to the use of that system. Plaintiffs' alternatives, by contrast, would require establishing entirely new government programs and infrastructures or fundamentally altering an existing one, and would almost certainly require women to take burdensome steps to find out about the availability of and sign up for a new benefit, thereby ensuring that fewer women would take advantage of it. *See* 78 Fed. Reg. at 39,888, AR at 20. Nor do plaintiffs offer any suggestion as to how these programs could be integrated with the employer-based system or how women would obtain government-provided preventive services in practice.

B. The Regulations Do Not Violate the Free Exercise Clause

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. *Smith*, 494 U.S. at 879. A law is neutral if it does not target religiously motivated conduct either on its face or as applied. *Lukumi*, 508 U.S. 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, as nearly every court to address a free exercise challenge to the prior version of the regulations has held. "The regulations were passed, not with the object of interfering with religious practices, but instead to improve women's access to health care and lessen the disparity between men's and women's healthcare costs." *O'Brien*, 894 F. Supp. 2d at 1161. The regulations reflect expert medical recommendations about the medical necessity of contraceptive services, without regard to any religious motivations for or against such services. *See, e.g.*, *Conestoga*, 917 F. Supp. 2d at 410 (finding it "clear" that "the purpose of the [regulations] is not to target religion, but instead to promote public health and gender equality"); *Grote*, 914 F. Supp. 2d at 952-53.[15]

[15] Plaintiffs' reliance on *Lukumi*, 508 U.S. 520, is misplaced, as this case is a far cry from it. There, 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

The regulations, moreover, do not pursue their purpose "only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545. The regulations apply to all non-grandfathered health plans that do not qualify for the religious employer exemption or the accommodations for eligible organizations. Thus, "it is just not true . . . that the burdens of the [regulations] fall on religious organizations 'but almost no others.'" *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (quoting *Lukumi*, 508 U.S. at 536); *see O'Brien*, 894 F. Supp. 2d at 1162; *Autocam*, 2012 WL 6845677, at *5; *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); *Intercommunity Ctr. for Justice & Peace v. INS*, 910 F.2d 42, 44 (2d Cir. 1990). "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

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other than Santeria sacrifices, *id*. at 535-36. There is no indication of a similar targeting of religious practice here. *See, e.g.*, *Conestoga*, 917 F. Supp. 2d at 410.

accommodations serve to accommodate religion, not to disfavor it. *Id*.; *see also 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."); *Grote*, 914 F. Supp. 2d at 953. Thus, these categorical exceptions and accommodations do not trigger strict scrutiny.[16]

C. The Regulations Do Not Violate the Free Speech Clause

Plaintiffs' two free speech claims fare no better. Indeed, every court to consider such a challenge to the prior version of the regulations has rejected it. The preventive services coverage regulations regulate conduct, not speech. *See, e.g.*, *O'Brien*, 894 F. Supp. 2d at 1166-67; *Autocam*, 2012 WL 6845677, at *8; *Grote*, 914 F. Supp. 2d at 955. And completion of the simple self-certification form is "plainly incidental to the . . . regulation of conduct" and thus does not violate free speech rights. *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* ("*FAIR*"), 547

[16] Nor does plaintiffs' hybrid rights theory trigger strict scrutiny. The hybrid rights theory has been frequently rejected, *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); *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) (rejecting hybrid rights theory); *Kissinger v. Board of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) (same), and, even if it were applied, "the combination of two untenable claims" does not "equal[] a tenable one." *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001). "[I]n law as in mathematics zero plus zero equals zero." *Id*. Finally, the regulations satisfy strict scrutiny in any event. *See supra*.

U.S. 47, 62 (2006).[17]

Plaintiffs' claim that the regulations impose a so-called "gag order" that interferes with their free-speech rights is likewise 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, AR at 12. What the regulations prohibit is an employer's improper attempt to interfere with its employees' ability to obtain contraceptive coverage from a third party by, for example, threatening the TPA with a termination of its relationship with the employer because of the TPA's "arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries." *See* 26 C.F.R. § 54.9815-2713A(b)(1)(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

[17] Plaintiffs' assertion that the regulations require them to support counseling "in favor" of contraceptive services is incorrect. Pls.' Br. at 35. The regulations require a TPA to make payments for "patient education and counseling for all women with reproductive capacity," as prescribed by a health care provider. *See* HRSA Guidelines, *supra*. The regulations do not purport to regulate the content of the education or counseling provided – that is between the patient and her health care provider. *See O'Brien*, 894 F. Supp. 2d at 1166 (observing that the regulations "do not require funding of one defined viewpoint").

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). Here, too, the regulations do not prevent plaintiffs from expressing their views regarding the use of contraceptive services, but rather protect employees' rights to obtain payments for contraceptive services through TPAs.

D. The Regulations Do Not Interfere With Church Governance

Finally, Plaintiffs assert that, by requiring plaintiffs to facilitate practices in violation of their religious beliefs, the regulations interfere with plaintiffs' "internal church governance" in violation of the Religion Clauses. But that is primarily a restatement of plaintiffs' substantial burden theory, which fails for reasons explained already. Indeed, the lone case cited by plaintiffs on this point, *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 132 S. Ct. 694 (2012), is inapposite. In *Hosanna-Tabor*, the Supreme Court held that allowing a minister employee to sue his or her church employer under the Americans with Disabilities Act—thereby interfering with "a church's ability to select its own ministers"—violates the Free Exercise and Establishment Clauses. *Id.* at 704, 706. But this case

is not about the selection of clergy, nor any other matters of church governance apart from plaintiffs' religious objection to providing contraceptive coverage (which, again, is subsumed by plaintiffs' substantial burden argument). Nor is this case about any law that regulates the structure of the church—plaintiffs may choose whatever organizational structure they wish.

II. PLAINTIFFS 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 that same rule applies to a statutory claim under RFRA, plaintiffs have not shown that the challenged regulations violate their First Amendment or RFRA rights, so there has been no loss of First Amendment freedoms for any period of time. In this respect, the merits and irreparable injury prongs of the preliminary injunction analysis merge together, and plaintiffs cannot show irreparable injury without also showing a likelihood of success on the merits, which they cannot do. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012).

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) (indicating that granting an injunction against the enforcement of a likely constitutional statute would harm the government). Enjoining the preventive services coverage regulations as to plaintiffs 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 the non-diocese plaintiffs' employees (and their families) 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 the non-diocese plaintiffs' employees may not share plaintiffs' religious beliefs. Those employees should not be deprived of the benefits of payments provided by a third party that is not their employer for the full range of FDA-approved contraceptive services, as prescribed by a health care provider, on the basis of their employers' 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, AR at 317-18, 407; 77 Fed. Reg. at 8727, AR at 214; 78 Fed. Reg. at 39,887, AR at 19. As a result, in many cases, both women and developing fetuses suffer negative health consequences.

See IOM REP. at 20, 102-04, AR at 318, 400-02; 77 Fed. Reg. at 8728, AR at 215. 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).

Enjoining defendants from enforcing, as to plaintiffs, the preventive services coverage regulations—the purpose of which is to eliminate these burdens—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). The non-diocese plaintiffs employ nearly 5,000 people, Second Am. Compl. ¶¶ 38, 42, and the scope of their health plans additionally include those employees' covered dependents. Accordingly, even assuming plaintiffs were likely to succeed on the merits (which they are not for the reasons explained above), any potential harm to plaintiffs resulting from their offense at a third party providing payment for contraceptive services at no cost to, and with no administration by, the non-diocese plaintiffs' would be outweighed by the significant harm an injunction would cause these employees and their families.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion for preliminary injunction.

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 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
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