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

CHRISTOPHER YEP, MARY ANNE YEP, and TRIUNE HEALTH GROUP, INC., an Illinois corporation, Plaintiffs, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; TIMOTHY GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF LABOR; HILDA SOLIS, in her official capacity as Secretary of the United States Department of Labor, Defendants.	Case No. 1:12-cv-06756

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), defendants hereby move to dismiss this action. The grounds for this motion are set forth in the accompanying memorandum.

Respectfully submitted this 9th day of November, 2012,

STUART F. DELERY
Acting Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

GARY SHAPIRO
United States Attorney

JENNIFER RICKETTS
Director, Federal Programs Branch

SHEILA M. LIEBER
Deputy Director

/s/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS (VA Bar No. 83212)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W.
Washington, D.C. 20001
Tel: (202) 514-3367; Fax: (202) 616-8470
Email: bradley.p.humphreys@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

/s/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS

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EASTERN DIVISION

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INTRODUCTION

Plaintiffs challenge regulations that are intended to ensure that women have access to health coverage, without cost-sharing, for certain preventive services that medical experts have deemed necessary for women's health and well-being. The preventive services coverage regulations that plaintiffs challenge require all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain recommended preventive services without cost-sharing (such as a copayment, coinsurance, or a deductible).[1] As relevant here, except as to group health plans of certain non-profit religious employers (and group health insurance coverage sold in connection with those plans), the preventive services that must be covered include all Food and Drug Administration ("FDA")-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider. The plaintiffs in this case are Triune Health Group, Inc. ("Triune"), a for-profit Illinois corporation that "specializes in facilitating the re-entry of injured workers into the workforce," and its owners, Christopher Yep and May Anne Yep ("the Yeps"). Am. Compl. ¶ 19, ECF No. 21. The health plan that Triune currently offers to its employees currently covers contraceptive coverage. Plaintiffs, however, assert that doing so is prohibited by their religious beliefs.

Plaintiffs' challenge rests largely on the theory that a for-profit, secular corporation established to provide rehabilitation services can claim to exercise a religion and thereby avoid the reach of laws designed to regulate commercial activity. This cannot be. Indeed, the Supreme Court has recognized that, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *United States v. Lee*, 455 U.S. 252, 261 (1982). Nor can the owners of a for-profit, secular company eliminate the legal separation provided by the corporate form to impose their

[1] A grandfathered plan is one that was in existence on March 23, 2010 and that has not undergone any of a defined set of changes. 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140.

personal religious beliefs on the corporate entity's employees. To hold otherwise would permit for-profit, secular companies and their owners to become laws unto themselves, claiming countless exemptions from an untold number of general commercial laws designed to improve the health and well-being of individual employees based on an infinite variety of alleged religious beliefs. Such a system would not only be unworkable, it would also cripple the government's ability to solve national problems through laws of general application. This Court, therefore, should reject plaintiffs' effort to bring about an unprecedented expansion of constitutional and statutory free exercise rights.

For these reasons, plaintiffs' claims are all subject to dismissal for failure to state a claim upon which relief may be granted. As a threshold matter, however, plaintiffs have not met their burden of establishing Article III standing. Because, as plaintiffs concede, Illinois law requires that the health plan Triune provides to its employees cover contraceptive services notwithstanding the preventive services coverage regulations, Am. Compl. ¶¶ 39, 41 ECF No. 21, plaintiffs cannot show that their alleged injuries are either fairly traceable to the challenged regulations or redressable by an order of the Court.

Even if the Court were to find this case justiciable, however, with respect to plaintiffs' Religious Freedom Restoration Act ("RFRA") claim, none of the plaintiffs can show, as each must, that the preventive services coverage regulations impose a substantial rather than an incidental burden on religious exercise. Triune is a for-profit, secular employer, and a secular entity by definition does not exercise religion. The Yeps' allegations of a burden on their own individual religious exercise fare no better, as the regulations that purportedly impose such a burden apply only to group health plans and health insurance issuers. The Yeps themselves are neither. It is well established that a corporation and its owners are wholly separate entities, and the Court should not permit the Yeps to eliminate that legal separation to impose their personal religious beliefs on the corporate entity or its employees. The Yeps cannot use the corporate form alternatively as a shield and a sword, depending on which suits them in any given circumstance.

Furthermore, even if Triune could exercise religion within the meaning of RFRA, or the Yeps could somehow pierce the corporate veil to impose their beliefs on their employees, the preventive services coverage regulations still do not substantially burden plaintiffs' exercise of religion for an independent reason: any burden caused by the regulations is simply too attenuated to qualify as a *substantial* burden. Indeed, the first court to address the merits of a challenge to the preventive services coverage regulations dismissed the plaintiffs' RFRA claim for this reason. *See O'Brien v. HHS*, No. 4:12-cv-476 (CEJ), 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012), *appeal docketed*, No. 12-3357 (8th Cir. Oct. 4., 2012). Just as Triune's employees have always retained the ability to choose whether to procure contraceptive services by using the salaries Triune pays them or by using some combination of their salaries and the insurance Triune provided, under the current regulations those employees retain the ability to choose what health services they wish to obtain according to their own beliefs and preferences. Triune remains free to advocate against their use of contraceptive services (or any other services). Ultimately, an employee's health care choices remain those of the employee, not Triune.

Moreover, even if the challenged regulations were deemed to impose a substantial burden on any plaintiff's 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 children, and equalizing the provision of recommended preventive care for women and men so that women who choose to do so can be a part of the workforce on an equal playing field with men.

Plaintiffs' First Amendment claims are equally meritless. The Free Exercise Clause does not prohibit a law that is neutral and generally applicable even if the law prescribes conduct that an individual's religion proscribes. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). The preventive services coverage regulations fall within this rubric because they do not target, or selectively burden, religiously motivated conduct. The regulations apply to all non-exempt, non-grandfathered plans, not just those of employers with a religious affiliation. Plaintiffs' Establishment Clause claim, which rests primarily on the theory that the religious

employer exemption discriminates among religions, is similarly flawed. The exemption distinguishes between *organizations* based on their purpose and composition; it does not favor one *religion*, *denomination*, or *sect* over another. The distinctions drawn by the exemption, therefore, simply do not violate the constitutional prohibition against denominational preferences. Furthermore, the regulations do not violate plaintiffs' free speech rights. The regulations compel conduct, not speech. They do not require plaintiffs to say anything; nor, as shown by this very lawsuit, do they prohibit plaintiffs from expressing to Triune's employees or the public their views in opposition to the use of contraceptive services. Indeed, the *O'Brien* court dismissed identical free exercise, Establishment Clause, and free speech challenges. *See* 2012 WL 4481208, at *11-13. And the highest courts of both New York and California have upheld state laws that are similar to the preventive services coverage regulations against First Amendment challenges similar to those asserted here. *See Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 461 (N.Y. 2006); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 74 n.3 (Cal. 2004).

Nor can plaintiffs succeed on their Administrative Procedure Act ("APA") claim. As an initial matter, plaintiffs lack prudential standing to raise a claim under section 1303(b)(1) of the ACA because plaintiffs are not "health insurance issuers" and they have not purchased a "qualified health plan." In any event, the preventive services coverage regulations neither require qualified health plans to cover abortions as prohibited by section 1303(b)(1), nor implicate the Weldon Amendment. Moreover, in promulgating the challenged regulations, defendants complied with the procedural requirements of the APA and carefully considered comments regarding the regulations' proper scope. Finally, plaintiffs' claim that the challenged regulations somehow violate the principle of separation of powers by "contravening the desires of the legislators who passed the [a]ct," Am. Comp. ¶ 106, has no basis in law.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

Prior to the enactment of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), many Americans did not receive the preventive health care they needed to stay healthy, avoid or delay the onset of disease, lead productive lives, and reduce health care costs. Due in large part 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."), *available at* http://cnsnews.com/sites/default/ files/documents/PREVENTIVE%20SERVICES-IOM%20REPORT_0.pdf (last visited Nov. 9, 2012). Section 1001 of the ACA—which includes the preventive services coverage provision that is relevant here—seeks to cure this problem by making recommended preventive care affordable and accessible for many more Americans.

The preventive services coverage 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.[2] 42 U.S.C. § 300gg-13(a). The preventive services that must be covered are: (1) evidence-based items or services that have in effect a rating of "A" or "B" from the United States Preventive Services Task Force ("USPSTF"); (2) immunizations recommended by the Advisory Committee on Immunization Practices; (3) for infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration ("HRSA");[3] and (4) for women, such additional preventive care and screenings not described by the USPSTF as provided in comprehensive guidelines supported by HRSA. *Id.*

[2] A group health plan includes a plan established or maintained by an employer that provides medical care to employees. 42 U.S.C. § 300gg-91(a)(1). Group health plans may be insured (i.e., medical care underwritten through an insurance contract) or self-insured (i.e., medical care funded directly by the employer). The ACA does not require employers to provide health coverage for their employees, but, beginning in 2014, certain large employers may face assessable payments if they fail to do so under certain circumstances. 26 U.S.C. § 4980H.

[3] HRSA is an agency within the Department of Health and Human Services ("HHS").

The requirement to provide coverage for recommended preventive services for women, without cost-sharing, was added as an amendment (the "Women's Health Amendment") to the ACA during the legislative process. 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 section 1001 of the ACA. *See* 155 Cong. Rec. S12021-02, S12025 (daily ed. Dec. 1, 2009) (statement of Sen. Boxer) ("The underlying bill introduced by Senator Reid already requires that preventive services recommended by [USPSTF] be covered at little to no cost . . . . But [those recommendations] do not include certain recommendations that many women's health advocates and medical professionals believe are critically important . . . ."); 155 Cong. Rec. S12265-02, S12271 (daily ed. Dec. 3, 2009) (statement of Sen. Franken) ("The current bill relies solely on [USPSTF] to determine which services will be covered at no cost. The problem is, several crucial women's health services are omitted. [The Women's Health Amendment] closes this gap.").

Research shows that cost-sharing requirements can pose barriers to preventive care and result in reduced use of preventive services, particularly for women. IOM REP. at 109; 155 Cong. Rec. S12021-02, S12026-27 (daily ed. Dec. 1, 2009) (statement of Sen. Mikulski) ("We want to either eliminate or shrink those deductibles and eliminate that high barrier, that overwhelming hurdle that prevents women from having access to [preventive care]."). Indeed, a 2010 survey showed that less than half of women are up to date with recommended preventive care screenings and services. IOM REP. at 19-20. By requiring coverage for recommended preventive services and eliminating cost-sharing requirements, Congress sought to increase access to and utilization of recommended preventive services. 75 Fed. Reg. 41,726, 41,728 (July 19, 2010). Increased use of preventive services will benefit the health of individual Americans and society at large: individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of disease; healthier workers will be more productive with fewer sick days; and increased utilization will result in savings due to lower health care costs. *Id*. at 41,728, 41,733; IOM REP. at 20.

Defendants issued interim final regulations implementing the preventive services coverage provision on July 19, 2010. 75 Fed. Reg. 41,726. The interim final regulations provide, among other things, that a group health plan or health insurance issuer offering non-grandfathered health coverage must provide coverage for newly recommended preventive services, without cost-sharing, for plan years (or, in the individual market, policy years) that begin on or after the date that is one year after the date on which the new recommendation is issued. 26 C.F.R. § 54.9815-2713T(b)(1); 29 C.F.R. § 2590.715-2713(b)(1); 45 C.F.R. § 147.130(b)(1).

Because there were no existing HRSA guidelines relating to preventive care and screening for women, HHS tasked the Institute of Medicine ("IOM")[4] with "review[ing] what preventive services are necessary for women's health and well-being" and developing recommendations for comprehensive guidelines to implement the Women's Health Amendment. IOM REP. at 2. IOM conducted an extensive science-based review and, on July 19, 2011, published a report of its analysis and recommendations. *Id*. at 20-26. The report recommended that HRSA guidelines include, among other things, well-woman visits; breastfeeding support; domestic violence screening; and, as relevant here, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id*. at 10-12. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices. FDA, Birth Control Guide, *available at* http://www.fda.gov/ForConsumers/ByAudience/ForWomen/ucm118465.htm (last visited Nov. 9, 2012).

Many women do not utilize contraceptive methods or sterilization procedures because they are not covered by their health plan or they require costly copayments, coinsurance, or deductibles. IOM REP. at 19, 109; Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services And Supplies Without Cost-Sharing*, 14 GUTTMACHER POL'Y REV. 7, 10

[4] IOM was established in 1970 by the National Academy of Sciences and is funded by Congress. IOM REP. at iv. It secures the services of eminent members of appropriate professions to examine policy matters pertaining to the health of the public and provides expert advice to the federal government. *Id*.

(2011), *available at* http://www.guttmacher.org/pubs/gpr/14/1/gpr140107.pdf (last visited Nov. 9, 2012) (citing 2010 study that found women with private insurance that covered prescription drugs paid 53 percent of the cost of their oral contraceptives). IOM determined that coverage, without cost-sharing, for FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling is necessary to increase utilization of these services, and thereby reduce unintended pregnancies (and the negative health outcomes that disproportionately accompany unintended pregnancies) and promote healthy birth spacing. IOM REP. at 102-03.

According to a national survey, in 2001, an estimated 49 percent of all pregnancies in the United States were unintended. *Id*. at 102. When compared to intended pregnancies, unintended pregnancies are more likely to result in poorer health outcomes for mothers and children. Women with unintended pregnancies are more likely than those with intended pregnancies to receive later or no prenatal care, to smoke and consume alcohol during pregnancy, to be depressed during pregnancy, and to experience domestic violence during pregnancy. *Id*. at 103. Children born as the result of unintended pregnancies are at increased risk of preterm birth and low birth weight as compared to children born as the result of intended pregnancies. *Id*. The use of contraception also allows women to avoid short interpregnancy intervals, which have been associated with low birth weight, prematurity, and small-for-gestational-age births. *Id*. at 102-03. Moreover, women with certain chronic medical conditions may need contraceptive services to postpone pregnancy, or to avoid it entirely, and thereby reduce risks to themselves or their children. *Id*. at 103 (noting women with diabetes or obesity may need to delay pregnancy); *id*. at 103-04 (indicating that pregnancy may be harmful for women with certain conditions, such as pulmonary hypertension).

Contraception, IOM noted, is also highly cost-effective because the costs associated with pregnancy greatly exceed the costs of contraceptive services. *Id*. at 107-08. In 2002, the direct medical cost of unintended pregnancy in the United States was estimated to be nearly $5 billion, with the cost savings due to contraceptive use estimated to be $19.3 billion. *Id*. at 107. Moreover, it has been estimated to cost employers 15 to 17 percent more to not provide contraceptive

coverage in their health plans than to provide such coverage, after accounting for both the direct medical costs of pregnancy and indirect costs such as employee absence and the reduced productivity associated with such absence. Sonfield, *supra*, at 10.

On August 1, 2011, HRSA adopted IOM's recommendations, subject to an exemption relating to certain religious employers authorized by an amendment to the interim final regulations. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Nov. 9, 2012). The amendment to the interim final regulations, issued on the same day, authorized HRSA to exempt group health plans established or maintained by certain religious employers (and associated group health insurance coverage) from any requirement to cover contraceptive services under HRSA's guidelines. 76 Fed. Reg. 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A). To qualify for the exemption, an employer must meet all of 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.
>
> (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.

45 C.F.R. § 147.130(a)(1)(iv)(B). The sections of the Internal Revenue Code referenced in the fourth criterion refer to "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order," that are exempt from taxation under 26 U.S.C. § 501(a). 26 U.S.C. §§ 6033(a)(1), (a)(3)(A)(i), (a)(3)(A)(iii). Thus, as relevant here, the amended interim final regulations required non-grandfathered plans that do not qualify for the religious employer exemption to provide coverage for recommended contraceptive services, without cost-sharing, for plan years beginning on or after August 1, 2012.

Defendants requested comments on the amended interim final regulations and specifically on the definition of religious employer contained in those regulations. 76 Fed. Reg. at 46,623. After carefully considering the thousands of comments they received, defendants decided to adopt in final regulations the definition of religious employer contained in the amended interim final regulations while also creating a temporary enforcement safe harbor for plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage. 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012).

Pursuant to the temporary enforcement safe harbor, defendants will not take any enforcement action against an employer, group health plan, or group health insurance issuer with respect to a non-grandfathered group health plan that fails to cover some or all recommended contraceptive services and that is established or maintained by an organization that meets all of the following criteria:

> (1) The organization is organized and operates as a non-profit entity.
>
> (2) From February 10, 2012 onward, the group health plan established or maintained by the organization has consistently not provided all or the same subset of the contraceptive coverage otherwise required at any point, consistent with any applicable State law, because of the religious beliefs of the organization.
>
> (3) The group health plan sponsored by the organization (or another entity on behalf of the plan, such as a health insurance issuer or third-party administrator) provides to plan participants a prescribed notice indicating that some or all contraceptive coverage will not be provided under the plan for the first plan year beginning on or after August 1, 2012.
>
> (4) The organization self-certifies that it satisfies the three criteria above, and documents its self-certification in accordance with prescribed procedures.

The enforcement safe harbor will be in effect until the first plan year that begins on or after August 1, 2013.[5] By that time, defendants expect that significant changes to the preventive services coverage regulations will have altered the landscape with respect to certain religious organizations by providing them with further accommodations.

[5] HHS, Guidance on the Temporary Enforcement Safe Harbor ("Guidance"), at 3 (Aug. 15, 2012), *available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf (last visited Nov. 9, 2012).

Those intended changes, which were first announced when defendants finalized the religious employer exemption, will establish alternative means of providing contraceptive coverage without cost-sharing while to accommodate non-exempt, non-grandfathered religious organizations' religious objections to covering contraceptive services. 77 Fed. Reg. at 8728. Defendants began the process of further amending the regulations on March 21, 2012, when they published an ANPRM in the Federal Register. 77 Fed. Reg. 16,501 (Mar. 21, 2012). The ANPRM "presents questions and ideas" on potential means of achieving the goals of providing women access to contraceptive services without cost-sharing and accommodating religious organizations' religious liberty interests. *Id*. at 16,503. The purpose of the ANPRM is to provide "an early opportunity for any interested stakeholder to provide advice and input into the policy development relating to the accommodation to be made" in the forthcoming amendments to the regulations. *Id*. Among other options, the ANPRM suggests requiring health insurance issuers to offer health insurance coverage without contraceptive coverage to religious organizations sponsor insured group health plans and that object to contraceptive coverage on religious grounds and simultaneously to offer such coverage directly to the organization's plan participants, at no charge to organizations or participants. *Id*. at 16,505. The ANPRM also suggests ideas and solicits comments on potential ways to accommodate religious organizations that sponsor self-insured group health plans for their employees.[6] *Id*. at 16,506-07.

After receiving comments on the ANPRM, defendants will publish a notice of proposed rulemaking, which will be subject to further public comment, before defendants issue further amendments to the preventive services coverage regulations. *Id*. at 16,501. Defendants intend to finalize the amendments to the regulations such that they are effective before the end of the temporary enforcement safe harbor. *Id*. at 16,503.

[6] The accommodations defendants are considering are not constitutionally or statutorily required; rather, they stem from defendants' commitment to work with, and respond to, stakeholders' concerns. *See* 77 Fed. Reg. at 16,503.

II. CURRENT PROCEEDINGS

Plaintiffs brought this action to challenge the lawfulness of the preventive services coverage regulations to the extent that they require the health coverage Triune Health Group, Inc. makes available to its employees to cover contraceptive services. Although plaintiffs initially included Illinois Department of Insurance and its director as defendants, *see* Compl., ECF No. 1, plaintiffs amended their complaint on October 15, 2012 to remove their state-law claims, *see* Am. Compl. Plaintiffs claim this requirement violates RFRA, the First Amendment to the United States Constitution, the APA, and the doctrine of separation of powers.

STANDARD OF REVIEW

Defendants move to dismiss the Amended Complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). The party invoking federal jurisdiction bears the burden of establishing its existence, and the Court must determine whether it has subject matter jurisdiction before addressing the merits of a claim. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 104 (1998).

Defendants also move to dismiss the Amended Complaint under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Under this Rule, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ARGUMENT

I. THE COURT SHOULD DISMISS PLAINTIFFS' CLAIMS FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFFS LACK STANDING

Much like the challenged regulations at issue in this case, Illinois law requires group insurance coverage within the state to include coverage for contraceptive services.[7] Specifically,

[7] At least twenty-eight states have laws requiring health insurance policies that cover prescription drugs to also provide coverage for FDA-approved contraceptives. *See* Guttmacher Institute, State Policies in Brief: Insurance Coverage of Contraceptives (Nov. 1, 2012), *available at* http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf (last visited Nov. 9, 2012).

215 Ill. Comp. Stat. 5/356z.4 states in relevant part that every "individual or group policy of . . . health insurance amended, delivered, issued, or renewed in [the State of Illinois] . . . that provides coverage for outpatient services and outpatient prescription drugs or devices must provide coverage for the insured and any dependent of the insured covered by the policy for all outpatient contraceptive services and all outpatient contraceptive drugs and devices approved by the Food and Drug Administration." Although there are limited exceptions to the requirement concerning, among other entities, religious organizations and health care providers, *see* 745 Ill. Rev. Stat § 70/1, *et seq.*, plaintiffs allege that the Illinois requirement applies to the health plan that they offer to their employees. *See* Am. Compl. ¶¶ 39, 41. For this reason, plaintiffs cannot show that their alleged harm is caused by the operation of federal law. Nor is it the case that a favorable decision by this Court would have any effect on plaintiffs' pre-existing (and current) obligations to provide contraceptive coverage under state law.

The Seventh Circuit has explained that, "[a]t its constitutional core [ ] standing requires that the parties before the court must allege injury fairly traceable to the alleged illegal conduct of the defendant that the court may redress." *O'Sullivan v. City of Chicago*, 396 F.3d 843, 857 (7th Cir. 2005). Accordingly, the court must engage in "an inquiry into the nature of the plaintiffs' injury, the connection between the injury and the complained-of actions and the scope of remedies available to the court." *Id.* Plaintiffs are required to demonstrate "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct' of the defendant." *Banks v. Sec'y of Ind. Family & Soc. Servs. Admin.*, 997 F.2d 231, 239 (7th Cir. 1993) (quoting *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 72 (1978)). In addition, it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Michigan v. EPA*, 581 F.3d 524, 528 (7th Cir. 2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). According to the Supreme Court, the "fairly traceable" and "redressability" components of standing are two distinct "facets of a single causation requirement." *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984). "To the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful

conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested. *Id.*

In analyzing traceability, courts must determine whether "the line of causation between the illegal conduct and injury [is] too attenuated." *Id.* at 752. As relevant here, Triune has already been providing contraceptive coverage pursuant to Illinois law, which requires Triune's health plan to cover all FDA-approved contraceptive services. *See* 215 Ill. Comp. Stat. 5/356z.4. Indeed, according to plaintiffs, Triune's health plan currently covers contraceptive services precisely because it is required to do so under Illinois law. *See* Am. Compl. ¶ 39. Plaintiffs also explain that they "cannot avoid the state law mandates because they apply to any benefits policy issued in Illinois, where Triune is located, so Triune cannot secure the policy it needs to provide health benefits without inclusion of mandated benefits." *Id.* ¶ 41. This state law requirement mandating coverage of the services to which plaintiffs allege a religious objection wholly undercuts any argument that plaintiffs' injury is traceable to the preventive services coverage requirement and not "th[e] result [of] independent action of some third party not before the court." *Lujan*, 504 U.S. at 560; *see also San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996) (existence of state law banning conduct similar to conduct addressed by federal law undermined traceability).

For the same reasons, granting plaintiffs their requested declaratory and injunctive relief will not redress their alleged injuries. Plaintiffs are explicit that they "cannot purchase an insurance policy in order to provide benefits consistent with their religious convictions because the *state* mandate requires any policy issued to Triune to provide their employees with access to drugs and services plaintiffs believe to be wrongful and intrinsically evil." Compl. ¶ 49 (emphasis added). Thus, even if the Court were to grant plaintiffs all the relief they seek in this case, plaintiffs' situation would remain the same. The preventive services coverage regulations "would simply fall away," leaving intact the Illinois requirement that Triune's health plan cover the services to which it objects. *White v. United States*, No. 2:08-cv-118, 2009 WL 173509, at *5 (S.D. Ohio Jan. 26, 2009) (holding that plaintiffs' economic injury was not caused by the Animal

Welfare Act, as cockfighting was banned in all fifty states); *see also, e.g.*, *Harp Adver. Ill., Inc. v. Vill. Of Chicago Ridge, Ill.*, 9 F.3d 1290, 1291-92 (7th Cir. 1993) (dismissing challenge to village zoning and sign codes because a separate ordinance that plaintiff failed to challenge also prohibited plaintiff from erecting the sign at issue, making the case "irrelevant"). Because there is an additional state law requirement that Triune's insurance include coverage for the services to which its owners' object, and plaintiffs do not challenge the lawfulness of that requirement in this lawsuit, the Court cannot redress plaintiffs' alleged injury. As such, the Court should dismiss plaintiffs' case in its entirety for lack of subject matter jurisdiction.

II. PLAINTIFFS' RELIGIOUS FREEDOM RESTORATION ACT CLAIM IS WITHOUT MERIT

A. Plaintiffs Have Not Sufficiently Alleged That the Preventive Services Coverage Regulation Substantially Burden Their Religious Exercise.

1. There is no substantial burden on Triune because the for-profit corporation does not exercise religion within the meaning of RFRA

Congress enacted the Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb-1 *et seq.*) in response to *Employment Division v. Smith*, 494 U.S. 872 (1990). RFRA was intended to reinstate the pre-*Smith* compelling interest test for evaluating legislation that substantially burdens the free exercise of religion. 42 U.S.C. § 2000bb-1(b). Under RFRA, the federal government generally may not "substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability.'" *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424 (2006) (quoting 42 U.S.C. § 2000bb-1(a)). But the government may substantially burden the exercise of religion if it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

Here, plaintiffs cannot show that the regulations substantially burden their religious exercise. Plaintiffs' RFRA claim is premised on the assumption that Triune can "exercise . . . religion" within the meaning of the statute. *Id.* But that position cannot be reconciled with Triune's status as a secular company. The terms "religious" and "secular" are antonyms; a

"secular" entity is defined as "not overtly or specifically religious." *See Merriam-Webster's Collegiate Dictionary* 1123 (11th ed. 2003). Thus, by definition, a secular company does not engage in any "exercise of religion," 42 U.S.C. § 2000bb-1(a), as required by RFRA. *See Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002) ("[T]he practice[] at issue must be of a religious nature."); *see also Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 83 (D.D.C. 2002) (rejecting RFRA claim because "nowhere in Plaintiff's Complaint does it contend that it is a religious organization. Instead, [Plaintiff] defines itself as a 'non-profit charitable corporation,' without any reference to its religious character or purpose"), *aff'd on other grounds*, 333 F.3d 156 (D.C. Cir. 2003).

Triune is plainly secular. Triune is not a religious employer; it is "a corporation that specializes in facilitating the re-entry of injured workers into the workforce." Am. Compl. ¶ 19. The company was not organized for carrying out a religious purpose; its Articles of Incorporation makes no reference at all to any religious purpose. *See* Triune Health Group, Inc., Articles of Incorporation, Ex. A. The company does not claim to be affiliated with a formally religious entity such as a church or that any such entity participates in the management of the company. Nor does the company assert that it employs persons of a particular faith; indeed, quite the opposite. *See* Am. Compl. ¶ 43 (alleging that the company "hires many non-Catholics"). In short, there is no escaping the conclusion that Triune is a secular company. The government is aware of no case in which a for-profit, secular employer with Triune's characteristics prevailed on a RFRA claim.

Because Triune is a secular employer, it is not entitled to the protections of the Free Exercise Clause or RFRA. This is because, although the First Amendment freedoms of speech and association are "right[s] enjoyed by religious and secular groups alike," the Free Exercise Clause "gives special solicitude to the rights of *religious* organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (emphasis added). The cases are replete with statements like this. *See, e.g.*, *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (stating that the Court's precedent

"radiates . . . a spirit of freedom for *religious* organizations, an independence from secular control or manipulation") (emphasis added); *Hosanna-Tabor*, 132 S. Ct. at 706 (Free Exercise Clause "protects a *religious* group's right to shape its own faith and mission") (emphasis added); *Werft v. Desert Sw. Annual Conference of United Methodist Church*, 377 F.3d 1099, 1102 (9th Cir. 2004) ("The Free Exercise Clause protects . . . *religious* organizations. . .") (emphasis added).

Indeed, no court has ever held that a for-profit, secular corporation is a "religious corporation" for purposes of federal law. For this reason, secular companies cannot permissibly discriminate on the basis of religion in hiring or firing their employees or otherwise establishing the terms and conditions of their employment. Title VII of the Civil Rights Act generally prohibits religious discrimination in the workplace. *See* 42 U.S.C. § 2000e-2(a). But that bar does not apply to "a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [a corporation] of its activities." *Id*. § 2000e-1(a). It is clear that Triune does not qualify as a "religious corporation"; it is for-profit, it is not affiliated with a formally religious entity, it provides secular services, and the company's Articles of Incorporation mention no religious purpose. *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007).

It would be extraordinary to conclude that Triune is not a "religious corporation" under Title VII (and it clearly is not) and thus cannot discriminate on the basis of religion in hiring or firing or otherwise establishing the terms and conditions of employment, 42 U.S.C. § 2000e-1(a), but nonetheless "exercise[s] . . . religion" within the meaning of RFRA, *id*. § 2000bb-1(b).[8] To reach such a conclusion would allow a secular company to impose its owner's religious beliefs on its employees in a way that denies those employees the protection of general laws designed to protect their health and well-being (including Title VII). A host of laws and regulations would be

[8] Indeed, such a conclusion would undermine Congress's decision to limit the exemption in Title VII to religious organizations; any company that does not qualify as a religious organization under Title VII could simply bring a claim under RFRA to obtain an exemption from Title VII's prohibition against discrimination in employment. *See, e.g.*, *Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Execs. Ass'n*, 491 U.S. 490, 510 (1989).

subject to attack. Moreover, any secular company would have precisely the same right as a religious organization to, for example, require that its employees "observe the [company owner's] standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco." *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330 n.4 (1987). These consequences show why the Free Exercise Clause, RFRA, and Title VII distinguish between secular and religious organizations, with only the latter receiving special protection.

It is significant that Triune elected to organize itself as a secular, for-profit entity and to enter commercial activity. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261. Having chosen this path, the corporation may not impose its owners' personal religious beliefs on its employees (many of whom may not share, or even know of, the owners' beliefs) by refusing to cover contraception. In this respect, "[v]oluntary commercial activity does not receive the same status accorded to directly religious activity." *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) (interpreting the Free Exercise Clause of the Alaska Constitution). Any burden is therefore caused by the company's "choice to enter into a commercial activity." *Id.*[9]

The preventive services coverage regulations also do not substantially burden the Yeps' religious exercise. By their terms, the regulations apply to group health plans and health insurance issuers; they do not impose any obligations on individuals. 42 U.S.C. § 300gg-91(a)(1); 26 C.F.R. § 54.9815-2713T; 29 C.F.R. § 2590.715-2713; 45 C.F.R. § 147.130. The Yeps are neither. The Yeps nonetheless allege that the regulations substantially burden *their* religious exercise because the regulations may require the group health plan sponsored by their

[9] An employer like Triune therefore stands in a fundamentally different position from a church or a religiously affiliated non-profit organization. *Cf. Amos*, 483 U.S. at 344 (Brennan, J., concurring) ("The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation . . . . but that [its] activities themselves are infused with a religious purpose.").

secular *company* to provide health insurance that includes contraceptive coverage. But a plaintiff cannot establish a substantial burden by invoking this type of trickle-down theory. "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Indeed, "[i]n our modern regulatory state, virtually all legislation (including neutral laws of general applicability) imposes an incidental burden at some level by placing indirect costs on an individual's activity. Recognizing this . . . [t]he federal government . . . ha[s] identified a substantiality threshold as the tipping point for requiring heightened justifications for governmental action." *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 262 (3d Cir. 2008) (Scirica, C.J., concurring). Here, any burden on the Yeps' religious exercise results from obligations that the preventive services coverage regulations impose on a legally separate, secular corporation. This type of attenuated burden is not cognizable under RFRA.[10] Indeed, 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.*, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524 (1993). Not so here, where the regulations apply to the group health plans sponsored by Triune, not to the Yeps themselves.

The Yeps' theory boils down to the claim that what's done to the corporation (or the group health plan sponsored by the corporation) is also done to its officers and shareholders. But, as a legal matter, that is simply not so. The Yeps have voluntarily chosen to enter into commerce and elected to do so by establishing a for-profit corporation, which "is a legal entity [that] exists separate and distinct from its shareholders, officers, and directors," *In re Estate of Wallen*, 633 N.E.2d 1350, 1357 (Ill. 1994). Indeed, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd.*

[10] The attenuation is in fact twice removed. A group health plan is a legally separate entity from the company that sponsors it. 29 U.S.C. § 1132(d). And Triune is a legally separate entity from its owners.

v. King, 533 U.S. 158, 163 (2001). As an Illinois corporation with a "perpetual" existence, Triune has broad powers to conduct business, hold and transact property, and enter into contracts, among others. *See* 805 Ill. Comp. Stat. 5/3.10 (1984); Triune Health Group, Inc., Articles of Incorporation, *supra*. The company's officers have a duty to act in the best interests of the corporation, *Graham v. Mimms*, 444 N.E.2d 549, 555 (1982), and they, in turn, are generally not liable for the corporation's actions, *see Wallen*, 633 N.E.2d at 1357. In short, "[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." *Cedric Kushner Promotions*, 533 U.S. at 163. The Yeps should not be permitted to eliminate that legal separation only when it suits them to impose their religious beliefs on Triune's employees.

Although the preventive services coverage regulations do not require the Yeps to provide contraceptive services directly, their complaint appears to be that, through their company's group health plans and the benefits they provide to employees, the Yeps will facilitate conduct (the use of contraceptives) that they find objectionable. But this complaint has no limits. A company provides numerous benefits, including a salary, to its employees and by doing so in some sense facilitates whatever use its employees make of those benefits. But the Yeps have no right to control the choices of their company's employees, many of whom (as plaintiffs concede) do not share the Yeps' religious beliefs. These employees have a legitimate interest in access to the preventive services coverage made available under the challenged regulations. More generally, if an owner's or shareholder's religious beliefs were automatically imputed to the company, any secular company with a religious owner or shareholder would be permitted to discriminate against the company's employees on the basis of religion in establishing the terms and conditions of employment. This result would constitute a wholesale evasion of the rule that a company must be a "religious organization[]" to assert free exercise rights, *Hosanna-Tabor*, 132 S. Ct. at 706, or a "religious corporation" to permissibly discriminate on the basis of religion in hiring or firing its employees or otherwise establishing the terms and conditions of their employment, 42 U.S.C. § 2000e-1(a).

2. Alternatively, any burden imposed by the challenged regulations is too attenuated to constitute a substantial burden.

Even assuming that Triune exercises religion within the meaning of RFRA and that the legal separation created by the corporate form can be pierced when the corporation or its owners want it to be, the regulations still do not substantially burden plaintiffs' religious exercise for another reason. Any burden imposed by the regulations is too attenuated to satisfy RFRA's *substantial* burden requirement.

Indeed, the first court to decide the merits of a challenge to the preventive services coverage regulations under RFRA concluded as much. *See O'Brien*, 2012 WL 4481208, at *5-7. Like the plaintiffs here, the plaintiffs in *O'Brien* were a for-profit company and an owner who held religious beliefs against contraception. *Id.* at *1. Assuming, but not deciding, that the company in *O'Brien* could exercise religion, the court nevertheless determined that any burden on that exercise (as well as the owner's exercise of religion) is too attenuated to state a claim for relief. The court explained that "the plain meaning of 'substantial,'" as used in RFRA, "suggests that the burden on religious exercise must be more than insignificant or remote." *Id.* at *5. And cases presenting the test that RFRA was intended to restore—*Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)—confirm this "common sense conclusion." *Id.* The plaintiff in *Sherbert*, the court explained, "was forced to 'choose between following the precepts of her religion [by resting, and not working, on her Sabbath] and forfeiting [unemployment] benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other." *Id.* (quoting *Sherbert*, 374 U.S. at 404). Similarly, in *Yoder*, the state compulsory-attendance law "affirmatively compel[led] [plaintiffs], under threat of criminal sanction to perform acts undeniably at odds with the fundamental tenets of their religious beliefs." *Id.* (quoting *Yoder*, 406 U.S. at 218).

In contrast to the direct and substantial burdens imposed in those cases, the court in *O'Brien* determined that the preventives services coverage regulations result in only an indirect and *de minimus* impact on the plaintiffs. *Id.* at *6-7.

> [T]he challenged regulations do not demand that plaintiffs alter their behavior in a manner that will directly and inevitably prevent plaintiffs from acting in accordance with their religious beliefs. [Plaintiff] is not prevented from keeping the Sabbath, from providing a religious upbringing for his children, or from participating in a religious ritual such as communion. Instead, plaintiffs remain free to exercise their religion, by not using contraceptives and by discouraging employees from using contraceptives. The burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [the company's] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiffs' religion. The Court rejects the proposition that requiring indirect financial support of a practice, from which plaintiff himself abstains according to his religious principles, constitutes a substantial burden on plaintiff's religious exercise.

Id. at *6. The court noted that the regulations have no more of an impact on the plaintiffs' religious beliefs than the company's payment of salaries to its employees, which those employees can also use to purchase contraceptives. *Id*. at *7. Indeed, the court observed, "if the financial support of which plaintiffs complain was in fact substantially burdensome, secular companies owned by individuals objecting on religious grounds to all modern medical care could no longer be required to provide health care to employees." *Id*. at *6.

The court also noted that adopting the plaintiffs' substantial burden argument would turn RFRA, which was meant as a shield, into a sword. *Id*. "[RFRA] is not a means to force one's religious practices upon others. RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *Id*. In short, because the preventive services regulations "are several degrees removed from imposing a substantial burden on [Triune], and one further degree removed from imposing a substantial burden on [the Yeps]," *id.* at *7, the Court should dismiss plaintiffs' RFRA claim even assuming secular companies like Triune can exercise religion.

B. Even if there were a substantial burden, the preventive services coverage regulations serve compelling governmental interests and are the least restrictive means to achieve those interests.

Even if plaintiffs were able to demonstrate a substantial burden on their religious exercise, they would not prevail because the preventive services coverage regulations are

justified by two compelling governmental interests, and are the least restrictive means to achieve those interests. As an initial matter, "the Government clearly has a compelling interest in safeguarding the public health by regulating the health care and insurance markets." *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011); *see also Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir. 1998); *Dickerson v. Stuart*, 877 F. Supp. 1556, 1560 (M.D. Fla. 1995) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992)).

There can be no question that this compelling interest in the promotion of public health is furthered by the regulations at issue here. As explained in the interim final regulations, the primary predicted benefit of the 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. at 41,733; *see also* 77 Fed. Reg. at 8728. Indeed, "[b]y expanding coverage and eliminating cost sharing for recommended preventive services, these interim final regulations could be expected to increase access to and utilization of these services, which are not used at optimal levels today." 75 Fed. Reg. at 41,733. Increased access to contraceptive services is a key part of these predicted health outcomes, as a lack of contraceptive use has proven to have negative health consequences for both women and a developing fetus. 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. Contraceptive coverage also helps to avoid "the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." *Id.* at 103. In fact, "pregnancy may be contraindicated for women with serious medical conditions such as pulmonary hypertension . . . and cyanotic heart disease, and for women with the Marfan Syndrome." *Id.* at 103-04.

Closely tied to this interest is a related, but separate, compelling interest that is furthered by the preventive services coverage regulations. As the Supreme Court explained in *Roberts v. United States 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. As such, "[a]ssuring women equal access to . . . goods, privileges, and advantages . . . clearly furthers compelling state interests." *Id.* By including in the ACA gender-specific preventive health services for women, Congress made clear that the goals and benefits of effective preventive health care apply with equal force to women, who might otherwise be excluded from such benefits if their unique health care burdens and responsibilities 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." *See* 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009); *see also* 155 Cong. Rec. S12265-02, S12269 (daily ed. Dec. 3, 2009); IOM REP. at 19. These costs result in women often forgoing preventive care. *See, e.g.*, 155 Cong. Rec. at S12274. Accordingly, this disproportionate burden on women creates "financial barriers . . . that prevent women from achieving health and well-being for themselves and their families." IOM REP. at 20. Thus, Congress's goal was to equalize the provision of health care for women and men in the area of preventive care, including the provision of family planning services for women. *See, e.g.*, 155 Cong. Rec. at S12271; *see also* 77 Fed. Reg. at 8728. Congress's attempt to equalize the provision of preventive health care services furthers a compelling governmental interest. *Cf. Catholic Charities of Sacramento*, 85 P.3d at 92-93.

The preventive services coverage regulations issued by defendants, moreover, are the least restrictive means of furthering these dual, albeit intertwined, interests. Taking into account the "particular claimant whose sincere exercise of religion is [purportedly] being substantially burdened," *O Centro*, 546 U.S. at 430-31, exempting Triune, and similarly-situated companies, from the obligation to make available to its employees a health plan that covers contraceptive services would remove these employees from the very protections that were intended to further the compelling interests recognized by Congress. *See, e.g., Graham v. Comm'r of Internal*

Revenue Serv., 822 F.2d 844, 853 (9th Cir. 1987) ("Where, as here, the purpose of granting the benefit is squarely at odds with the creation of an exception, we think the government is entitled to point out that the creation of an exception does violence to the rationale on which the benefit is dispensed in the first instance.").

Each woman who wishes to use contraceptives and who works for Triune or a similarly situated company (and each woman who is a covered spouse or dependent of an employee)—or, for that matter, any woman in such a position in the future—is significantly disadvantaged when her company chooses to provide a plan that fails to cover such services without cost-sharing. *See United States v. Friday*, 525 F.3d 938, 956 (10th Cir. 2008) (noting that the government's interest is still compelling even when the impact is limited in scope). As revealed by the IOM Report, those female employees (and covered spouses and dependents) would be, as a whole, less likely to use contraceptive services in light of the financial barriers to obtaining them and would then be at risk of unhealthier outcomes, both for the women themselves and their potential newborn children. IOM REP. at 102-03. They would also be at a competitive disadvantage in the workforce due to their lost productivity. These harms would befall female employees (and covered spouses and dependents) who do not share their employer's religious beliefs and might not have been aware of those beliefs when they joined the ostensibly secular company. Plaintiffs' desire for Triune not to make available a health plan that permits such individuals to exercise their own choice as to contraceptive use must yield to the government's compelling interest in avoiding the adverse and unfair consequences that would be suffered by such individuals as a result of the company's decision. *See Lee*, 455 U.S. at 261 (noting that a religious exemption is improper where it "operates to impose the employer's religious faith on the employees").

Although the preventive services coverage regulations provide for an exception for "religious employers," 45 C.F.R. § 147.130(a)(1)(iv)(A), and defendants are currently in the process of considering how to further accommodate the beliefs of other religious organizations,[11]

[11] In fact, the ANPRM notes that the amendment process will consider whether the accommodation could, or should, be expanded to for-profit entities under certain circumstances. 77 Fed. Reg. at 16,504.

there is a rational distinction between the narrow exception currently in existence and plaintiffs' requested expansion. As revealed by the plain text of the regulations, a "religious employer" is narrowly defined to be an employer that, *inter alia*, has the "inculcation of religious values" as its purpose and "primarily employs persons who share the religious tenets of the organization." *Id*. § 147.130(a)(1)(iv)(B). Thus, the exception does not undermine the government's compelling interests. It anticipates that the impact on employees of exempted organizations will be minimal, given that any religious objections of the exempted organizations are presumably shared by most of the individuals actually making the choice as to whether to use contraceptive services. *See* 77 Fed. Reg. at 8728 ("The religious employer exemption in the final regulations does not undermine the overall benefits described above. A group health plan . . . qualifies for the exemption if, among other qualifications, the plan is established and maintained by an employer that primarily employs persons who share the religious tenets of the organization. As such, the employees of employers availing themselves of the exemption would be less likely to use contraceptives even if contraceptives were covered under their health plans.").

The same is not true for Triune, which plaintiffs acknowledge employs people who do not share the owners' religious beliefs. *See* Am. Compl. ¶ 43. Should plaintiffs be permitted to extend the protections of RFRA to any employer whose owner objects to the operation of the regulations, it is difficult to see how the regulations could continue to function or be enforced in a rational manner. *See O Centro*, 546 U.S. at 435 ("[T]he Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodation would seriously compromise its ability to administer the program.").

For these reasons, plaintiffs' RFRA challenge should be rejected.[12]

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[12] Defendants anticipate that plaintiffs will rely on *Newland v. Sebelius*, Civil Action No. 1:12-cv-1123-JLK, 2012 WL 3069154 (D. Colo. July 27, 2012), *appeal docketed*, No. 12-1380 (10th Cir. Sept. 26, 2012), in arguing that they have stated a viable RFRA claim. But the court in *Newland* explicitly declined to address the defendants' claim that a for-profit, secular company cannot exercise religion within the meaning of RFRA, concluding that the question needed "more deliberate investigation." *Id*. at *6. Moreover, defendants believe the *Newland* court's compelling interest and least restrictive means analysis is flawed for the reasons explained above.

III. PLAINTIFFS FIRST AMENDMENT CLAIMS ARE MERITLESS

A. The Regulations Do Not Violate the Free Exercise Clause

For the reasons explained above, a for-profit, secular employer like Triune does not engage in any exercise of religion protected by the First Amendment. Nevertheless, even if it did, the preventive services coverage regulations do not violate the Free Exercise Clause because they are neutral laws of general applicability. That was precisely the holding in *O'Brien*, 2012 WL 4481208, at *7-9, and the highest courts of two states have also rejected free exercise claims nearly identical to the one raised by plaintiffs here in cases challenging state laws that are similar to the preventive services coverage regulations. *See Catholic Charities of Diocese of Albany*, 859 N.E.2d at 468-69; *Catholic Charities of Sacramento*, 85 P.3d at 81-87. This Court should do the same.

A neutral and generally applicable law does not violate 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 but rather has as its purpose something other than the disapproval of a particular religion, or of religion in general. *Lukumi*, 508 U.S. at 533, 546. A

For similar reasons, the recent ruling in *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012), does not help plaintiffs, as the *Legatus* court also declined to decide whether a for-profit corporation can assert Free Exercise or RFRA rights. *Id.* at *4-5. In *Legatus*, the court preliminarily enjoined the government from enforcing the contraceptive coverage requirement against a for-profit company and its owner. The court appropriately recognized that, with respect to First Amendment and RFRA claims, the likelihood of success on the merits and irreparable harm prongs of the preliminary injunction analysis merge such that, to obtain a preliminary injunction, a plaintiff must establish a likelihood of success on the merits. 2012 WL 5359630, at *3. Nevertheless, the court entered a preliminary injunction without determining that plaintiffs were likely to succeed on the merits. *Id*. at *13. Indeed, the court concluded that "[p]laintiffs . . . have [not] shown a strong likelihood of success on the merits." *Id.*; *see also Adams v. City of Marshall*, No. 4:05-cv-62, 2006 WL 2095334, at *1 (W.D. Mich. 2006) ("Both parties have a possibility of success, but that is not enough to satisfy Plaintiffs' obligation to show a 'substantial' likelihood of success."). Moreover, in its substantial burden analysis, the court merely "assume[d]" that plaintiffs could demonstrate a substantial burden on their religious exercise, observing that "courts often simply assume that a law substantially burdens a person's exercise of religion when that person so claims." *Legatus*, 2012 WL 5359630, at *6. This approach, however, reads the substantial burden requirement right out of RFRA, which the court cannot do. As the *O'Brien* court explained, Congress's use of the term "substantial" means that "the burden on religious exercise must be more than insignificant or remote." 2012 WL 4481208, at *5. For these reasons, and those set forth above, the government respectfully maintains that *Legatus* was incorrectly decided as to the for-profit company and its owner.

law is generally applicable if it does not selectively impose burdens only on conduct motivated by religious belief. *Id*. at 535-37, 545. Unlike such selective laws, these regulations are neutral and generally applicable. They do not target religiously motivated conduct. Their purpose is to promote public health and gender equality by increasing access to and utilization of recommended preventive services, including those for women. *See O'Brien*, 2012 WL 4481208, at *7 (holding that the "regulations are neutral"). The regulations reflect expert recommendations about the medical need for the services, without regard to any religious motivations for or against such services. As the IOM Report shows, this purpose is entirely secular in nature. IOM REP. at 2-4, 7-8; *see also Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 275 (3d Cir. 2007).

The preventive services coverage regulations are neutral and generally applicable. First, the regulations are neutral because they do not target religiously motivated conduct. They do not, on their face, refer to any religion or religious practice,[13] and they do not evidence any "official purpose to disapprove of a particular religion or of religion in general." *Id*. at 532. The object of the regulations is to promote public health by increasing access to and utilization of recommended preventive services, including those for women. *O'Brien*, 2012 WL 4481208, at *7. They reflect expert medical recommendations without regard to any religious motivations for or against such services. As shown by the IOM Report, this purpose has nothing to do with religion, as the IOM Report is entirely secular in nature. IOM REP. at 2-4, 7-8; *see also Lighthouse Inst. for Evangelism*, 510 F.3d at 275 (concluding law was neutral where there was no evidence "it was developed with the aim of infringing on religious practices").

[13] The regulations refer to religion in the context of exempting certain religious employers from the requirement to cover contraceptive services. But this reference does not destroy the regulations' neutrality. *See O'Brien*, 2012 WL 4481208, at *8. Any burden on plaintiffs' religious beliefs—and there is none—would "arise[] not from the religious terminology used in the exemption, but from the generally applicable requirement to provide coverage for contraceptives." *Catholic Charities of Sacramento*, 85 P.3d at 83.

Likewise, the regulations are generally applicable because they do not pursue their purpose "only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545. The regulations apply to all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage and do not qualify for the religious employer exemption. *O'Brien*, 2012 WL 4481208, at *8.[14] 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 United States v. Amer*, 110 F.3d 873, 879 (2d Cir. 1997) (concluding law that "punishe[d] conduct within its reach without regard to whether the conduct was religiously motivated" was generally applicable).

Plaintiffs allege that the regulations are not generally applicable because they contain certain categorical exceptions. *See* Am. Compl. ¶¶ 54-55. But the existence of "express exceptions for objectively defined categories of [entities]," like the ones plaintiffs reference, does not negate a law's general applicability. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004); *see also Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008); *Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 961 (9th Cir. 1991); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006) (refusing to "interpret *Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption"). For example, the exception for grandfathered plans is available on equal terms to all employers, whether religious or secular, and the religious employer exemption serves to *accommodate* religion, not to disfavor it. The regulations apply with equal force to all remaining group health plans and health insurance issuers. The regulatory scheme is therefore not the result of "religious

[14] Plaintiffs suggest that this exemption is unlawful because it exempts some religious organizations but not others. Am. Compl. ¶¶ 80-84. The First Amendment, however, does not prohibit the government from distinguishing among types of organizations—based on purpose, composition, or character—when it is attempting to accommodate religion. *See, e.g., Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 673 (1970) (upholding tax exemption for realty owned by associations organized exclusively for religious purposes and used exclusively for religious purposes); *Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468-69 (N.Y. 2006). It prohibits only laws that "officially prefer[]" "one religious denomination" over another. *Larson v. Valente*, 456 U.S. 228, 244 (1982); *see also Gillette v. United States*, 401 U.S. 437, 450-51 (1971). The religious employer exemption contains no such denominational preference.

animus," is not "discriminatorily enforced against religious institutions," and does not "devalue[] religious reasons." *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 277 (3d Cir. 2007).

Plaintiffs also allege that defendants have created a system of individualized exemptions. *See* Am. Compl. ¶¶ 59-62. To warrant strict scrutiny, however, a system of individualized exemptions must be one that enables the government to make a subjective, case-by-case inquiry of the reasons for the relevant conduct, and the government must utilize that system to grant exemptions for secular reasons but not for religious reasons. *Smith*, 494 U.S. at 884. Plaintiffs can point to no such system with respect to the preventive services coverage regulations, and there is none. While a law which requires "individualized governmental assessment of the reasons for the relevant conduct" is not generally applicable, *Lukumi*, 508 U.S. at 537, the existence of discretion to define categorical exceptions neither requires nor risks individualized assessments. The exceptions themselves are categorical and generally applicable.

Because the preventive services coverage regulations are neutral laws of general applicability, they do not run afoul of the Free Exercise Clause.[15]

B. The Regulations Do Not Violate the Establishment Clause

"The clearest command of the Establishment Clause is that one religious *denomination* cannot be officially preferred over another." *Larson*, 456 U.S. at 244 (emphasis added). A law that discriminates among religions by "aid[ing] one religion" or "prefer[ring] one religion over another" is subject to strict scrutiny. *Id.* at 246 (quotations omitted); *see also Olsen v. DEA*, 878 F.2d 1458, 1461 (D.C. Cir. 1989) (observing that "[a] statutory exemption authorized for one church alone, and for which no other church may qualify" creates a "denominational preference"). Thus, for example, the Supreme Court struck down on Establishment Clause grounds a state statute that was "drafted with the explicit intention" of requiring "particular religious denominations" to comply with registration and reporting requirements while excluding

[15] Even if the regulations were subject to strict scrutiny, plaintiffs' Free Exercise challenge would still fail. As explained above, *see supra* pp. 22-26, the regulations satisfy strict scrutiny.

other religious denominations. *Larson*, 456 U.S. at 254; *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703-07 (1994) (striking down statute that created special school district for religious enclave of Satmar Hasidim because it "single[d] out a particular religious sect for special treatment").

The preventive services coverage regulations do not grant any denominational preference or otherwise discriminate among religions. *O'Brien*, 2012 WL 4481208, at *9. They are therefore analogous to statutes upheld by the Supreme Court against Establishment Clause challenges. *See Gillette*, 401 U.S. at 450-51 (upholding statute that provided exemption from military service for persons who had conscientious objection to all wars, but not those who objected to only a particular war, because "no particular sectarian affiliation" was required to qualify for conscientious objector status and the statute therefore did not discriminate among religions); *see also Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (upholding Religious Land Use and Institutionalized Persons Act against Establishment Clause challenge because it did not "confer[] . . . privileged status on any particular religious sect" or "single[] out [any] bona fide faith for disadvantageous treatment"). Plaintiffs' challenge is similarly without merit.

It is of no moment that the religious employer exemption applies to some religious employers—for example, those that primarily inculcate religious values or hire co-religionists—but not others. *O'Brien*, 2012 WL 4481208, at *9-10. The relevant inquiry is whether the distinction drawn by the regulations between exempt and non-exempt entities is based on religious affiliation. *See Walz*, 397 U.S. at 673 (holding that a law exempting from property taxes all realty owned by an association organized exclusively for religious purposes and used exclusively for carrying out such purposes did not violate the Establishment Clause because it did not "single[] out one particular church or religious group"); *Droz v. Comm'r of IRS*, 48 F.3d 1120, 1124 (9th Cir. 1995) (concluding that religious exemption from self-employment Social Security taxes did not violate the Establishment Clause even though "some individuals receive exemptions, and other individuals with identical beliefs do not"); *Catholic Charities of Diocese of Albany*, 859 N.E. 2d at 468-69 ("[T]his kind of distinction—not between denominations, but

between religious organizations based on the nature of their activities—is not what *Larson* condemns.”). Here, the regulations’ definition of “religious employer” does not refer to any particular denomination. The criteria for the exemption focus on the purpose and composition of the organization, not on its sectarian affiliation. The exemption is available on an equal basis to organizations affiliated with any and all religions. The regulations thus do not promote some religions over others and therefore do not implicate the Establishment Clause.

Nor does the religious employer exemption foster excessive government entanglement with religion. As an initial matter, Triune acknowledges that it does not qualify for the religious employer exemption. Am. Compl. ¶ 43. In particular, Triune admits that it fails to satisfy even the fourth criterion for the religious employer exemption—the requirement that it be a nonprofit organization as described in section 6033 of the Internal Revenue Code. *Id.*; 45 C.F.R. § 147.130(a)(1)(iv)(B)(4). Plaintiffs cannot credibly claim that this criterion requires any inquiries that would pose a potential entanglement issue. Accordingly, any entanglement that might result from the religious employer exemption would not exist with respect to these plaintiffs. In any event, the religious employer exemption does not violate the prohibition against excessive entanglement between government and religion. The Supreme Court has made clear that “[n]ot all entanglements” are unconstitutional. *Agostini v. Felton*, 521 U.S. 203, 233 (1997). To violate the Establishment Clause, “[e]ntanglement must be ‘excessive.’” *Id.* “[R]outine regulatory interaction which involves no inquiries into religious doctrine . . . and no detailed monitoring and close administrative contact between secular and religious bodies does not . . . violate the nonentanglement command.” *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680, 696-97 (1989). This exemption relies on “neutral, objective criteria,” *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008), and requires no greater involvement than that which has been upheld by the Supreme Court on numerous occasions. *O’Brien*, 2012 WL 4481208, at *11; *see, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 615-617 (1988) (concluding there was no excessive entanglement where the government reviewed adolescent counseling programs set up by religious institution grantees, reviewed the materials used by such grantees, and

monitored the programs by periodic visits); *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 764-765 (1976) (rejecting excessive entanglement challenge where the State conducted annual audits to ensure that grants to religious colleges were not used to teach religion).

Accordingly, plaintiffs' Establishment Clause claim fails.[16]

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

Plaintiffs' free speech claim fares no better. The right to freedom of speech "prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 61 (2006). But the preventive services coverage regulations do not require plaintiffs—or any other person, employer, or entity—to say anything. Nor do the preventive services coverage regulations limit what plaintiffs may say. Indeed, plaintiffs may even encourage Triune's employees not to use contraceptive services. The preventive services regulations only regulate conduct, not speech. *See FAIR*, 547 U.S. at 60-62 (concluding that statute that required law schools to provide military recruiters with equal access to campus and students regulated conduct, not speech).

Plaintiffs appear to concede that they are not required to speak. Rather, they allege only that because they must cover "education and counseling," they are made to pay for speech with which they disagree. Am. Compl. ¶¶ 91-92. But Plaintiffs' speculation regarding what that counseling might entail, *id.*, is of their own invention. The conversations between a patient and her doctor or counselor may take any number of forms and cover any number of approaches to women's health. And the very occurrence of such a conversation is due to a choice of the insured, not her employer. Plaintiffs' theory would mean that the mere possibility of an employer's disagreement with a subject of an incidental discussion between an employee and her doctor would ground that employer's First Amendment challenge against any government effort to regulate health insurance coverage. *See O'Brien*, 2012 WL 4481208, at *12.

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[16] Even if the regulations discriminate among religions (and they do not), they are valid under the Establishment Clause, because they satisfy strict scrutiny. *See supra* pp. 22-26; *Larson*, 456 U.S. at 251-52.

Similarly, the conduct required by the preventive services coverage regulations is not "inherently expressive," such that it is entitled to First Amendment protection. *See FAIR*, 547 U.S. at 66. An employer that provides a health plan that covers contraceptive services, along with numerous other medical items and services, because it is required by law to do so is not engaged in the sort of conduct the Supreme Court has recognized as inherently expressive. *Compare id*. at 65-66 (making space for military recruiters on campus is not conduct that indicates colleges' support for, or sponsorship of, recruiters' message), *with Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 568-70 (1995) (openly gay, lesbian, and bisexual group marching in parade is expressive conduct), *and W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (not saluting American flag is expressive conduct). Because the preventive services coverage regulations do not compel any speech or expressive conduct, they do not violate the Free Speech Clause.

For these reasons, all of plaintiffs' First Amendment claims fail.[17]

IV. THE PREVENTIVE SERVICES COVERAGE REGULATIONS DO NOT VIOLATE THE ADMINISTRATIVE PROCEDURE ACT

A. The Preventive Services Coverage Regulations Do Not Violate Federal Restrictions Relating to Abortions

Plaintiffs contend that the preventive services regulations violate the APA because they conflict with two federal prohibitions relating to abortions: (1) section 1303(b)(1) of the ACA, and (2) the Weldon Amendment to the Consolidated Appropriations Act of 2012. Am. Compl. ¶¶ 96-98. Section 1303(b)(1)(A) of the ACA provides that "nothing in this title . . . shall be

[17] Indeed, the highest courts of two states have rejected First Amendment claims like those raised by plaintiffs here in cases challenging similar provisions of state law. Under both California and New York law, group health insurance coverage that includes coverage for prescription drugs must also provide coverage for prescription contraceptives. *Diocese of Albany*, 859 N.E.2d at 461; *Catholic Charities of Sacramento*, 85 P.3d at 74 n.3. Both states' laws contain an exemption for religious employers that is similar to the exemption contained in the preventive services coverage regulations. *Diocese of Albany*, 859 N.E.2d at 462; *Catholic Charities of Sacramento*, 85 P.3d at 74 n.3. The highest courts in both states held that the laws do not violate the Free Exercise Clause because they are neutral laws of general applicability. *Diocese of Albany*, 859 N.E.2d at 468-69; *Catholic Charities of Sacramento*, 85 P.3d at 81-87. The courts rejected the Establishment Clause challenge because the exemptions for religious employers do not discriminate among religious denominations or sects. *Diocese of Albany*, 859 N.E.2d at 468-69; *Catholic Charities of Sacramento*, 85 P.3d at 83-87. And they upheld the laws under the Free Speech Clause because "a law regulating health care benefits is not speech." *Catholic Charities of Sacramento*, 85 P.3d at 89; *see also Diocese of Albany*, 859 N.E.2d at 465.

construed to require a qualified health plan to provide" abortion services. 42 U.S.C. § 18023(b)(1)(A). The Weldon Amendment denies funds made available in the Consolidated Appropriations Act of 2012 to any federal, state, or local agency, program, or government that "subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Pub. L. No. 112-74, § 506(d)(1), 125 Stat. 786, 1111 (2012). Plaintiffs appear to reason that, because the preventive services regulations require group health plans to cover emergency contraception, such as Plan B, they in effect require plaintiffs to provide coverage for abortions in violation of federal law.

Plaintiffs' claim that the challenged regulations conflict with section 1303(b)(1) of the ACA should be dismissed at the outset because plaintiffs lack prudential standing to assert it. The doctrine of prudential standing requires that a plaintiff's claim fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *see also Winkler v. Gates*, 481 F.3d 977, 979-80 (7th Cir. 2007). The necessary link between plaintiffs and section 1303(b)(1) is missing here. Section 1303(b)(1) protects health insurance issuers that offer qualified health plans. 42 U.S.C. § 18023(b)(1). But plaintiffs do not allege that they are either health insurance issuers or purchasers of a qualified health plan. Nor could they reasonably do so. A "health insurance issuer" is an "insurance company, insurance service or insurance organization" that is "licensed to engage in the business of insurance in a State." *Id.* § 300gg-91(b)(2); *see id.* § 18021(b)(2). And plaintiffs do not purport to hold any such license. Moreover, a "qualified health plan" is one that, among other things, has in effect a certification from an Exchange. *Id.* § 18021(a)(1)(A); *see also id.* § 18031. The Exchanges contemplated by the ACA, however, will not be operational until 2014, *id.* § 18031(b), and Triune, a large employer, Am. Compl. ¶ 27, will not be able to purchase a qualified health plan until 2017, at the earliest, 42 U.S.C. § 18032(f). Because section 1303(b)(1) is inapplicable to the health plan that Triune offers to its employees, the Court should dismiss this claim for lack of prudential standing. *See*

O'Brien, 2012 WL 4481208, at *14 ("Plaintiffs are not within the zone of interests protected under [section 1303(b)(1)], since it applies only to qualified health care plans available through Exchanges.").

Even if the Court were to reach the merits of plaintiffs' claims that the regulations violate section 1303(b)(1) and the Weldon Amendment, the Court should nevertheless dismiss those claims because they are based on a misunderstanding of the scope of these laws as they relate to emergency contraceptives. The preventive services coverage regulations do not, in contravention of federal law, mandate that any health plan cover abortion as a preventive service or that it cover abortion at all. Rather, they require that non-grandfathered group health plans cover all FDA-approved "contraceptive methods, sterilization procedures, and patient education and counseling," as prescribed by a health care provider. *See* HRSA Guidelines, *supra*. In fact, the federal government has made it clear that these regulations "do not include abortifacient drugs." HealthCare.gov, Affordable Care Act Rules on Expanding Access to Preventive Services for Women (August 1, 2011), *available at* http://www.healthcare.gov/news/factsheets/ 2011/08/womensprevention08012011a.html (last visited Nov. 9, 2012); *see also* IOM REP. at 22 (recognizing that abortion services are outside the scope of permissible recommendations).

In recommending what contraceptive services should be covered by health plans without cost-sharing, the IOM Report identified those contraceptives that have been approved by the FDA as safe and effective. *See* IOM REP. at 10. And the list of FDA-approved contraceptives includes emergency contraceptives such as Plan B. *See* FDA, Birth Control Guide, *supra*. The basis for the inclusion of such drugs as safe and effective means of contraception dates back to 1997, when the FDA first explained why Plan B, and similar drugs, act as contraceptives rather than abortifacients:

> Emergency contraceptive pills are not effective if the woman is pregnant; they act by delaying or inhibiting ovulation, and/or altering tubal transport of sperm and/or ova (thereby inhibiting fertilization), and/or altering the endometrium (thereby inhibiting implantation). Studies of combined oral contraceptives inadvertently taken early in pregnancy have not shown that the drugs have an adverse effect on the fetus, and warnings concerning such effects were removed from labeling several years ago. There is, therefore, no evidence that these drugs, taken in

smaller total doses for a short period of time for emergency contraception, will have an adverse effect on an established pregnancy.

Prescription Drug Products; Certain Combined Oral Contraceptives for Use as Postcoital Emergency Contraception, 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997). In light of this conclusion by the FDA, HHS over 15 years ago informed Title X grantees, which are required to offer a range of acceptable and effective family planning methods and may not offer abortion as a family planning method, that they "should consider the availability of emergency contraception the same as any other method which has been established as safe and effective." Office of Population Affairs, Memorandum (Apr. 23, 1997), *available at* http://www.hhs.gov/opa/title-x-family-planning/initiatives-and-resources/documents-and-tools/opa-97-02.html (last visited Nov. 9, 2012); *see also* 42 U.S.C. §§ 300, 300a-6.

Thus, although plaintiffs might seek to relitigate this issue in the present context, the preventive services coverage regulations simply adopted a settled understanding of FDA-approved emergency contraceptives that is in accordance with existing federal laws prohibiting federal funding for certain abortions.[18] Such an approach cannot be deemed arbitrary or capricious or contrary to law when it is consistent with over a decade of regulatory policy and practice. *See Bhd. of R.R. Signalmen v. Surface Transp. Bd.*, 638 F.3d 807, 815 (D.C. Cir. 2011) (giving particular deference to an agency's longstanding interpretation) (citing *Barnhart v. Walton*, 535 U.S. 212, 220 (2002)).

The conclusion that the term "abortion" in these federal laws was not intended to cover contraceptives, including emergency contraceptives, is reinforced by the legislative history of the Weldon Amendment. The Weldon Amendment was initially passed by the House of Representatives as part of the Abortion Non-Discrimination Act of 2002, and was later incorporated as a "rider" to the Consolidated Appropriations Act of 2005, Pub. L. No. 108-447,

[18] Title X specifically prohibits the Secretary from providing funds "used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Yet, as members of Congress are, and have been, aware, this prohibition does not prevent the use or distribution of emergency contraceptives as a method of family planning. *See, e.g.*, Statement of Senator Helms, 146 Cong. Rec. S6062-01, S6095 (daily ed. June 29, 2000) ("In fact, the Congressional Research Service confirmed to me that Federal law does, indeed, permit the distribution of the 'morning-after pill' at school-based health clinics receiving Federal funds designated for family planning services.").

118 Stat. 2809 (2005), and subsequent years. *See California ex rel. Lockyer v. United States*, 450 F.3d 436, 439 (9th Cir. 2006). During the floor debate on the House vote, Representative David Weldon, after whom the Amendment is named, went out of his way to make clear that the definition of "abortion" is a narrow one. Weldon remarked:

> There have been people who have come to this floor today and tried to assert that the language in this bill would bar the provision of contraception services in many institutions that are already providing it. Please show me in the statute where you find that interpretation. I think it could be described as a tremendous misinterpretation or a tremendous stretch of the imagination.
>
> The provision of contraceptive services has never been defined as abortion in Federal statute, nor has emergency contraception, what has commonly been interpreted as the morning-after pill. Now some religious groups may interpret that as abortion, but we make no reference in this statute to religious groups or their definitions; and under the current FDA policy that is considered contraception, and it is not affected at all by this statute.

148 Cong. Rec. H6566, H6580 (daily ed. Sept. 25, 2002). That Representative Weldon himself did not consider "abortion" to include FDA-approved emergency contraceptives leaves little doubt that the Weldon Amendment was not intended to apply to those items. *See Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (indicating that a statement of one of the legislation's sponsors deserves to be accorded substantial weight in interpreting a statute).

B. Issuance of the Regulations Was Procedurally Proper

Plaintiffs' claim that defendants failed to follow the procedures required by the APA in issuing the preventive services coverage regulations, *see* Am. Compl. ¶ 98, is baseless. The APA's rulemaking provisions generally require that agencies provide notice of a proposed rule, invite and consider public comments, and adopt a final rule that includes a statement of basis and purpose. *See* 5 U.S.C. § 553(b), (c). Plaintiffs' assertion that defendants did not comply with these requirements ignores the relevant legal authority. Defendants issued the preventive services coverage regulations pursuant to express statutory authority granting them discretion to promulgate regulations relating to health coverage on an interim final basis (i.e., without prior notice and comment). *See* 29 U.S.C. § 1191c; 26 U.S.C. 9833; 42 U.S.C. § 300gg-92.[19]

[19] Defendants also made a determination, in the alternative, that issuance of the regulations in interim final form was in the public interest, and thus, defendants had "good cause" to dispense with the APA's notice-and-

Moreover, even if there had been a requirement for prior notice-and-comment—which there was not—the absence of notice and comment prior to issuance of the interim final rules would be harmless error because plaintiffs have since had an opportunity to comment on any perceived deficiencies in those interim final rules.

It is well-established that, when Congress sets forth its "clear intent that APA notice and comment procedures need not be followed," an agency may lawfully dispense with those requirements and issue an interim final rule. *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1237 (D.C. Cir. 1994) (upholding issuance of interim final rule where enabling statute provided for an expedited regulatory process and instructed HHS to issue an interim final rule followed by public comment); *see also Nat'l Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Serv.*, 416 F. Supp. 2d 92, 105 (D.D.C. 2006) (upholding issuance of interim final regulation where the statute provided that "[t]he Secretary may promulgate interim final regulations to implement [the cost containment provision]"); *Asiana Airlines v. FAA*, 134 F.3d 393, 397-98 (D.C. Cir. 1998). The question in determining whether a specific statute authorizes deviation from the notice-and-comment requirement is "whether Congress has established procedures so clearly different from those required by the APA that it must have intended to displace the norm." *Id.* at 397. That is precisely the case here.

As stated in both the July 19, 2010 and August 3, 2011 interim final rules, "Section 9833 of the [Internal Revenue] Code, section 734 of ERISA, and section 2792 of the [Public Health Service] Act authorize the Secretaries of the Treasury, Labor, and HHS [ ] to promulgate any interim final rules that they determine are appropriate to carry out the provisions of chapter 100 of the Code, part 7 of subtitle B of title I of ERISA, and part A of title XXVII of the PHS Act, which include PHS Act sections 2701 through 2728 and the incorporation of those sections into ERISA section 715 and [Internal Revenue] Code section 9815." 75 Fed. Reg. at 41729-30

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comment requirements. 76 Fed. Reg. at 46,624. That determination was proper, and serves as an independent reason that plaintiffs' APA claim is meritless. *See, e.g.*, *Mid-Tex Elec. Coop., Inc. v. FERC*, 822 F.2d 1123, 1133 (D.C. Cir. 1987) (finding that good cause existed for issuing an interim final rule without notice and comment and crediting FERC's context-specific concerns regarding "regulatory confusion" and "irremedial financial consequences"); *Republic Steel Corp. v. Costle*, 621 F.2d 797, 803-04 (6th Cir. 1980).

(referring to 29 U.S.C. § 1191c; 26 U.S.C. § 9833; and 42 U.S.C. § 300gg-92); 76 Fed. Reg. at 46,624 (same). These statutory provisions expressly authorize defendants to issue interim final rules and thus clearly and expressly reflect the intent of Congress to confer upon the Secretaries discretion to issue rules without engaging in prior notice-and-comment. Indeed, by authorizing the Secretaries to promulgate "any interim final rules as the Secretar[ies] determine[] are appropriate," 29 U.S.C. § 1191c; 26 U.S.C. § 9833; and 42 U.S.C. § 300gg-92, the rulemaking provisions confer even broader authority upon the Secretaries than the authority upheld in the above-referenced cases. Here, the statutory language unambiguously evidences Congress's "clear intent that APA notice and comment procedures need not be followed." *Methodist Hosp. of Sacramento*, 38 F.3d at 1237. In issuing the interim final rule, defendants properly exercised their discretion in balancing the need for both public input and timely guidance. For this reason alone, plaintiffs' claim should be dismissed.

Even assuming, *arguendo*, that defendants were not authorized by statute to issue the interim final rules and that defendants' good cause finding was not sufficient, the absence of prior notice and comment would constitute harmless error. The APA's judicial review provision instructs courts to take "due account . . . of the rule of prejudicial error." 5 U.S.C. § 706(2)(F). And courts routinely conduct some form of harmless error analysis when they determine whether an agency has failed to comply with the APA's notice-and-comment requirement. *See, e.g.*, *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008) (noting that the court will not set aside a rule absent a showing by petitioners "that they suffered prejudice from the agency's failure to provide an opportunity for public comment" (quotation omitted)); *Shelton v. Marsh*, 902 F.2d 1201, 1206 (6th Cir. 1990). The burden falls on the party asserting error to demonstrate prejudice. *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 89 (D.D.C. 2007).

In this case, plaintiffs cannot demonstrate any prejudice to plaintiffs, or similarly situated entities, stemming from the alleged deficiencies in the administrative process because plaintiffs were, in fact, given an opportunity to comment on the challenged regulations. *See Shelton*, 902 F.2d at 1206-07 (holding that failure to provide notice was harmless when interested parties had

actual notice); *Conservation Law Found. v. Evans*, 360 F.3d 21, 29-30 (1st Cir. 2004) (concluding that failure to provide a fifteen-day comment period was harmless when the rulemaking process included several opportunities for public participation). Defendants solicited comments for two months following the effective date of the original preventive services coverage regulations. *See* 75 Fed. Reg. at 41,726. Then, following an amendment to the interim final rules on August 3, 2011, defendants solicited comments for an additional two months. *See* 76 Fed. Reg. at 46,621. That defendants permitted two rounds of public comment "suggests that [defendants have] been open-minded," with the result that "real public reconsideration of the issued rule has taken place." *Petry v. Block*, 737 F.2d 1193, 1203 (D.C. Cir. 1984) (quotation omitted) (finding that, in light of a post-promulgation comment period, remand to the agency for further proceedings was unnecessary); *see also Republic Steel Corp.*, 621 F.2d at 804 (upholding rule where agency provided only post-promulgation comment period); *Universal Health Serv. of McAllen, Inc. v. Sullivan*, 770 F. Supp. 704, 721 (D.D.C. 1991) ("[F]ailure to comply with the pre-promulgation procedures of § 553 of the APA may be cured by an adequate later notice if the agency's mind remain[s] open enough at the later stage." (quotation omitted)). Moreover, the preamble to the amended interim final rule reveals that plaintiffs comments, had they submitted any, would have likely been duplicative of other comments to the same effect that defendants had already received.[20] 76 Fed. Reg. 46,623. And, in response to the concerns of religious organizations, defendants authorized HRSA to exempt certain religious employers from the requirement to cover contraceptive services and defendants are considering additional accommodations for certain religious organizations. *Id.* Accordingly, it is clear that defendants enjoyed the benefit of public comment and "the parties have not been deprived of the opportunity to present relevant information by lack of notice that the issue was there." *Am. Radio*

[20] The same is true with respect to the guidelines developed by HRSA. *See* 77 Fed. Reg. at 8726 (noting that defendants received "considerable feedback regarding which preventive services for women should be covered without cost sharing"). The public was also given an opportunity to participate in the IOM's process of reviewing and recommending what preventive services are necessary for women's health and well-being.

Relay League, Inc., 524 F.3d at 236. For these reasons, plaintiffs' procedural APA claims should be dismissed.

C. The Regulations Are Neither Arbitrary Nor Capricious

Plaintiffs also contend that defendants acted arbitrarily and capriciously by ignoring comments indicating that the required coverage for contraceptive services and counseling "could not reasonably be viewed as preventive care." Am. Compl. ¶ 100. Yet, plaintiffs ignore that HRSA's development of guidelines including coverage of the full-range of FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider, was the result of an extensive science-based review conducted by IOM. *See* IOM REP. at 10-12, 102-03. Plaintiffs also ignore defendants' statements in the rulemaking record in response to comments suggesting that coverage for such service would impinge on religious employers' religious freedom. 76 Fed. Reg. at 46,623 (noting that defendants received "considerable feedback regarding which preventive services for women should be considered for coverage under PHS Act section 2713(a)(4)"). Thus, it can hardly be argued that defendants have failed to consider the regulations' proper scope. Although plaintiffs may take issue with the outcome of the rulemaking process, an agency's decision must be upheld under the APA's highly deferential arbitrary and capricious standard if the "agency's path may be reasonably discerned." *Israel v. U.S. Dep't of Agric.*, 282 F.3d 521, 526 (7th Cir. 2002). Defendants' consideration of the relevant concerns shows that they acted neither arbitrarily nor capriciously. *See O'Brien*, 2012 WL 4481208, at *14 (concluding that defendants did not act arbitrarily and capriciously given that "defendants considered all religious objections to the regulations").

For all these reasons, plaintiffs' APA claim should be rejected.

V. PLAINTIFFS' SEPARATION OF POWERS CLAIM IS MERITLESS

Finally, plaintiffs contend that, because the regulations require coverage of what plaintiffs—but not the Food and Drug Administration—consider to be "abortion," the regulations

violate the principle of separation of "Separation of Powers, as defined by the United States Constitution" by "directly contravening the desires of the legislators who passed the [ACA]." Am. Compl. ¶¶ 104, 06. This claim is largely derivative of plaintiffs' allegation that the challenged regulations violate section 1303(b)(1)(A), and must fail for the same reasons. *See supra* pp. 34-38. In any event, Congress obviously did not preclude coverage of the drugs to which plaintiffs' object (or any FDA-approved drugs), and plaintiffs allege nothing to suggest that individual legislators expressed a view about coverage of Plan B or Ella specifically. In requiring all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide certain preventive services without cost-sharing, Congress delegated the determination of what additional preventive care and screenings must be covered for women to HRSA. HRSA, in turn, adopted the recommendation of IOM that the Guidelines include the full range of FDA-approved contraception services. Because the preventive services coverage regulations are consistent with the settled understanding that provision of FDA-approved contraceptive services does not violate federal laws prohibiting federal funding for certain abortions, plaintiffs' claim that the regulations somehow usurp congressional authority is wholly without merit.

CONCLUSION

This Court should dismiss plaintiffs' Amended Complaint in its entirety.

Respectfully submitted this 9th day of November, 2012,

STUART F. DELERY
Acting Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

GARY SHAPIRO
United States Attorney

JENNIFER RICKETTS
Director, Federal Programs Branch

SHEILA M. LIEBER
Deputy Director

/s/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS (VA Bar No. 83212)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W.
Washington, D.C. 20001
Tel: (202) 514-3367; Fax: (202) 616-8470
Email: bradley.p.humphreys@usdoj.gov

Attorneys for Defendants

EXHIBIT A

File Number 5695-778-2

Whereas, ARTICLES OF INCORPORATION OF
DISABILITY MANAGEMENT NETWORK, LTD.
INCORPORATED UNDER THE LAWS OF THE STATE OF ILLINOIS HAVE BEEN FILED IN THE OFFICE OF THE SECRETARY OF STATE AS PROVIDED BY THE BUSINESS CORPORATION ACT OF ILLINOIS, IN FORCE JULY 1, A.D. 1984.

Now Therefore, I, George H. Ryan, Secretary of State of the State of Illinois, by virtue of the powers vested in me by law, do hereby issue this certificate and attach hereto a copy of the Application of the aforesaid corporation.

In Testimony Whereof, *I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois, at the City of Springfield, this* 21ST *day of* AUGUST *A.D. 19*92 *and of the Independence of the United States the two hundred and* 17TH.

George H Ryan
SECRETARY OF STATE

2 5 3 2 9 1 1 3 5

PAID

AUG 21 1992

Form **BCA-2.10** | **ARTICLES OF INCORPORATION**

GEORGE H. RYAN
Secretary of State
Department of Business Services
Springfield, IL 62756
Telephone (217) 782-6961

Payment must be made by certified check, cashier's check, Illinois attorney's check, Illinois C.P.A's check or money order, payable to "Secretary of State."

FILED
AUG 21 1992
GEORGE H. RYAN
SECRETARY OF STATE

SUBMIT IN DUPLICATE!

This space for use by Secretary of State

Date 8-21-92
Franchise Tax $ 25.00
Filing Fee $ 75.00
Approved: E 100.00

1. CORPORATE NAME: DISABILITY MANAGEMENT NETWORK, LTD.

(The corporate name must contain the word "corporation", "company," "incorporated," "limited" or an abbreviation thereof.)

2. Initial Registered Agent: Patrick H. Agnew
First Name / Middle Initial / Last name

Initial Registered Office: 220 East State Street, P. O. Box 1389
Number / Street / Suite #
Rockford, IL 61105-1389 Winnebago
City / Zip Code / County

3. Purpose or purposes for which the corporation is organized:
(If not sufficient space to cover this point, add one or more sheets of this size.)

The transaction of any or all lawful businesses for which corporations may be incorporated under this Act.

44

4. Paragraph 1: Authorized Shares, Issued Shares and Consideration Received:

Class	Par Value per Share	Number of Shares Authorized	Number of Shares Proposed to be Issued	Consideration to be Received Therefor
Common	$ NPV	100,000	1,000	$ 1,000
			TOTAL	$ 1,000

Paragraph 2: The preferences, qualifications, limitations, restrictions and special or relative rights in respect of the shares of each class are:
(If not sufficient space to cover this point, add one or more sheets of this size.)

2532911135

5695-778-2

(over)

PAID

5. OPTIONAL: (a) Number of directors constituting the initial board of directors of the corporation: ______

(b) Names and addresses of the persons who are to serve as directors until the first annual meeting of shareholders or until their successors are elected and qualify:

Name	Residential Address

6. OPTIONAL: (a) It is estimated that the value of all property to be owned by the corporation for the following year wherever located will be: $ ______

(b) It is estimated that the value of the property to be located within the State of Illinois during the following year will be: $ ______

(c) It is estimated that the gross amount of business that will be transacted by the corporation during the following year will be: $ ______

(d) It is estimated that the gross amount of business that will be transacted from places of business in the State of Illinois during the following year will be: $ ______

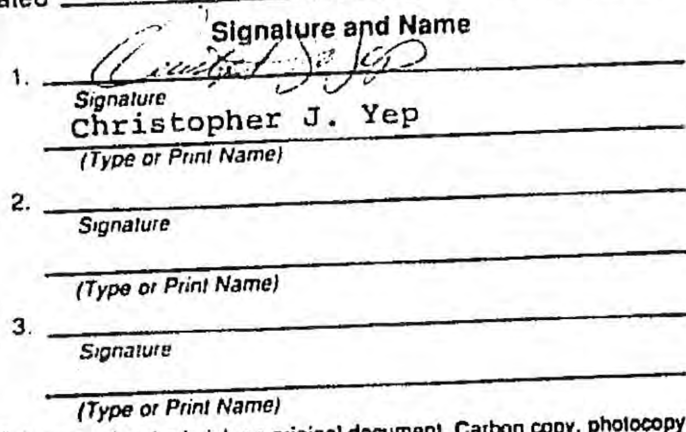
7 OPTIONAL *OTHER PROVISIONS*

Attach a separate sheet of this size for any other provision to be included in the Articles of Incorporation, e.g., authorizing preemptive rights, denying cumulative voting, regulating internal affairs, voting majority requirements, fixing a duration other than perpetual, etc.

8. **NAME(S) & ADDRESS(ES) OF INCORPORATOR(S)**

The undersigned incorporator(s) hereby declare(s), under penalties of perjury, that the statements made in the foregoing Articles of Incorporation are true.

Dated July 30, 19 92.



Signature and Name	Address
1. [signature] (Signature) Christopher J. Yep (Type or Print Name)	1. 3703 N. Main St., Suite 108 (Street) Rockford, IL 61103 (City/Town, State, Zip Code)
2. ______ (Signature) ______ (Type or Print Name)	2. ______ (Street) ______ (City/Town, State, Zip Code)
3. ______ (Signature) ______ (Type or Print Name)	3. ______ (Street) ______ (City/Town, State, Zip Code)

(Signatures must be in ink on original document. Carbon copy, photocopy or rubber stamp signatures may only be used on conformed copies.)

NOTE: If a corporation acts as incorporator, the name of the corporation and the state of incorporation shall be shown and the execution shall be by its President or Vice President and verified by him, and attested by its Secretary or Assistant Secretary.

FEE SCHEDULE

- The initial franchise tax is assessed at the rate of 15/100 of 1 percent ($1.50 per $1,000) on the paid-in capital represented in this state, with a minimum of $25 and a maximum of $1,000,000.
- The filing fee is $75.
- The minimum total due (franchise tax + filing fee) is **$100.** (Applies when the Consideration to be Received as set forth in Item 4 does not exceed $16,667)
- The Department of Business Services in Springfield will provide assistance in calculating the total fees if necessary.

Illinois Secretary of State
Department of Business Services
Springfield, IL 62756
Telephone (217) 782-6961

C-162.12

2532911135

File # D895-7782

Form **BCA-5.10**
NFP-105.10
(Rev. Jan. 1995)

George H. Ryan
Secretary of State
Department of Business Services
Springfield, IL 62756
Telephone (217) 782-3647

SUBMIT IN DUPLICATE

STATEMENT OF CHANGE OF REGISTERED AGENT AND/OR REGISTERED OFFICE

FILED
DEC 27 1995
GEORGE H. RYAN
SECRETARY OF STATE

This space for use by Secretary of State

Date 12/27/95

Filing Fee $5

Approved: 4

Remit payment in check or money order, payable to "Secretary of State"

1. CORPORATE NAME: **DISABILITY MANAGEMENT NETWORK, LTD.**

2. STATE OR COUNTRY OF INCORPORATION: Illinois

3. Name and address of the registered agent and registered office as they appear on the records of the office of th Secretary of State (*before change*).

Registered Agent	James	W.	Keeling
	First Name	*Middle Name*	*Last Name*
Registered Office	220 E. State Street		P.O. Box 1389
	Number *Street*	*Suite No. (A P.O. Box alone is not acceptable)*	
	Rockford	61105	Winnebago
	City	*Zip Code*	*County*

4. Name and address of the registered agent and registered office shall be (*after all changes herein reported*):

Registered Agent	James	W.	Keeling
	First Name	*Middle Name*	*Last Name*
Registered Office	100 Park Avenue	P.O. Box 1389	#101
	Number *Street*	*Suite No. (A P.O. Box alone is not acceptable)*	
	Rockford	61105	Winnebago
	City	*Zip Code*	*County*

5. The address of the registered office and the address of the business office of the registered agent, as changed \ be identical.

6. The above change was authorized by: (*"X" one box only)*
   a. ☐ By resolution duly adopted by the board of directors. *(Note 5)*
   b. ☒ By action of the registered agent. *(Note 6)*

NOTE: When the registered agent changes, the signatures of both president and secretary are required.

7. *(If authorized by the board of directors, sign here. See Note 5)*
The undersigned corporation has caused this statement to be signed by its duly authorized officers, each of wh affirms, under penalties of perjury, that the facts stated herein are true.

Dated ______________________ 19, 96 ______________________
(Exact Name of Corporation)

attested by______________________ ______________________
(Signature of Secretary or Assistance Secretary) *(Signature of Vice President)*

______________________ ______________________
(Type or Print Name and Title) *(Type or Print Name and Title)*

(If change of registered office by registered agent, sign here. Se Note 6)
The undersigned, under penalties of perjury, affirms that the facts stated herein are true.

Dated: 11/22 19, 96 ______________________
(Signature of Registered Agent of Reco

NOTES

1. The registered office may, but need not be the same as the principal office of the corporation. However, registered office and the office address of the registered agent must be the same.

2. The registered office must include a street or read address; a post office box number alone is not acceptable.

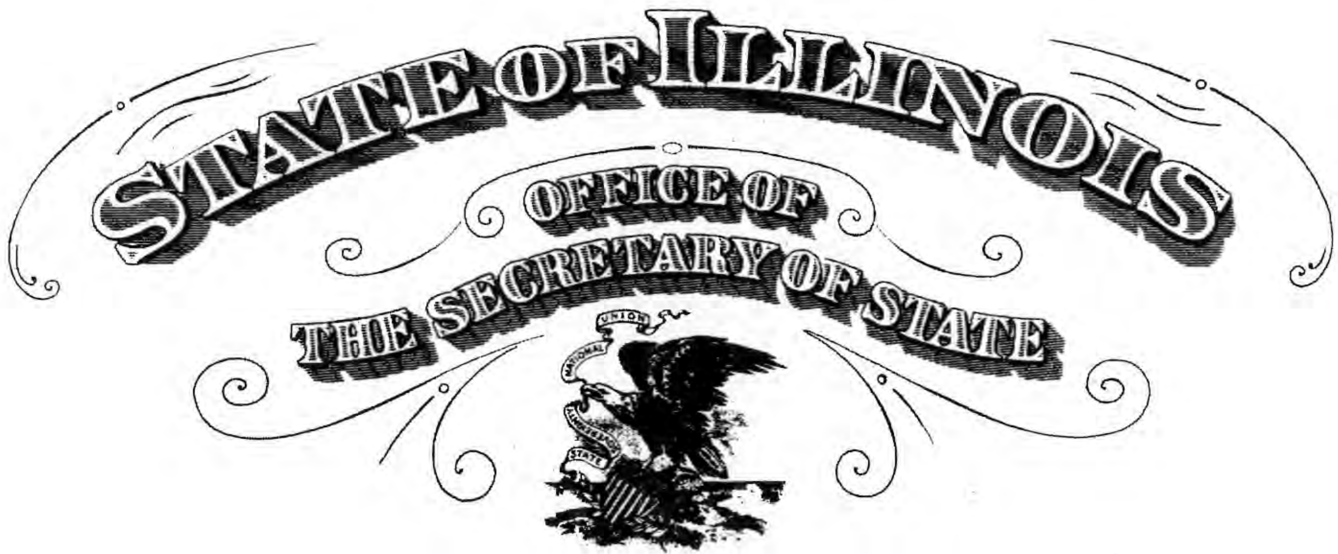
3. A corporation cannot act as its own registered agent.

4. If the registered office is changed from one county to another, then the corporation must file with the recorder deeds of the new county a certified copy of the articles of incorporation and a certified copy of the statement change of registered office. Such certified copies may be obtained ONLY from the Secretary of State.

5. any change of *registered agent* must be by resolution adopted by the board of directors. This statement must th be signed by the president *(or vice-president)* and by the secretary *(or assistant secretary)*.

6. The registered agent may report a change of the *registered office* of the corporation for which he or she is registe agent. When the agent reports such a change, this statement must be signed by the registered agent.

File Number 5695-778-2



To all to whom these Presents Shall Come, Greeting:

I, Jesse White, Secretary of State of the State of Illinois, do hereby certify that I am the keeper of the records of the Department of Business Services. I certify that

THE FOREGOING AND HERETO ATTACHED IS A TRUE AND CORRECT COPY, CONSISTING OF 5 PAGES, AS TAKEN FROM THE ORIGINAL ON FILE IN THIS OFFICE FOR DISABILITY MANAGEMENT NETWORK, LTD..****

In Testimony Whereof, *I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois, this* 24TH *day of* OCTOBER *A.D.* 2012 .

Jesse White

SECRETARY OF STATE

Authentication #: 1229802079
Authenticate at: http://www.cyberdriveillinois.com

ASSUMED NAME(S) RENEWAL

OFFICE OF THE SECRETARY OF STATE

SPRINGFIELD, ILLINOIS 62756
D 5695-778-2
06/11/10

JESSE WHITE
SECRETARY OF STATE

CP0358901

FILED
JUL 30 2010
JESSE WHITE
SECRETARY OF STATE

DISABILITY MANAGEMENT NETWORK, LTD.
JAMES W KEELING
100 PARK AVENUE PO BOX 1389
ROCKFORD IL 61105-0000

IN ACCORDANCE WITH THE BUSINESS CORPORATION ACT OF 1983, EFFECTIVE JULY 1, 1984, CORPORATE ASSUMED NAME(S) SHALL BE RENEWABLE FOR PERIODS OF FIVE YEARS EXPIRING IN YEARS EVENLY DIVISIBLE BY FIVE. THE FEE IS $150.00 PER ASSUMED NAME FOR THE ENTIRE FIVE YEAR PERIOD.

LISTED BELOW, PLEASE FIND THE ASSUMED NAME(S) CURRENTLY IN USE BY THE ABOVE REFERENCED CORPORATION. IF YOU WISH TO RENEW ANY OF THE LISTED ASSUMED NAME(S), SIMPLY CIRCLE THE APPROPRIATE ANSWER AND SUBMIT WITH THE REQUIRED FEE AND SIGN BELOW.

IF YOU WISH TO APPLY FOR A NEW ASSUMED NAME, CONTACT THIS OFFICE AND APPROPRIATE FORMS WILL BE PROVIDED.

SIGNATURE ---------------------- President ---------- 7/21/2010
CORPORATE TITLE DATE

REMIT TO JESSE WHITE, SECRETARY OF STATE
DEPARTMENT OF BUSINESS SERVICES
ROOM 330 HOWLETT BUILDING
SPRINGFIELD, IL 62756

(YES) NO $150.00 TRIUNE HEALTH GROUP, LTD.
File Renewal(s) @ www.cyberdriveillinois.com with an Expedited fee.

PAID
JUL 30 2010
DEPARTMENT OF BUSINESS SERVICES

File Number 5695-778-2

To all to whom these Presents Shall Come, Greeting:

I, Jesse White, Secretary of State of the State of Illinois, do hereby certify that I am the keeper of the records of the Department of Business Services. I certify that

THE FOREGOING AND HERETO ATTACHED IS A TRUE AND CORRECT COPY, CONSISTING OF 1 PAGES, AS TAKEN FROM THE ORIGINAL ON FILE IN THIS OFFICE FOR DISABILITY MANAGEMENT NETWORK, LTD..****

In Testimony Whereof, *I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois, this* 24TH *day of* OCTOBER *A.D.* 2012 .

Jesse White

SECRETARY OF STATE

Authentication #: 1229802083

Authenticate at: http://www.cyberdriveillinois.com

Certificate Number 35263

To all to whom these Presents Shall Come, Greeting:

Whereas, *Articles of Incorporation duly signed and verified of* KORTE AND LUITJOHAN EXCAVATING CONTRACTORS, INC. *have been filed in the Office of the Secretary of State on the* 3rd *day of* January *A. D. 19*69, *as provided by* "THE BUSINESS CORPORATION ACT" *of Illinois, in force July 13, A. D. 1933.*

Now Therefore, I, PAUL POWELL, *Secretary of State of the State of Illinois by virtue of the powers vested in me by law, do hereby issue this certificate of incorporation and attach thereto a copy of the Articles of Incorporation of the aforesaid corporation.*

In Testimony Whereof, *I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois, Done at the City of Springfield this* 3rd *day of* January *A.D. 19*69 *and of the Independence of the United States the one hundred and* 93rd.

(SEAL)

Paul Powell

SECRETARY OF STATE.

FORM B C A-47

BEFORE ATTEMPTING TO EXECUTE THESE BLANKS BE SURE TO READ CAREFULLY THE INSTRUCTIONS ON THE BACK THEREOF.

(THESE ARTICLES MUST BE FILED IN DUPLICATE)

(Do not write in this space)
Date Paid 1-3-69
Initial License Fee $ 2.50
Franchise Tax $ 150.00
Filing Fee $ 75.00
Clerk

STATE OF ILLINOIS,
MADISON COUNTY } ss.

TO PAUL POWELL, Secretary of State:

27 43

The undersigned,

Name	Address Number Street	City	State
Cyril B. Korte	809 Cypress,	Highland,	Illinois
Joseph G. Luitjohan	1221 Thirteenth St.,	Highland,	Illinois

being one or more natural persons of the age of twenty-one years or more or a corporation, and having subscribed to shares of the corporation to be organized pursuant hereto, for the purpose of forming a corporation under "The Business Corporation Act" of the State of Illinois, do hereby adopt the following Articles of Incorporation:

ARTICLE ONE

The name of the corporation hereby incorporated is: KORTE AND LUITJOHAN EXCAVATING CONTRACTORS, INC.

ARTICLE TWO

The *address* of its initial registered office in the State of Illinois is: 1221 Thirteenth Street

Street, in the City of Highland (62249 (Zip Code)) County of Madison 60 and

the *name* of its initial Registered Agent at *said address* is: Joseph G. Luitjohan

ARTICLE THREE

The duration of the corporation is: Perpetual

PAID
JAN 6 1969

ARTICLE FOUR

The purpose or purposes for which the corporation is organized are:

The purpose of the corporation shall be to engage for profit in any business which may be operated by a corporation in the State of Illinois under the General Business Corporation Act of Illinois, to have and to exercise all powers of a corporation under that act, specifically, to own, operate, franchise, handle and repair all kinds of earth moving equipment, trenching equipment, excavating equipment, trucks and all related supplies and materials, to be sold as principal, agent, broker, and in any lawful capacity, and generally to take, lease, purchase, invest in, or otherwise acquire, and to own, use, hold, sell, convey, exchange, repair and otherwise handle, manage, operate, deal in and dispose of general equipment as heretofore listed at wholesale or retail.

To establish, maintain and operate offices, agencies or places of business for the sale and distribution of excavating, trenching and trucking services of all kinds whatsoever, and engage generally in the construction, excavating and contracting business as either a contractor or sub-contractor.

To establish, maintain and operate offices or places of business for the sale and distribution of sand, gravel, soil, concrete, lumber, asphalt of all types and kinds whatsoever, and engage generally in the construction material business at either wholesale or retail.

To buy, sell, own, exchange and deal in general merchandise of all types and kinds whatsoever.

To buy, sell, hold, lease, rent, improve, mortgage, encumber, control, operate, handle and deal in real estate and any and all interests therein or thereto.

To carry on a general mercantile, industrial, investing, and trading business in all its branches; to devise, invent, manufacture, fabricate, assemble, install, service, maintain, alter, sell, buy, import, export, license as licensor or licensee, lease as lessor or lessee, distribute, job, enter into, negotiate, execute, acquire,

(Continued on Separate Page)

ARTICLE FIVE

PARAGRAPH 1: The aggregate number of shares which the corporation is authorized to issue is 30,000 divided into TWO classes. The designation of each class, the number of shares of each class, and the par value, if any, of the shares of each class, or a statement that the shares of any class are without par value, are as follows:

Class	Series (If any)	Number of Shares	Par value per share or statement that shares are without par value
A Common		5,000	Without Par Value
I Preferred		25,000	Without Par Value

PARAGRAPH 2: The preferences, qualifications, limitations, restrictions and the special or relative rights in respect of the shares of each class are:

The total number of shares of stock which the corporation shall have the authority to issue is Thirty Thousand (30,000), consisting of Five Thousand (5,000) shares of Class A Voting Common Stock; Twenty-Five Thousand (25,000) shares of Class I Voting Preferred Stock; all are without par value.

The designations, preferences, privileges and restrictions or qualifications of the shares of each class are as follows:

The holders of the shares of Class I Preferred Stock shall be entitled to receive, and the corporation shall be bound to pay thereof, preferential non-cumulative dividends, as and when declared by the Board of Directors, out of tho annual net profits of the corporation or out of its net assets in excess of its capital, as determined pursuant and subject to the provisions of the General Corporation Law of the State of Illinois, at the rate of Thirty Dollars per share per annum in respect of each share of Class I Preferred Stock, payable semi-annually on the first day of the fiscal year as established by the Board of Directors and semi-annually thereafter during each year or on such other days and datesas shall be determined by the Board of Directors of the corporation, before any dividends shall be declared or paid upon

ARTICLE FOUR, Cont'd.

and assign contracts in respect of, acquire, receive, grant and assign licensing arrangements, franchises, and other rights in respect of, and generally deal in and with, at wholesale and retail, as principal, and as sales, business, special or general agent, representative, broker, factor, merchant, distributor, jobber, advisor, and in any other lawful capacity, goods, wares, merchandise, commodities, and unimproved, improved, finished, processed, and other real, personal, and mixed property of any kind, together with the components, resultants, and by-products thereof.

To apply for, register, obtain, purchase, lease, take licenses in respect of or otherwise acquire, and to hold, own, use, operate, develop, enjoy, turn to account, grant licenses and immunities in respect of, manufacture under and to introduce, sell, assign, mortgage, pledge or otherwise dispose of, and, in any manner deal with and contract with reference to:

(a) Inventions, devices, formulae, processes and any improvements and modifications thereof;

(b) letters patent, patent rights, patented processes, copyrights, designs, and similar rights, trade-marks, trade names, trade symbols and other indications of origin and ownership granted by or recognized under the laws of the United States of America, the District of Columbia, any state or subdivision thereof, and any commonwealth, territory, possession, dependency, colony, agency, or instrumentality of the United States of America and of any foreign country, and all rights connected therewith or appertaining thereunto;

(c) franchises, licenses, grants and concessions.

To make, enter into, perform and carry out contracts of every kind and description with any persons, firm, association, corporation or government agency or instrumentality thereof.

To purchase, take, receive, subscribe, and otherwise acquire, own, use, hold, and otherwise employ, sell, lease, exchange, transfer, and otherwise dispose of, mortgage, lend, pledge, and otherwise deal in and with, securities (which term, for the purpose of this Article, includes, without limitation of the generality thereof, any shares of stock, bonds, debentures, notes, mortgages, other obligations, and any certificates, receipts or other instruments representing rights to receive, purchase or subscribe for the same, or representing any other rights or interests therein or any property or assets) of any persons, domestic and foreign firms, associations, and corporations, and by any government or agency or instrumentality thereof; to make payment therefor in any lawful manner; and, while owner of any such securities, to exercise any and all rights, powers and privileges in respect thereof, including the right to vote.

To acquire by purchase, exchange or otherwise, all, or any part of, or any interest in, the properties, assets, business and good will of any one or more persons, firms, associations or corporations heretofore or hereafter engaged in any business for which a corporation may now or hereafter be organized under the laws of the State of Illinois; to pay for the same in cash, property or its own or dispose of the whole or any part thereof; and in connection therewith, to assume performance of any liabilities, obligations or contracts of such person, firms, associations or corporations, and to conduct the whole or any part of any business thus acquired.

To lend money in furtherance of its corporate purposes and to invest and reinvest its funds from time to time to such extent, to such persons, firms, associations, corporations, governments, or agencies or instrumentalities thereof, and on such terms and on such security, if any, as the Board of Directors of the corporation

ARTICLE FOUR, Cont'd.

may determine.

To make contracts of all kinds and endorse the payment of principal, interest or dividends upon, and to assure the performance of sinking funds or other obligations of, any securities, and to assure in any way permitted by law the performance of any of the contracts or other undertakings in which the corporation may otherwise be or become interested, of any persons, firms, association, corporation, government, or agency or instrumentality thereof, or of any other combination, organization or entity whatsoever.

To borrow money without limit as to amount and at such rates of interest as it may be determined; from time to time to issue and sell its own securities, including its shares of stock, notes, bonds, debentures, and other obligations, in such amounts, on such terms and conditions, for such purposes and for such prices now or hereafter permitted by the laws of the State of Illinois and by this certificate of incorporation, as the Board of Directors of the corporation may determine; and to secure any of its obligations by mortgage, pledge or other encumbrance of all or any of its property, franchises and income.

To be a promoter or manager of other corporations of any type or kind; and to participate with others in any corporation, partnership, limited partnership, joint venture, or other association of any kind, or in any transaction, undertaking or arrangement, which the corporation would have power to conduct by itself, whether or not such participation involves sharing or delegation of control with or to others.

To draw, make, accept, endorse, execute, and issue promissory notes, drafts, bills of exchange, warrants, bonds, debentures, and other negotiable or transferable instruments and evidences of indebtedness whether secured by mortgage or otherwise, as well as to secure the same by mortgage or otherwise, so far as may be permitted by the laws of the State of Illinois.

To purchase, receive, take, reacquire or otherwise acquire, own, and hold, sell, lend, exchange, reissue, transfer or otherwise dispose of, pledge, use, cancel, and otherwise deal in and with its own shares and its other securities from time to time to such an extent and in such manner and upon such terms as the Board of Directors of the corporation shall determine; provided that the corporation shall not use its funds or property for the purchase of its own shares of capital stock when its capital is impaired or when such would cause any impairment of its capital, except to the extent permitted by law.

To organize, as an incorporator, or cause to be organized under the laws of the State of Illinois, or of any other State of the United States of America, or of the District of Columbia, or of any commonwealth, territory, dependency, colony, possession, agency, or instrumentality of the United States of America, or of any foreign country, a corporation or corporations for the purpose of conducting and promoting any business or purpose for which corporations may be organized, and to dissolve, wind up, liquidate, merge or consolidate any such corporation or corporations or to cause the same to be dissolved, wound,up, liquidated, merged, or concolidated.

To conduct its business, promote its purposes, and carry on its operations in any any all of its branches and maintain offices both within and without the State of Illinois, in any and all States of the United States of America, in the District of Columbia, and in any or all commonwealths, territories, dependencies, colonies, possessions, agencies, or instrumentalities of the United States of America and of foreign countries.

ARTICLE FOUR, Cont'd.

To promote and exercise all or any part of the foregoing purposes and powers in any and all parts of the world, and to conduct its business in all or any of its branches as principal, agent, broker, factor, contractor, and in any other lawful capacity, either alone or through or in conjunction with any corporations, associations, partnerships, firms, trustees, syndicates, individuals, organizations, and other entities in any part of the world, and, in conducting its business and promoting any of its purposes, to maintain offices, branches and agencies in any part of the world, to make and perform any contracts and to do any acts and things, and to carry on any business, and to exercise any powers and privileges suitable, convenient, or proper for the conduct, proportion, and attainment of any of the business and purposes herein specified or which at any time may be incidental thereto or may appear conducive to or expedient for the accomplishment of any of such business and purposes and which might be engaged in or carried on by a corporation incorporated or organized under the General Corporation Law of the State of Illinois, and to have and exercise all of the powers conferred by the laws of the State of Illinois upon corporations incorporated or organized under the General Corporation Laws of the State of Illinois.

The foregoing provisions of this Article shall be construed both as purposes and powers and each as an independent purpose and power. The foregoing enumeration of specific purposes and powers shall not be held to limit or restrict in any manner the purposes and powers of the corporation, and the purposes and powers herein specified shall, except when otherwise provided in this Article, being nowise limited or restricted by reference to, or inference from, the terms of any provisions of this or any other Article of this certificate of incorporation; provided, that the corporation shall not conduct any business, promote any purpose, or exercise any power or privilege within or without the State of Illinois which under the laws thereof, the corporation may not lawfully conduct, promote, or exercise.

ARTICLE FIVE, Paragraph 2: Cont'd.

of Directors. On and after the date fixed for such redemption, the holders of the shares so called for redemption shall cease to be entitled to any further dividends and the respective holders thereof shall have no right or interest thereon or therein, by reason of the ownership of such shares, except to receive the said redemption price, as a debt without interest, upon presentation and surrender of their certificates therefor. Shares so redeemed shall not be reissued.

In the event of any liquidation, dissolution or winding up of the corporation, whether voluntary or involuntary, the holders of the stock of the corporation shall be entitled to receive out of the assets of the corporation (whether from capital or surplus or both) the stated value of their shares plus any declared and unpaid dividends in accordance with the following schedule of priority:

First,	Class I Preferred
Last,	Class A Common

If, upon such liquidation, dissolution or winding up of the corporation, the assets of the corporation shall be insufficient to permit the payment in full to the holders of the shares of stock in accordance with the above schedule of priority, then the entire assets of the corporation shall be distributed ratably among the holders of the shares of the Class I Preferred Stock; to the extent the assets are sufficient and lastly to the Class A Common Stock to the extent the assets are available. The foregoing provisions of this paragraph shall not, however, be deemed to require the distribution of assets among the holders of the shares of the several classes of stock of the corporation in the event of a consolidation, merger, lease or sale, which does not in fact result in the liquidation or winding up of the enterprise.

At all stockholders' meetings at which directors of this corporation are to be elected, each stockholder entitled to vote shall have as many votes as shall equal the number of shares of voting stock owned by him, multiplied by the number of directors to be elected, and he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them as he may see fit.

After full dividends for the then current year shall have been declared or paid upon or set apart for the holders of the shares of Class I Preferred Stock, as hereinbefore provided, additional dividends may be declared or paid or set apart during such year. Such additional dividends, if declared, shall be paid to the holders of the shares of Class A Common Stock as hereafter set forth.

The corporation, through its Board of Directors, and conformable with the Illinois Corporation Law, may from time time redeem the whole or any part of the Class I Preferred Stock at one hundred six per cent (106%) of the issued value per share plus all declared and unpaid dividends. The notice of such redemption shall be mailed not less than thirty days prior to the date upon which the stock is to be redeemed to each holder of stock so to be redeemed, at his address as it appears on the books of the corporation. In the event that less than all of the outstanding Class I Preferred Stock of the corporation is to be redeemed, the amount to be redeemed and the method of effecting such redemption may be determined by the Board (Continued on Separate Page)

ARTICLE SIX

The class and number of shares which the corporation proposes to issue without further report to the Secretary of State, and the consideration (expressed in dollars) to be received by the corporation therefor, are:

Class of shares	Number of shares	Total consideration to be received therefor:
Class A	-500-	$ 5,000.00
		$

ARTICLE SEVEN

The corporation will not commence business until at least one thousand dollars has been received as consideration for the issuance of shares.

ARTICLE EIGHT

The number of directors to be elected at the first meeting of the shareholders is: TWO

ARTICLE NINE

PARAGRAPH 1: It is estimated that the value of all property to be owned by the corporation for the following year wherever located will be $5,000.00

PARAGRAPH 2: It is estimated that the value of the property to be located within the State of Illinois during the following year will be $5,000.00

PARAGRAPH 3: It is estimated that the gross amount of business which will be transacted by the corporation during the following year will be $50,000.00

PARAGRAPH 4: It is estimated that the gross amount of business which will be transacted at or from places of business *in the State of Illinois during the following year will be* $50,000.00

NOTE: If all the property of the corporation is to be located in this State and all of its business is to be transacted at or from places of business in this State, or if the incorporators elect to pay the initial franchise tax on the basis of its entire stated capital and paid-in surplus, then the information called for in Article Nine need not be stated.

Cyril B. Korte
Joseph G. Luitjohan

Incorporators

NOTE: There may be one or more incorporators. Each incorporator shall be either a corporation, domestic or foreign, or a natural person of the age of twenty-one years or more. If a corporation acts as incorporator, the name of the corporation and state of incorporation shall be shown and the execution must be by its President or Vice-President and verified by him, and the corporate seal shall be affixed and attested by its Secretary or an Assistant Secretary.

OATH AND ACKNOWLEDGMENT

STATE OF ILLINOIS }
St. Clair County } ss.

I, Kathleen Browning, A Notary Public, do hereby certify that on the 23rd day of December 196 8 Cyril B. Korte and Joseph G. Luitjohan personally appeared before me and being first duly sworn by me acknowledged the signing of the foregoing document in the respective capacities therein set forth and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year above written.

(NOTARIAL SEAL)

Kathleen Browning
Notary Public

FORM B C A-47

ARTICLES OF INCORPORATION

The following fees are required to be paid at the time of issuing certificate of incorporation: Filing fee, $75.00; Initial license fee of 50c per $1,000.00 or 1/20th of 1% of the amount of stated capital and paid-in surplus the corporation proposes to issue without further report (Article Six); Initial franchise tax of 1/10th of 1% of the issued, as above noted. However, the minimum initial franchise tax is $100.00 and varies monthly on $100,000, or less, as follows: January, $150.00; February, $141.67; March, $133.34; April, $125.00; May, $116.67; June, $108.34; July, $100.00; August, $91.67; September, $83.34; October, $75.00; November, $66.67; December, $58.34; (See Sec 133 BCA).

In excess of $100,000, the franchise tax per $1,000.00 is as follows: Jan., $1.50; Feb., 1.4167; March, 1.3334; April, 1.25; May, 1.1667; June, 1.0834; July, 1.00; Aug., .9167; Sept., .8334; Oct., .75; Nov., .6667; Dec., .5834. All shares issued in excess of the amount mentioned in Article Six of this application must be reported within 60 days from date of issuance thereof, and franchise tax and license fee paid thereon; otherwise, the corporation is subject to a penalty of 1% for each month on the amount until reported and subject to a fine of not to exceed $500.00.

The same fees are required for a subsequent issue of shares except the filing fee is $1.00 instead of $75.00.

JAN - 3 1969

Paul Powell
Secretary of State

(Rev. 2—Req. 135—25M) 6-67 41450

Box 4938 No. 438953

Articles of Incorporation

of

KORTE AND LUITJOHAN EXCAVATING CONTRACTORS, INC.

Highland

Number of Authorized Shares 30,000 npv

Duration perpetual years

JAN - 2 1969

Paul Powell
Secretary of State

C-57

File Number 4938-953-1

State of Illinois
Office of
The Secretary of State

Whereas, ARTICLES OF AMENDMENT TO THE ARTICLES OF INCORPORATION OF
KORTE AND LUITJOHAN EXCAVATING CONTRACTORS, INC.
INCORPORATED UNDER THE LAWS OF THE STATE OF ILLINOIS HAVE BEEN FILED IN THE OFFICE OF THE SECRETARY OF STATE AS PROVIDED BY THE BUSINESS CORPORATION ACT OF ILLINOIS, IN FORCE JULY 1, A.D. 1984.

Now Therefore, I, George H. Ryan, Secretary of State of the State of Illinois, by virtue of the powers vested in me by law, do hereby issue this certificate and attach hereto a copy of the Application of the aforesaid corporation.

In Testimony Whereof, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois, at the City of Springfield, this 23RD day of JULY A.D. 19 98 and of the Independence of the United States the two hundred and 23RD.

George H Ryan

Secretary of State

C-212.2

PAID

Form **BCA-10.30** (Rev. Jan. 1995)	**ARTICLES OF AMENDMENT**	JUL 2 4 1998 File # 4938-913-1
George H. Ryan Secretary of State Department of Business Services Springfield, IL 62756 Telephone (217) 782-1832	FILED JUL 23 1998 GEORGE H. RYAN SECRETARY OF STATE	**SUBMIT IN DUPLICATE** This space for use by Secretary of State Date 7-22-98
Remit payment in check or money order, payable to "Secretary of State." The filing fee for restated articles of amendment - $100.00 http://www.sos.state.il.us		Franchise Tax $ Filing Fee* $25.00 Penalty $ Approved: 5X

1. CORPORATE NAME: KORTE AND LUITJOHAN EXCAVATING CONTRACTORS, INC.

(Note 1)

2. MANNER OF ADOPTION OF AMENDMENT:

The following amendment of the Articles of Incorporation was adopted on JUNE 15, 19 98 in the manner indicated below. ("X" one box only)

☐ By a majority of the incorporators, provided no directors were named in the articles of incorporation and no directors have been elected;

(Note 2)

☐ By a majority of the board of directors, in accordance with Section 10.10, the corporation having issued no shares as of the time of adoption of this amendment;

(Note 2)

☐ By a majority of the board of directors, in accordance with Section 10.15, shares having been issued but shareholder action not being required for the adoption of the amendment;

(Note 3)

☐ By the shareholders, in accordance with Section 10.20, a resolution of the board of directors having been duly adopted and submitted to the shareholders. At a meeting of shareholders, not less than the minimum number of votes required by statute and by the articles of incorporation were voted in favor of the amendment;

(Note 4)

☐ By the shareholders, in accordance with Sections 10.20 and 7.10, a resolution of the board of directors having been duly adopted and submitted to the shareholders. A consent in writing has been signed by shareholders having not less than the minimum number of votes required by statute and by the articles of incorporation. Shareholders who have not consented in writing have been given notice in accordance with Section 7.10;

(Notes 4 & 5)

[XX] By the shareholders, in accordance with Sections 10.20 and 7.10, a resolution of the board of directors having been duly adopted and submitted to the shareholders. A consent in writing has been signed by all the shareholders entitled to vote on this amendment.

(Note 5)

3. TEXT OF AMENDMENT:

a. When amendment effects a name change, insert the new corporate name below. Use Page 2 for all other amendments.

Article I: The name of the corporation is:

KORTE & LUITJOHAN CONTRACTORS, INC.

(NEW NAME)

7-22 7/23

All changes other than name, include on page 2

(over)

Text of Amendment

b. *(If amendment affects the corporate purpose, the amended purpose is required to be set forth in its entirety. If there is not sufficient space to do so, add one or more sheets of this size.)*

4. The manner, if not set forth in Article 3b, in which any exchange, reclassification or cancellation of issued shares, or a reduction of the number of authorized shares of any class below the number of issued shares of that class, provided for or effected by this amendment, is as follows: *(If not applicable, insert "No change")*

NO CHANGE

5. (a) The manner, if not set forth in Article 3b, in which said amendment effects a change in the amount of paid-in capital (Paid-in capital replaces the terms Stated Capital and Paid-in Surplus and is equal to the total of these accounts) is as follows: *(If not applicable, insert "No change")*

NO CHANGE

(b) The amount of paid-in capital (Paid-in Capital replaces the terms Stated Capital and Paid-in Surplus and is equal to the total of these accounts) as changed by this amendment is as follows: *(If not applicable, insert "No change")*

NO CHANGE

	Before Amendment	After Amendment
Paid-In Capital	$	$

(Complete either Item 6 or 7 below. All signatures must be in BLACK INK.)

6. The undersigned corporation has caused this statement to be signed by its duly authorized officers, each of whom affirms, under penalties of perjury, that the facts stated herein are true.

Dated JUNE 15, 19 98 KORTE AND LUITJOHAN EXCAVATING CONTRACTORS
(Exact Name of Corporation at date of execution)

attested by Jane Korte by Cyril B. Korte
(Signature of Secretary or Assistant Secretary) *(Signature of President or Vice President)*

JANE KORTE, SECRETARY CYRIL B. KORTE, PRESIDENT
(Type or Print Name and Title) *(Type or Print Name and Title)*

7. If amendment is authorized pursuant to Section 10.10 by the incorporators, the incorporators must sign below, and type or print name and title.

OR

If amendment is authorized by the directors pursuant to Section 10.10 and there are no officers, then a majority of the directors or such directors as may be designated by the board, must sign below, and type or print name and title.

The undersigned affirms, under the penalties of perjury, that the facts stated herein are true.

Dated ____________, 19 ___

FORM **BCA 5.10/5.20** (rev. Dec. 2003)
STATEMENT OF CHANGE OF REGISTERED AGENT AND/OR REGISTERED OFFICE
Business Corporation Act

FILED
DEC 0 5 2008
JESSE WHITE
SECRETARY OF STATE

Jesse White, Secretary of State
Department of Business Services
501 S. Second St., Rm. 328
Springfield, IL 62756
217-782-7808
www.cyberdriveillinois.com

Remit payment in the form of a check or money order payable to Secretary of State.

File # 4938-953-1 Filing Fee: $25 Approved: [initials]

Submit in duplicate — Type or Print clearly in black ink — Do not write above this line

1. Corporate Name: Korte & Luitjohan Contractors, Inc.

CP0649822

2. State or Country of Incorporation: Illinois

3. Name and Address of Registered Agent and Registered Office as they appear on the records of the Office of the Secretary of State (before change):

Registered Agent:	Jane	E.	Korte
	First Name	Middle Name	Last Name
Registered Office:	Route 40 & 143, P.O. Box 9		
	Number	Street	Suite # (P.O. Box alone is unacceptable)
	Highland	62249	Madison
	City	ZIP Code	County

4. Name and Address of Registered Agent and Registered Office shall be (after all changes herein reported):

Registered Agent:	Celeste		Korte
	First Name	Middle Name	Last Name
Registered Office:	12052	Highland Road	
	Number	Street	Suite # (P.O. Box alone is unacceptable)
	Highland	62249	Madison
	City	ZIP Code	County

060

5. The address of the registered office and the address of the business office of the registered agent, as changed, will be identical.

PAID
DEC 0 5 2008
DEPARTMENT OF BUSINESS SERVICES

6. The above change was authorized by: ("X" one box only)
   a. ☑ Resolution duly adopted by the board of directors. **(See Note 5 on reverse.)**
   b. ☐ Action of the registered agent. **(See Note 6 on reverse.)**

SEE REVERSE FOR SIGNATURE(S).

7. **If authorized by the board of directors, sign here. (See Note 5 below.)**
The undersigned corporation has caused this statement to be signed by a duly authorized officer who affirms, under penalties of perjury, that the facts stated herein are true and correct.

Dated 12/2 (Month & Day), 2008 (Year) Korte & Luitjohan Contractors, Inc. (Exact Name of Corporation)

Cyril B Korte
Any Authorized Officer's Signature

Cyril B Korte, President
Name and Title (type or print)

If change of registered office by registered agent, sign here. (See Note 6 below.)
The undersigned, under penalties of perjury, affirms that the facts stated herein are true and correct.

Dated ____________ (Month & Day), ______ (Year) ____________________ Signature of Registered Agent of Record

____
Name (type or print)
If Registered Agent is a corporation,
Name and Title of officer who is signing on its behalf.

NOTES

1. The registered office may, but need not be, the same as the principal office of the corporation. However, the registered office and the office address of the registered agent must be the same.
2. The registered office must include a street or road address (P.O. Box alone is unacceptable).
3. A corporation cannot act as its own registered agent.
4. If the registered office is changed from one county to another, the corporation must file with the Recorder of Deeds of the new county a certified copy of the Articles of Incorporation and a certified copy of the Statement of Change of Registered Office. Such certified copies may be obtained ONLY from the Secretary of State.
5. Any change of registered agent must be by resolution adopted by the board of directors. This statement must be signed by a duly authorized officer.
6. The registered agent may report a change of the registered office of the corporation for which he/she is a registered agent. When the agent reports such a change, this statement must be signed by the registered agent. If a corporation is acting as the registered agent, a duly authorized officer of such corporation must sign this statement.

File Number 4938-953-1

To all to whom these Presents Shall Come, Greeting:

I, Jesse White, Secretary of State of the State of Illinois, do hereby certify that I am the keeper of the records of the Department of Business Services. I certify that

THE FOREGOING AND HERETO ATTACHED IS A TRUE AND CORRECT COPY, CONSISTING OF 16 PAGES, AS TAKEN FROM THE ORIGINAL ON FILE IN THIS OFFICE FOR KORTE & LUITJOHAN CONTRACTORS, INC.. ***

In Testimony Whereof, *I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois, this* 26TH *day of* OCTOBER *A.D.* 2012 .

Jesse White

SECRETARY OF STATE

Authentication #: 1230002671
Authenticate at: http://www.cyberdriveillinois.com