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

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND REPLY IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Plaintiffs ask this Court to preliminarily enjoin regulations that are intended to help ensure that women have access to health coverage, without cost-sharing, for certain preventive services that medical experts deem necessary for women's health and well-being. For the reasons stated in defendants' pending motion to dismiss, plaintiffs' motion for preliminary injunction should be denied because plaintiffs have not shown that they are likely to succeed on the merits of their claims. Indeed, plaintiffs' claims are all subject to dismissal for failure to state a claim upon which relief may be granted. When individuals establish a for-profit, secular company, that entity becomes subject to a host of laws and regulations designed to protect employees: from Title VII of the Civil Rights Act and the Americans with Disabilities Act (which prohibit discrimination in employment) to the Occupational Health and Safety Act ("OSHA") (which assures safe and healthy working conditions for employees) to the Fair Labor Standards Act and the Family and Medical Leave Act (which set minimum standards for employee wages and benefits) to laws, like the one at issue here, that govern the health coverage that a company provides to its employees. The government is not aware of any case—and plaintiffs cite none—in which a for-profit, secular company like Triune obtained an exemption from such general laws designed to protect employees under either the Religious Freedom Restoration Act ("RFRA") or the First Amendment. And for good reason: Granting such exemptions would limit the protections employees of secular companies receive to only those that are consistent with the personal religious beliefs of the company's owner(s). Because plaintiffs have failed to show that the law requires such an exemption for Triune—a secular company established to provide rehabilitation services that does not purport to take an individual's religious beliefs into account when hiring—plaintiffs cannot succeed on their RFRA and Free Exercise Clause claims.

Plaintiffs also cannot succeed on their remaining claims under the First Amendment and the Administrative Procedure Act ("APA"). Even assuming that a secular, for-profit company like Triune could exercise religion, the preventive services coverage regulations do not violate the Free Exercise Clause because they are neutral and generally applicable: they do not target, or

selectively burden, religiously motivated conduct. Nor do the regulations violate the Establishment Clause by preferring some religious denominations over others, or violate plaintiffs' free speech rights. Finally, plaintiffs' response brief hardly acknowledges—much less responds to—defendants' arguments for why plaintiffs have failed to state a claim under the APA. In any event, plaintiffs' arguments with respect to the APA are wholly without merit.

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 group health insurance coverage Triune purchases for its employees cover contraceptive services independent of the preventive services coverage regulations, plaintiffs cannot show that their alleged injuries are either fairly traceable to the challenged regulations or redressable by an order of the Court.

Plaintiffs also cannot establish the remaining requirements for obtaining preliminary injunctive relief. The typical function of a preliminary injunction is to preserve the status quo pending final resolution of a case. Here, the status quo is that Triune makes available to its employees health plans that cover emergency contraceptives. Requiring the company to maintain the status quo, by continuing to offer that coverage, cannot cause irreparable harm, especially given that plaintiffs waited nearly sixteen months to seek emergency relief and, by plaintiffs' own admission, Triune is precluded by Illinois law from obtaining group health insurance coverage that does not cover the services to which the Yeps object. In contrast, entering a preliminary injunction would harm both the government and the public. The employees of Triune, who were hired without regard to their faith and thus may not share the Yeps' religious beliefs, may be deprived of the benefits of receiving a health plan through their employer that covers the full range of recommended contraceptive services. This would perpetuate, rather than mitigate, the public health and gender equality problems the government sought to address through the contraceptive coverage requirement.

CURRENT PROCEEDINGS[1]

Plaintiffs brought this action to challenge the lawfulness of the preventive services coverage regulations to the extent that they require the health coverage Triune makes available to its employees to cover contraceptive services. Although plaintiffs initially included the Illinois Department of Insurance and its director as defendants, plaintiffs amended their complaint on October 15, 2012 to remove their state-law claims. Plaintiffs claim that the preventive services coverage regulations violate RFRA, the First Amendment to the United States Constitution, the APA, and the doctrine of separation of powers. Defendants' moved to dismiss plaintiffs' Amended Complaint on November 9, 2012. On November 29, 2012, plaintiffs filed a combined motion for a preliminary injunction and response to defendants' motion to dismiss.

STANDARD OF REVIEW

Defendants have moved 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 have also moved 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).

This memorandum also responds to plaintiffs' motion for a preliminary injunction. A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish that he is

[1] Because defendants provided the relevant statutory and regulatory background in their motion to dismiss, defendants do not repeat that discussion here.

likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20.

ARGUMENT

I. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

In their opening brief, defendants pointed out that—by plaintiffs' own admission—Illinois law requires the group health insurance coverage that Triune purchases for its employees to cover the full-range of FDA-approved contraceptive services. Defs.' Mem. in Supp. of Mot. to Dismiss ("Defs.' Mem.") at 12-15, ECF No. 24-1; *see also* Am. Compl. ¶¶ 39, 41, ECF No. 21. Consequently, plaintiffs cannot show that any alleged harm is caused by the operation of federal law alone. Nor can plaintiffs argue that a favorable decision by this Court would redress plaintiffs' claimed injury. Defs.' Mem. at 13-15.

Even now, plaintiffs continue to confirm that, independent of the preventive services coverage regulations, state law precludes plaintiffs from obtaining group health insurance coverage for Triune's employees that does not include the coverage to which the Yeps object. In their joint declaration, Christopher and Mary Anne Yep explain that, although they instructed their insurance brokers to locate and purchase insurance policies that were consistent with their religious beliefs, their brokers were unable to do so. Yeps Decl. ¶ 72, ECF No. 36-3. The Yeps then retained new brokers, but those brokers advised the Yeps that they did not think it possible to obtain such coverage. *Id.* The Yeps state clearly that, "even in the absence of the Federal Mandate," "Triune cannot purchase an insurance policy in order to provide benefits consistent with our religious convictions because the Illinois Mandate requires any policy issued to Triune to provide its employees with access to drugs and services that our Roman Catholic faith teaches us and which we sincerely believe to be intrinsically evil, gravely wrong and sinful." *Id.* Yet, as plaintiffs acknowledge, they do not challenge the legality of the Illinois requirement before this Court. Pls.' Mem. at 11-12. And, even though plaintiffs may challenge the Illinois requirement

separately in state court, it is entirely speculative whether plaintiffs will be successful in that effort. In the absence of a definitive ruling on plaintiffs' challenge to the Illinois law in their state-law action, the independent state requirement that the group health insurance coverage that Triune purchases for its employees cover all FDA-approved contraceptive services remains good law. Thus, if the Court were to invalidate the preventive services coverage regulations—which it should not—the federal provision "would simply fall away," leaving intact the Illinois requirement. *See White v. United States*, No. 08-118, 2009 WL 173509, at *5 (S.D. Ohio Jan 26, 2009); *see also Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 473 (7th Cir. 2012) (a necessary element of standing is that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision") (internal citation omitted). Because Illinois law precludes Triune from purchasing group health insurance coverage that does not include coverage for FDA-approved contraceptive services, plaintiffs' alleged injury is traceable to an independent third party not before this Court. Accordingly, even if the Court were to hold the challenged regulations to be unlawful, such a ruling would not provide plaintiffs the relief that they seek in this action. The Court should therefore dismiss plaintiffs' Amended Complaint for lack of standing.[2]

II. PLAINTIFFS' AMENDED COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED, AND PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS[3]

A. Plaintiffs' Religious Freedom Restoration Act Claim Is Without Merit and Should Be Dismissed

[2] Plaintiffs' reliance on *O'Brien v. HHS*, No. 4:12-CV-476 (CEJ), 2012 WL 4481208, at *6 (E.D. Mo. Sept. 28, 2012), *appeal docketed*, No. 12-3357 (8th Cir. Oct. 4, 2012), Pls.' Mem. at 12-13, is misplaced, as the plaintiffs in *O'Brien* did not allege, as plaintiffs do here, that the corporation would be unable to obtain group health insurance coverage that does not include coverage for services to which its owners object even in the absence of the preventive services coverage regulations.

[3] Rather than responding directly to the merits arguments raised in defendants' pending motion to dismiss, plaintiffs assert that defendants' arguments are "defeated by the arguments made [ ] in support of Plaintiffs' Motion for a Preliminary Injunction." Pls.' Mem. at 13 n.6. Accordingly, defendants are required to repeat here a number of the arguments asserted in their motion to dismiss in order to respond to plaintiffs' motion for a preliminary injunction.

1. The preventive services coverage regulations do not substantially burden any exercise of religion by a for-profit, secular company and its owners.

Plaintiffs' principal claim is that Triune is a "person" who "exercise[s] . . . religion" with the meaning of RFRA. 42 U.S.C. § 2000bb-1(b). But that position cannot be reconciled with Triune's status as a secular company. *See Hobby Lobby Stores, Inc. v. Sebelius*, No. Civ-12-1000-HE, 2012 WL 5844972, at *5, *8 (W.D. Okla. Nov. 19, 2012), *appeal docketed*, No. 12-6294 (10th Cir. Nov. 20, 2012). As explained in defendants' opening brief—and despite plaintiffs' argument to the contrary, Pls.' Mem. at 16—Triune is plainly secular. The company's pursuits are not religious; it is a "a corporation that specializes in facilitating 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. And 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.

Because Triune is a secular employer, it is not entitled to the protections of RFRA. RFRA incorporates Free Exercise jurisprudence. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003). As defendants have already explained, as far as organizations are concerned, although the First Amendment freedoms of speech and association are "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); *see also* Defs.' Mem. at 16-17 (citing cases). In short, only a *religious* organization can "exercise religion" under RFRA.

Thus, as the *Hobby Lobby* court and numerous others have recognized, there is no authority for the novel proposition "that secular, for-profit corporations" such as Triune "have a constitutional right to the free exercise of religion" under the Free Exercise Clause. 2012 WL 5844972, at *5; *see also Anselmo v. Cnty. of Shasta*, No. CIV. 2:12–361 WBS EFB, 2012 WL 2090437, at *13 (E.D. Cal. June 8, 2012) ("Although corporations and limited partnerships have broad rights, the court has been unable to find a single [Religious Land Use and Institutionalized

Persons Act] case protecting the religious exercise rights of a non-religious organization such as Seven Hills."); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *4 (E.D. Mich. Oct. 31, 2012) ("Neither the Supreme Court nor the Sixth Circuit has held that a for-profit corporation can assert its own rights under the Free Exercise Clause.").

The cases relied on by plaintiffs are not to the contrary, as none of them held that a for-profit corporation may exercise religion. For example, *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and *United States v. Lee*, 455 U.S. 252 (1982), all involved *individual* plaintiffs. Sherbert was an employee discharged for refusing to work on Saturdays; Yoder was a member of the Old Order Amish religion who objected to a compulsory school attendance law; and Lee was also a member of the Old Order Amish who objected to paying social security tax for his employees. None of the plaintiffs was a secular, for-profit corporation. Nor are plaintiffs helped by *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), or *EEOC v. Townley Eng'g and Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988). Plaintiffs' statement that both cases "recognized that a for-profit and even 'secular' corporation could assert free exercise claims," Pls.' Mem. at 16, is misleading. Both cases expressly declined to decide whether "a for-profit corporation can assert its own rights under the Free Exercise Clause." *Stormans*, 586 F.3d at 1119; *see also Townley*, 859 F.2d at 619-20. Instead, they held that the particular plaintiff corporations had standing to raise the rights of their owners. *Stormans*, 586 F.3d at 1119-22; *Townley*, 859 F.2d at 619-20 & n.15. But this case does not present that standing question, as the Yeps are also plaintiffs here. *See Hobby Lobby*, 2012 WL 2012 WL 5844972, at *5 n.10. None of the other cases cited by plaintiffs fares any better. In fact, plaintiffs do not cite a single case that held that a for-profit corporation can exercise religion under RFRA and the Free Exercise Clause.[4] Of the courts to rule on similar challenges to the preventive

[4] The court in *Morr-Fitz, Inc. v. Blagojevich*, No. 2005-CH-000495, 2011 WL 1338081 (Ill. Cir. Ct. 7th, Apr. 5, 2011), upon which plaintiffs rely, Pls.' Mem. at 16, had no need to, and did not, address the question of whether a for-profit corporation can exercise religion, as the owners of the plaintiff corporations were also parties. *See id*; *see also Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 643 (2006) (plaintiff non-profit church); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (same).

services coverage regulations, only *Hobby Lobby* squarely addressed—and soundly rejected—the idea that secular, for-profit corporation can raise a RFRA or Free Exercise claim. *See* 2012 WL 5844972.[5] This Court should do the same.

To the extent plaintiffs suggest that the individual owners of a corporation can raise a RFRA challenge against any law to which the owners object on religious grounds—even a law that imposes no legal obligations on the owners themselves—they ignore RFRA's requirement that a burden be "substantial." *See Civil Liberties for Urban Believers v. Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (warning, in RLUIPA context, against "render[ing] meaningless the word 'substantial'"); *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007) ("In the 'Free Exercise' context, the Supreme Court has made clear that the 'substantial burden' hurdle is high . . . ."); *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 262 (3d Cir. 2008) (Scirica, C.J., concurring). As the *Hobby Lobby* court correctly noted, "RFRA's

[5] The court in *Tyndale House Publishers, Inc. v. Sebelius*, Civ. A. No. 12-1635, 2012 WL 5817323 (D.D.C. Nov. 16, 2012), did not address this argument, but rather, erroneously equated the analysis of standing under Article III with RFRA's substantial burden requirement. *Id.* at *7-8. The existence of a corporation's *standing* does not mean that a requirement, which is not imposed on the corporation's owners at all, amounts to a *substantial burden* on the owners' exercise of religion. *Compare United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973) (an "identifiable trifle" is sufficient to establish injury in fact), *with Hobby Lobby*, 2012 WL 5844972, at *9-12 (discussing meaning of "substantial burden"). For similar reasons, *Stormans*, 586 F.3d 1109, and *Townley*, 859 F.2d 610—on which the *Tyndale* court relied—are not persuasive. Both cases addressed standing; neither had anything to say about whether an alleged burden on a corporation could also be a *substantial* burden on its owners. The court in *Tyndale* also erred by treating the company and its owners as "alter-ego[s] . . . for religious purposes." 2012 WL 5817323, at *8. A company and its owners cannot be treated as alter-egos for some purposes and not others; if the corporate veil is pierced, it is pierced for all purposes. *See, e.g.*, *Nautilus Ins. Co. v. Reuter*, 537 F.3d 733, 738 (7th Cir. 2008).

Newland v. Sebelius, Civ. A. No. 1:12-cv-1123-JLK, 2012 WL 3069154, at *6 (D. Colo. July 27, 2012), *appeal docketed*, No. 12-1380 (10th Cir. Sept. 26, 2012), did not decide whether a for-profit company can exercise religion, or whether the regulations impose a substantial burden on the exercise of religion, but only recognized that these are "difficult questions of first impression." Moreover, the *Newland* court applied a relaxed preliminary injunction standard, by which it did not require the plaintiffs to show a likelihood of success on the merits. *See id*. at *3. *But see Hobby Lobby*, 2012 WL 5844972, at *3-5 (declining to employ a relaxed standard despite being in the Tenth Circuit). But in this Circuit, plaintiffs must show a likelihood of success on the merits in order to obtain a preliminary injunction. *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 769 (7th Cir. 2011).

Similarly, in *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *5 (E.D. Mich. Oct. 31, 2012), the court declined to decide whether a for-profit corporation can assert RFRA rights. Further, the court "assume[d]" that the regulations substantially burdened the owner's exercise of religion merely because the plaintiff "so claim[ed]." *Id.* at *6. But this approach reads the substantial burden requirement right out of RFRA, which a court may not do. In any event, the court in *Legatus* concluded that the plaintiffs had not shown a likelihood of success. *Id*. at *13.

provisions do not apply to *any* burden on religious exercise, but rather to a 'substantial' burden on that exercise." 2012 WL 5844972, at *10.

The preventive services coverage regulations impose obligations on a legally separate, secular corporation's group health plan, not that corporation's owners. Plaintiffs do not dispute, nor could they, that Triune is 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. v. King*, 533 U.S. 158, 163 (2001). Thus, although Triune acts through its agents, it is the corporate entity that is legally responsible for those acts. *See, e.g., In re Consolidated Objections*, 739 N.E.2d 509, 515-16 (Ill. 2000). Any burden on the Yeps' individual religious exercise is too attenuated to be considered "substantial" under RFRA. *See Hobby Lobby*, at *11.

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

As defendants explained in their opening brief, 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. As now two district courts have concluded, the burden plaintiffs assert here—that, after a series of independent decisions by health care providers and employees covered under the corporation's health plan, the corporation's funds might subsidize an employee's participation in an activity that the owner of the company find objectionable—is too "indirect and attenuated" to be "substantial." *Hobby Lobby*, 2012 WL 5844972, at *11 (rejecting similar argument by owners of a secular, for-profit corporation that was self-insured); *O'Brien*, 2012 WL 4481208, at *5-7.[6]

[6] Although a motions panel of the Eighth Circuit issued a stay pending appeal in *O'Brien*, the panel gave no explanation for its stay, which was issued over a dissent. "'Decisions by motions panels are summary in character, made often on a scanty record, and not entitled to the weight of a decision made after plenary submission.'" *In re Rodriquez*, 258 F.3d 757, 759 (8th Cir. 2001) (quoting *United States v. City of Milwaukee*, 144 F.3d 524, 526 n.1 (7th Cir. 1998)). That is particularly so where, as in *O'Brien*, a motions panel gives no reasons its action. *See, e.g.,*

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3. Even if there is a substantial burden, the regulations serve compelling governmental interests and are the least restrictive means to achieve those interests.

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

As demonstrated in defendants' opening brief, the preventive services coverage regulations serve two undoubtedly compelling and related interests: the improved health of women and potential newborn children, and gender equality in the provision of preventive care. so that women can contribute to society on equal terms with men. Such interests have repeatedly been recognized as compelling. *See* Defs.' Mem. at 23 (citing cases). Plaintiffs make much of the fact that to satisfy RFRA an interest must be compelling not just in the abstract, but with respect to the claimant seeking an exemption. *See* Pls.' Mem. at 23-24. But, as discussed in defendants' opening brief, the interests in promoting the health of women and newborn children and furthering gender equality *are* compelling when applied specifically to Triune and other companies that object to the regulations on religious grounds.[7] Taking into account the "particular claimant whose sincere exercise of religion is [purportedly] being substantially burdened," *O Centro*, 546 U.S. at 430-31—that is, plaintiffs and similarly situated entities—an exemption of Triune and other similar employers from the obligation to make available to their employees a health plan that covers recommended preventive services, including recommended contraceptive services, without cost-sharing 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,

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Gonzalez v. Arizona, 485 F.3d 1041, 1046 (9th Cir. 2007) (noting Supreme Court vacated an injunction "because the motions panel gave no reasons for its action").

[7] Plaintiffs miss the point when they attempt to minimize the magnitude of these interests by arguing that contraception is widely available and even subsidized for certain low-income individuals. *See* Pls.' Mem. at 24. Although a majority of employers cover FDA-approved contraceptives, *see* IOM REP. at 109, many women forgo preventive services, including certain reproductive health care, because of cost-sharing imposed by their health plans, *see id.* at 19-20, 109. The challenged regulations eliminate that cost-sharing. 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012). And, of course, the government's interest in ensuring access to contraceptive services is *particularly* compelling for women employed by companies, like Triune, that wish to remove such coverage from their employee health plans.

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."), *overruled in part on other grounds by Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1033 (9th Cir. 2007) (en banc).[8]

Plaintiffs' primary argument is that the interests underlying the regulations cannot be considered compelling when millions of people are not protected by the regulations at the moment. *See* Pls.' Mem. at 23-30.[9] Yet this is simply not a case where underinclusive enforcement of a law suggests that the government's "supposedly vital interest" is not really compelling. *Lukumi*, 508 U.S. at 546-47 (internal quotations and citations omitted). Many of the

[8] Although the government has a compelling interest in applying the preventive services coverage regulations to Triune specifically, it notes that the appropriate inquiry encompasses Triune and all similarly situated entities—meaning the entire group of entities that would be entitled to an exemption if the theory advanced by plaintiffs were accepted. Courts have recognized that it is appropriate to analyze the impact of an exemption on all similarly situated individuals or organizations. *See, e.g., United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001) (per curiam) ("Oliver has argued a one-man exemption should be made, however, there is nothing so peculiar or special with Oliver's situation which warrants an exception. There are no safeguards to prevent similarly situated individuals from asserting the same privilege and leading to uncontrolled eagle harvesting."); *Lee*, 455 U.S. at 260 (considering the impact on the tax system if all religious adherents—not just the plaintiff—could opt out); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990) ("There is no principled way of exempting the school without exempting all other sectarian schools and thereby the thousands of lay teachers and staff members on their payrolls."); *see also, e.g., Graham*, 822 F.2d at 853; *United States v. Winddancer*, 435 F. Supp. 2d 687, 697 (M.D. Tenn. 2006).

O Centro is not to the contrary. To be sure, the Court rejected "slippery-slope" arguments for refusing to accommodate a particular claimant. *See O Centro*, 546 U.S. at 435-36. But it construed the scope of the requested exemption as encompassing *all* members of the plaintiff religious sect. *See id.* at 433. Similarly, the exemption in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), encompassed *all* Amish children; and the exemption in *Sherbert v. Verner*, 374 U.S. 398 (1963), encompassed *all* individuals who had a religious objection to working on Saturdays. *See O Centro*, 546 U.S. at 431 (discussing *Yoder* and *Sherbert*). The Court's warning in *O Centro* against "slippery-slope" arguments was a rejection of arguments by analogy—that is, speculation that providing an exemption to one group will lead to exemptions for other non-similarly situated groups. It was not an invitation to ignore the reality that an exemption for a particular claimant might necessarily lead to an exemption for an entire category of similarly situated entities.

[9] Plaintiffs repeatedly and grossly overstate the number of individuals in grandfathered plans. Plaintiffs cite only the court's decision in *Newland*, in which the court stated that 191 million Americans are covered under plans that "may be grandfathered under the ACA," 2012 WL 3069154, at *1; Pls.' Mem. at 24. But the *Newland* court appears to have drawn that number from estimates of the *total* number of individuals covered by health plans existing at the beginning of 2010, ignoring the fact that the number of grandfathered plans is significantly and steadily declining. *See Newland*, 2012 WL 3069154, at *1 (citing 75 Fed. Reg. 34,538, 34,550 (June 17, 2010)). By 2012, for example, the year in which the contraceptive coverage requirement was first imposed, the government's mid-range estimate is that 38 percent of employer plans will have lost grandfathered status, and by 2013, this mid-range estimate increases to 51 percent. 75 Fed. Reg. 34,552. Further, the government estimates that the percentage of individual market policies losing grandfather status in a given year exceeds the range of 40 to 67 percent. *Id.* at 34,552-53.

"exemptions" referred to by plaintiffs are not exemptions from the preventive services coverage regulations at all, but are instead provisions of the ACA that exclude individuals and entities from other requirements imposed by the ACA. They reflect the government's attempts to balance the compelling interests underlying the challenged regulations against other significant interests supporting the complex administrative scheme created by the ACA. *See Lee*, 455 U.S. at 259 ("The Court has long recognized that balance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions."); *Winddancer*, 435 F. Supp. 2d at 695-98 (recognizing that the regulations governing access to eagle parts "strike a delicate balance" between competing compelling interest). And, unlike the exemption plaintiffs seek for all employers that object to the regulations on religious grounds, the existing exemptions do not undermine the government's interests in any significant way. *See Lukumi*, 508 U.S. at 547; *S. Ridge Baptist Church v. Industrial Com'n of Ohio*, 911 F.2d 1203, 1208-09 (6th Cir. 1990) (rejecting the plaintiff's argument that the existence of exemptions indicates that a law is the not the least restrictive means of achieving a compelling interest where the exemptions do not undermine that interest).

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

The incremental transition of the marketplace into the ACA administrative scheme does nothing to call into question the compelling interests furthered by the preventive services coverage regulations. Even under the grandfathering provision, it is projected that more group health plans will transition to the requirements under the regulations as time goes on. Defendants estimate that, as a practical matter, a majority of group health plans will lose their grandfather status by 2013. *See id.* at 34,552. Thus, any purported damage to the compelling interests underlying the regulations will be quickly mitigated, which is in stark contrast to the *permanent* exemption plaintiffs seek. Plaintiffs would have this Court believe that an interest cannot truly be "compelling" unless Congress is willing to impose it on everyone all at once despite competing interests, but plaintiffs offer no support for such an untenable proposition. To the contrary, this approach is a perfectly reasonable balancing of competing interests. *See Winddancer*, 435 F. Supp. 2d at 695-98.

Second, 26 U.S.C. § 4980H(c)(2) does *not*, as plaintiffs suggest, exempt small employers from the preventive services coverage regulations. *See* 42 U.S.C. § 300gg-13(a); 76 Fed. Reg. at 46,622 n.1. Instead, it excludes employers with fewer than fifty full-time equivalent employees from the employer responsibility provision, meaning that, starting in 2014, such employers are not subject to assessable payments if they do not provide health coverage to their full-time employees and certain other criteria are met.[10] *See* 26 U.S.C. § 4980H(c)(2). Employees of these small businesses can get health insurance through other ACA provisions, primarily premium tax credits and health insurance exchanges, and the coverage they receive will include all preventive services, including contraception.[11] In addition, small businesses that offer non-grandfathered

[10] In contrast, beginning in 2014, certain large employers face assessable payments if they fail to provide health coverage for their employees under certain circumstances. 26 U.S.C. § 4980H.

[11] For this reason, even if there were some connection between the preventive services coverage provision and the employer responsibility provision, excluding small employers from the employer responsibility provision would not undermine the government's compelling interest in ensuring that employees have access to recommended preventive services. As noted, employees of small employers that do not provide health coverage will be able to obtain health coverage through health insurance exchanges, and, if eligible, receive premium tax credits and cost-sharing reductions to assist them in affording such coverage. *See* 42 U.S.C. § 18021; *id.* § 18031(d)(2)(B)(i). Because the preventive services coverage requirement applies to the health plans being offered through the

(continued on next page…)

health coverage to their employees are required to provide coverage for recommended preventive services, including contraceptive services, without cost-sharing. And there is reason to believe that many small employers will continue to offer health coverage to their employees, because the ACA, among other things, provides for tax incentives for small businesses to encourage the purchase of health insurance. *See id.* § 45R.

Third, although 26 U.S.C. § 5000A(d)(2) exempts from the minimum coverage provision of the ACA "member[s] of a recognized religious sect or division thereof" who, on the basis of their religion, are opposed to the concept of health insurance and members of health care sharing ministries, this provision is entirely unrelated to the preventive services coverage regulations. *See also id.* § 1402(g)(1). The minimum coverage provision will require certain individuals who fail to maintain a minimum level of health insurance to pay a tax penalty beginning in 2014. It provides no exemption from the preventive services coverage regulations, as it only excludes certain *individuals* from the requirement to obtain health coverage and says nothing about the requirement that non-grandfathered group health plans provide preventive services coverage to their participants. It is also clearly an attempt by Congress to *accommodate* religion and, unlike the broad exemption sought by plaintiffs, is sufficiently narrow so as not to undermine the larger administrative scheme. *See Lee*, 455 U.S. at 260-61.

Furthermore, exempting these discrete and "readily identifiable," *id.* at 260-61, classes of individuals from the minimum coverage provision is unlikely to appreciably undermine the compelling interests motivating the preventive services coverage regulations. By definition, a woman who is "conscientiously opposed to acceptance of the benefits of any private or public insurance which . . . makes payments toward the cost of, or provides services for, medical care," 26 U.S.C. § 1402(g)(1), or is a member of a health care sharing ministry described in 26 U.S.C. § 5000A(d)(2)(B)(ii) would not utilize health coverage—including contraceptive coverage—even if it were offered.

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exchanges, the coverage individuals buy there will necessarily cover recommended contraceptive services. *Id.* § 300gg-13(a).

The only true exemption from the preventive services coverage regulations cited by plaintiffs is the exemption for "religious employer[s]," 45 C.F.R. § 147.130(a)(1)(iv)(B). But there is a rational distinction between the narrow exception currently in existence and the expansion plaintiffs seek. A "religious employer" is an employer that, among other things, has the "inculcation of religious values" as its purpose and "primarily employs persons who share the religious tenets of the organization." *Id*. 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 of whether to use contraceptive services. *See* 77 Fed. Reg. at 8728.

The same is not true for Triune, which does not and cannot discriminate based upon religious beliefs in hiring, and therefore almost certainly employs many individuals who do not share the Yeps' religious beliefs. If courts were to grant plaintiffs' request to extend the protections of RFRA to any employer whose owners or shareholders object to 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. Providing for voluntary participation among for-profit, secular employers would be "almost a contradiction in terms and difficult, if not impossible, to administer." *Lee*, 455 U.S. at 258. We are a "cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961); *see also S. Ridge Baptist Church*, 911 F.2d at 1211, and many people object to countless medical services. If any organization, no matter the high degree of attenuation between the mission of that organization and the exercise of religious belief, were able to seek an exemption from the operation of the preventive services coverage regulations, it is difficult to see how defendants could administer the regulations in a manner that would achieve Congress's goals of improving the health of women and children and equalizing the coverage of preventive services for women. *See United States v. Israel*, 317 F.3d 768, 772 (7th Cir. 2003) (recognizing that granting plaintiff's RFRA claim "would lead to significant administrative problems for the [government]

and open the door to a . . . proliferation of claims"). Indeed, women who receive their health coverage through corporations like Triune would face negative health and employment outcomes because they had obtained employment with a company that imposes its owners' religious beliefs on their health care needs. *See id.* (noting consequences "for the public and the government"); 77 Fed. Reg. at 8728.

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

The preventive services coverage regulations, moreover, are the least restrictive means of furthering the government's interests. When determining whether a particular regulatory scheme is "least restrictive," the appropriate inquiry is whether the individual or organization with religious objections, and those similarly situated, can be exempted from the scheme—or whether the scheme can otherwise be modified—without undermining the government's compelling interest. *See Israel*, 317 F.3d at 772; *S. Ridge Baptist Church*, 911 F.2d at 1206 (describing the least restrictive means test as "the extent to which accommodation of the defendant would impede the state's objectives"); *United States v. Schmucker*, 815 F.2d 413, 417 (6th Cir. 1987) (same); *see also, e.g.*, *United States v. Wilgus*, 638 F.3d 1274, 1289-95 (10th Cir. 2011); *New Life Baptist Church Acad. v. Town of E. Longmeadow*, 885 F.2d 940, 946 (1st Cir. 1989) (Breyer, J.). The government is not required "to do the impossible—refute each and every conceivable alternative regulation scheme." *Wilgus*, 638 F.3d at 1289. Instead, the government need only "refute the alternative schemes offered by the challenger." *Id.*

Instead of explaining how Triune and similarly situated secular companies could be exempted from the regulations without significant damage to the government's compelling interests in public health and gender equality, plaintiffs conjure up several new regulatory schemes—most of which would require the government to pay for contraceptive coverage—that they claim would be less restrictive. *See* Pls.' Mem. at 30-31. Rather than suggesting modifications to the current employer-based system that Congress enacted, *see generally* H.R. Rep. No. 111-443, pt. II, at 984-86 (2010) (explaining why Congress chose to build on the

employer-based system), plaintiffs would have the system turned upside-down to accommodate the Yeps' beliefs at enormous administrative and financial cost to the government. But just because plaintiffs can devise an entirely new legislative and administrative scheme does not make that scheme a feasible less restrictive means. *See Wilgus*, 638 F.3d at 1289; *New Life Baptist Church Acad.*, 885 F.2d at 946.

In effect, plaintiffs want the government "to subsidize private religious practices," *Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67, 94 (Cal. 2004), by expending significant resources to adopt an entirely new legislative or administrative scheme or fundamentally alter an existing one. But a proposed alternative scheme is not an adequate alternative—and thus not a viable less restrictive means to achieve the compelling interest—if it is not "feasible" or "plausible." *See, e.g.*, *New Life Baptist Church Acad.*, 885 F.2d at 947 (considering "in a practical way" whether proffered alternative would "threaten potential administrative difficulties, including those costs and complexities which . . . may significantly interfere with the state's ability to achieve its . . . objectives"); *Graham*, 822 F.2d at 852 ("To allow an exception for Scientologists is, we think, possible; but it is not feasible."). In determining whether a proposed alternative scheme is feasible, courts often consider the additional administrative and fiscal costs of the scheme. *See, e.g.*, *S. Ridge Baptist Church*, 911 F.2d at 1206; *Fegans v. Norris*, 537 F.3d 897, 905-06 (8th Cir. 2008); *United States v. Lafley*, 656 F.3d 936, 942 (9th Cir. 2011); *New Life Baptist Church Acad.*, 885 F.2d at 947. Plaintiffs' alternatives would impose considerable new costs and other burdens on the government and would otherwise be impractical. *See, e.g.*, *Lafley*, 656 F.3d at 942; *Gooden v. Crain*, 353 F. App'x 885, 888 (5th Cir. 2009); *Adams v. Comm'r of Internal Revenue*, 170 F.3d 173, 180 n.8 (3d Cir. 1999).[12]

[12] The costs and administrative burdens that plaintiffs' alternative schemes would impose on the government are not the only reason that they are infeasible. The ACA requires that recommended preventive services be covered without cost-sharing through the existing employer-based system. *See* H.R. Rep. No. 111-443, pt. II, at 984-86. Thus, even if defendants wanted to adopt one of plaintiffs' non-employer-based alternatives, they would be constrained by the statute from doing so.

Nor would the proposed alternatives be equally effective in advancing the government's compelling interests. *See, e.g., Kaemmerling v. Lappin*, 553 F.3d 669, 684 (D.C. Cir. 2008) (finding that means was least restrictive where no alternative means would achieve compelling interests); *Murphy v. State of Ark.*, 852 F.2d 1039, 1042-43 (8th Cir. 1988) (same). As discussed above, Congress determined that the best way to achieve the goals of the ACA, including expanding preventive services coverage, was to utilize the existing employer-based system. The anticipated benefits of the preventive services coverage regulations are attributable not only to the fact that recommended contraceptive services will be available to women with no cost sharing, but also to the fact that these services will be available through the existing employer-based system of health coverage through which women will face minimal logistical and administrative obstacles to receiving coverage of their care. Plaintiffs' alternatives, by contrast, have none of these advantages. They would require establishing entirely new government programs and infrastructures or fundamentally altering an existing one, and would almost certainly require women to take steps to find out about the availability of and sign up for the new benefit, thereby ensuring that fewer women would take advantage of it. Nor do plaintiffs offer any suggestion as to how these programs could be integrated with the employer-based system or how women would obtain government-provided preventive services in practice. Thus, plaintiffs' proposals—in addition to raising myriad administrative and logistical difficulties and being unauthorized by statute and not funded by appropriation—are less likely to achieve the compelling interests furthered by the regulations, and therefore do not represent reasonable less restrictive means.

B. Plaintiffs' First Amendment Claims Are Meritless

1. The regulations do not violate the Free Exercise Clause.

Defendants' opening brief demonstrated that the preventive services coverage regulations are neutral and generally applicable because they do not target, or selectively burden, religiously motivated conduct. Defs.' Mem. at 27-30. The regulations are intended to increase access to and utilization of recommended preventive services, including those for women, and they apply to all

non-exempt, non-grandfathered plans, not just those of employers with a religious affiliation. *Id*. Defendants, moreover, cited numerous cases to demonstrate that the existence of exceptions for objectively defined categories of entities—like grandfathered plans and religious employers—does not negate the regulations' general applicability. *Id*. at 29. Plaintiffs do not even attempt to address any of this authority in their opposition; instead, they merely state—without citation to any relevant authority—that the regulations cannot be considered generally applicable because of these categorical exemptions. *See* Pls.' Mem. at 33. Because defendants have already shown that this is not the law, that claim should be dismissed. *See O'Brien*, 2012 WL 4481208, at *7-9; *Hobby Lobby*, 2012 WL 5844972, at *13 (same).[13]

2. The regulations do not violate the Establishment Clause.

With no real explanation, plaintiffs blithely assert that the preventive services coverage regulations violate the Establishment Clause because the religious employer exemption amounts to a denominational preference forbidden by *Larson v. Valente*, 456 U.S. 228 (1982). *See* Pls.' Mem. at 34-35 Plaintiffs are mistaken. *See O'Brien*, 2012 WL 4481208, at *9-11.

The religious employer exemption is similar to the exemption for houses of worship that the Supreme Court upheld in *Walz v. Tax Commission of New York*, 397 U.S. 664 (1970)—a case defendants cited in their opening brief and which plaintiffs make no effort to distinguish. The Court in *Walz* upheld under the Establishment Clause a statute that created an exemption for realty owned by associations organized exclusively for religious purposes and used exclusively for religious purposes. The exemption was lawful because it did not "single[] out one particular church or religious group" for favored treatment. *Walz*, 397 U.S. at 673. The same is true of the religious employer exemption; it is available on equal terms to employers of all denominations. Contrary to plaintiffs' suggestion, nothing in the Establishment Clause, or the cases interpreting it, requires the government to create an exemption for for-profit, secular companies whenever it creates an exemption for religious organizations. *See e.g.*, *Corp. of Presiding Bishop v. Amos*,

[13] Even if the regulations were subject to strict scrutiny, plaintiffs' Free Exercise challenge would still fail. As explained above, *see supra* at 10-18, the regulations satisfy strict scrutiny.

483 U.S. 327, 334 (1987) (upholding Title VII's exemption for *religious* organizations); *O'Brien*, 2012 WL 4481208, at *10-11 ("Accommodations of religion are possible because the legislative line-drawing to which the plaintiffs object, between the religious and the secular, is constitutionally permissible."); 42 U.S.C. § 12113(d) (providing exemptions from certain provisions of the Americans with Disabilities Act for *religious* organizations).[14]

2. The regulations do not violate the Free Speech Clause.

Plaintiffs' opposition reveals that their free speech claim is based on a fundamental misconception of what is required by the preventive services coverage regulations. Contrary to plaintiffs' assertion, the regulations do not require Triune to subsidize education and counseling "in favor" of the use of contraceptive services. Pls.' Mem. at 35-36. Rather, the regulations require that employers offer to their employees a health plan that includes coverage for "patient education and counseling for all women with reproductive capacity," as prescribed by a health care provider. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines, *available at* http://www.hrsa.gov/womensguidelines/ (last visited Dec. 12, 2012). The regulations do not purport to regulate the content of the education or counseling provided—that is between the patient and her health care provider. *See O'Brien*, 2012 WL 4481208, at *12 (observing that the preventive services coverage regulations "do not require funding of one defined viewpoint"). Therefore, this case does not involve the sort of "political and ideological causes" at issue in the Supreme Court's compelled-subsidy cases. *Keller v. State Bar of Cal.*, 496 U.S. 1, 5 (1990); *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977); *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2291 (2012). Those cases simply do not stand for the proposition that an employer may refuse to provide health coverage for medical services because, during the course of a medical visit, a health care provider may say something with which the employer disagrees. As defendants previously explained, *see* Defs.' Mem. at 33, taken to its logical conclusion, plaintiffs' theory would preclude virtually all government efforts to

[14] 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* at 10-18; *Larson*, 456 U.S. at 251-52.

regulate health coverage, as a medical visit almost invariably involves some communication between the patient and a health care provider, and there may be many instances in which the entity providing the health coverage disagrees with the content of this communication.[15]

C. Plaintiffs' Administrative Procedure Act Claims Are Without Merit

1. 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, Pls.' Mem. at 36-38, 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). Defendants complied with these requirements.

On August 1, 2011, defendants issued an amendment to the interim final regulations authorizing HRSA to exempt group health plans sponsored 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. That amendment was issued pursuant to express statutory authority granting defendants discretion to promulgate regulations relating to health coverage on an interim final basis (i.e., without prior notice and comment). [16] *Id*. at

[15] Indeed, like the *O'Brien* court, 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. *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 461 (N.Y. 2006); *Catholic Charities of Sacramento*, 85 P.3d at 74 n.3. Both states' laws contain an exemption for religious employers' health insurance coverage that is similar to the exemption contained in the preventive services coverage regulations. *Catholic Charities of 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. *Catholic Charities of 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' health insurance coverage 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 Catholic Charities of Diocese of Albany*, 859 N.E.2d at 465.

[16] 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-comment requirements. 76 Fed. Reg. at 46,624.

46,624. Defendants requested comments for a period of 60 days on the amendment and specifically on the definition of "religious employer" contained in the exemption authorized by the amendment. *Id*. at 46,621. After receiving and carefully considering thousands of comments, defendants adopted the definition of "religious employer" contained in the amended interim final regulations, and created a temporary enforcement safe harbor period during which defendants would consider additional amendments to the regulations to further accommodate religious organizations' religious objections to providing contraception coverage. 77 Fed. Reg. at 8726-27.

Because defendants provided notice and an opportunity to comment on the amendment to the interim final regulations, they satisfied the APA's procedural requirements. Plaintiffs' assertion that defendants were "close-minded" about the regulations and that, but for that purported close-mindedness, the regulations "would still not be finalized," Pls.' Mem. at 38, is pure speculation. Similarly, plaintiffs' assertion that comments were "ignore[d]," *id.* at 37, has no basis. The mere fact that the regulations were not altered in the manner plaintiffs seek does not undermine the thoughtfulness of defendants' consideration.

2. The regulations do not violate federal restrictions related to abortion.

Plaintiffs also contend that—by requiring coverage of some forms of emergency contraception, such as Plan B and ella—the preventive services coverage regulations conflict with the terms of Executive Order 13,535 concerning abortions, and therefore violate the APA. Pls.' Mem. at 38-42. The Court should dismiss this claim, however, because it is 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, as explained more fully in defendants' motion to dismiss, 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 government has made 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/womensprevention 08012011a.html (last visited Dec. 12, 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, 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), http://www.hhs.gov/opa/pdfs/opa-97-02.pdf (last visited Dec. 12, 2012); *see also* 42 U.S.C. §§ 300, 300a-6.

Thus, although plaintiffs might seek to re-litigate 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. Such an approach cannot be deemed 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)).

For these reasons, and the reasons stated in defendants' opening brief, plaintiffs' APA claims should be dismissed.

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

Although "[t]he loss of First Amendment freedoms," or a violation of RFRA, "for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), plaintiffs have not shown that the challenged regulations violate their First Amendment or RFRA rights, so there has been no "loss of First Amendment freedoms" for any period of time, *id.* In this respect, the merits and irreparable injury prongs of the analysis merge together, and plaintiffs cannot show irreparable injury without also showing a likelihood of success on the merits, which they cannot do. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012).

Indeed, plaintiffs' delay further counsels against a finding of irreparable harm. The contraceptive coverage requirement was issued on August 1, 2011. Yet plaintiffs waited nearly sixteen months—until November 29, 2012—to seek preliminary injunctive relief. Such a substantial and unexplained delay seriously undermines plaintiffs' claim of irreparable harm. *See Ty, Inc. v. Jones Grp.*, 237 F.3d 891, 903 (7th Cir. 2001); *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (denying preliminary injunctive relief and noting that a delay of forty-four days after final regulations were issued was "inexcusable").[17]

[17] To the extent plaintiffs here—like the plaintiffs in *Tyndale*—attempt to justify their delay by pointing to defendants' argument from other cases that there is no irreparable harm until the regulations apply to a plaintiff, plaintiffs miss the point. A plaintiff should not wait over sixteen months to file suit, thereby creating its own purported emergency, and then be permitted to seek the "extraordinary and drastic remedy" of a preliminary injunction. *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (quotations omitted); *Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) ("Equity demands that those who would challenge the legal sufficiency of administrative decisions . . . do so with haste and dispatch."). Plaintiffs' unexplained delay not only casts doubt on

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Moreover, preliminary injunctive relief would harm the government and the public. With regard to the government, "there is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008). Enjoining the regulations as to a for-profit, secular corporation after January 2013 would undermine the government's ability to achieve Congress's goals of improving the health of women and children and equalizing the coverage of preventive services 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. It would also be contrary to the public interest to deny the employees of Triune the benefits of the preventive services coverage regulations. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) ("[C]ourts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."). Because Triune is a for-profit, secular employer, many of its employees undoubtedly do not share the Yeps' religious beliefs. Those employees should not be denied the benefits of receiving a health plan through their employer that covers contraceptive services. Enjoining the government from enforcing the regulations, the purpose of which is to eliminate these burdens, 75 Fed. Reg. 41,726, 41,733 (July 19, 2010); *see also* 77 Fed. Reg. at 8728, as to plaintiffs would thus harm the public. Any potential harm to plaintiffs resulting from their desire not to provide contraceptive coverage is thus outweighed by the significant harm an injunction would cause to the public.

CONCLUSION

For the forgoing reasons, this Court should deny plaintiffs' motion for a preliminary injunction and grant defendants' motion to dismiss this case in its entirety.

Respectfully submitted this 12th day of December, 2012,

STUART F. DELERY
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their claimed need for urgent relief, but it imposes on the Court (and the defendants) to consider numerous constitutional and statutory claims in rushed fashion, when there is every indication that the rush was entirely unavoidable.

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS