IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MOST REVEREND DAVID A ZUBIK, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH, *et al.*, Plaintiffs, v. KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, *et al.*, Defendants.	Case No. 2:13-cv-01459

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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INTRODUCTION

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

When the contraceptive-coverage requirement was first established, in August 2011, certain non-profit religious organizations—including the plaintiffs here—objected on religious grounds to having to provide contraceptive coverage in the group health plans they offer to their employees. Although, in the government's view, these organizations were mistaken to claim that an accommodation was required under the First Amendment or the Religious Freedom Restoration Act (RFRA), the defendant Departments decided to accommodate the concerns expressed by these organizations. First, they established an exemption for the group health plans of houses of worship and their integrated auxiliaries (and any associated group health insurance coverage). One of the plaintiffs—the Diocese—qualifies for this exemption. In addition, defendants established accommodations for the group health plans of eligible non-profit religious organizations, like Catholic Charities (and any associated group health insurance coverage), that relieve it of responsibility to contract, arrange, pay, or refer for contraceptive coverage or services, but that also ensure that the women it employs and who participate in its plan are not

denied access to contraceptive coverage without cost-sharing. To be eligible for an accommodation, the organization merely needs to certify that it meets the eligibility criteria, *i.e.*, that it is a non-profit organization that holds itself out as religious and has a religious objection to providing coverage for some or all contraceptives. Once the organization certifies that it meets these criteria, it need not contract, arrange, pay, or refer for contraceptive coverage or services. If the group health plan of the organization is self-insured—like the plaintiffs here—their third-party administrator (TPA) will arrange contraceptive coverage for the accommodated organization's employees and covered dependents. In neither case does the objecting employer bear the cost (if any) of providing contraceptive coverage; nor does it administer such coverage; nor does it contract or otherwise arrange for such coverage; nor does it refer for such coverage.

Remarkably, plaintiffs now declare that these accommodations themselves violate their rights under RFRA and the First Amendment. They contend that the mere act of certifying that Catholic Charities is eligible for an accommodation is a substantial burden on their religious exercise because, once they make the certification, Catholic Charities's employees will be able to obtain contraceptive coverage through another party. This extraordinary contention suggests that plaintiffs not only seek to avoid paying for, administering, or otherwise providing contraceptive coverage themselves, but also seek to prevent the women who work for Catholic Charities from obtaining such coverage, even if through a third party.

At bottom, plaintiffs' position seems to be that any asserted burden, no matter how *de minimis*, amounts to a substantial burden under RFRA. That is not the law. Congress amended the initial version of RFRA to add the word "substantially," and thus made clear that "any burden" would not suffice. Although these regulations require virtually nothing of them, plaintiffs claim that the regulations run afoul of their sincerely held religious beliefs prohibiting them from providing or facilitating health coverage for certain contraceptive services, and that the challenged regulations violate RFRA and the First Amendment. All of these claims should be dismissed or, in the alternative, summary judgment should be entered in favor of defendants.

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

Further, plaintiffs' challenge rests largely on the theory that even the extremely attenuated connection between them and the independent provision by their TPA of payments for contraceptive services to which they object on religious grounds—but for which plaintiffs pay nothing—amounts to a substantial burden on their religious exercise. This cannot be. Regardless of how plaintiffs frame their religious beliefs, courts must independently consider whether a given law imposes a substantial burden on those beliefs. *See Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012), *aff'd*, __ F.3d __, 2013 WL 5182544 (6th Cir. Sept. 17, 2013). The regulations impose, at most, only the most *de minimis* burden on plaintiffs' religious exercise, too slight and attenuated to be "substantial" under RFRA, and little different from plaintiffs' payment of salaries to their employees, which those employees can also use to buy contraceptive services if they so choose.

Moreover, even if the challenged regulations were deemed to impose a substantial burden on plaintiffs' religious exercise, the regulations would not violate RFRA because they are narrowly tailored to serve two compelling governmental interests: improving the health of women and newborn children, and equalizing the provision of preventive care for women and men so that women can participate in the workforce, and society more generally, on an equal playing field with men.

Plaintiffs' First Amendment claims are equally meritless. Indeed, nearly every court to consider similar First Amendment challenges to the prior version of the regulations rejected the claims, and their analysis applies here. Plaintiffs also cannot succeed on their APA claims because the regulations are in accordance with federal law.

For these reasons, and those explained below, the Court should dismiss plaintiffs' Compliant in its entirety or, in the alternative, enter summary judgment in favor of defendants.

STANDARD OF REVIEW[1]

Defendants move to dismiss the Amended Complaint in its entirety for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). 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).

To the extent that the Court must consider the administrative record in addition to the face of the Amended Complaint, defendants move, in the alternative, for summary judgment pursuant to Federal Rule of Civil Procedure 56. A party is entitled to summary judgment where the administrative record demonstrates "that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

[1] Defendants exclude a discussion of the regulatory history of the challenged regulations and respectfully refer plaintiffs and the Court to defendants' prior briefing.

ARGUMENT

I. PLAINTIFFS' REGLIGIOUS FREEDOM RESTORATION ACT CLAIM IS WITHOUT MERIT

A. The Regulations Do Not Substantially Burden Plaintiffs' Exercise of Religion

Under RFRA, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb-1 *et seq.*), the federal government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. 2000bb-1. Importantly, "only *substantial* burdens on the exercise of religion trigger the compelling interest requirement." *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001) (emphasis added). "A substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (citing *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981)). "An inconsequential or *de minimis* burden on religious practice does not rise to this level, nor does a burden on activity unimportant to the adherent's religious scheme." *Kaemmerling*, 553 F.3d at 678; *see also Braunfeld v. Brown*, 366 U.S. 599, 606 (1961); *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 262 (3d Cir. 2008) (Scirica, C.J., concurring).

For two reasons, plaintiffs cannot show that the challenged regulations substantially burden their religious exercise.[2] First, because the regulations require virtually nothing of

[2] Plaintiffs repeatedly refer to cases involving for-profit companies that object to the contraceptive coverage regulations. *See, e.g.*, Pls.' Mem. in Supp. of Mot. for Prelim. Inj. ("Pls.' Mem.") at 14-15, 23-24, ECF No. 6. But those cases are inapposite because for-profit corporations—unlike plaintiffs—do not qualify for the religious employer exemption or the accommodations for eligible organizations. Furthermore, plaintiffs' statement that "courts in at least twenty eight cases have afforded preliminary injunctive relief to for-profit plaintiffs challenging the Mandate," *id.* at 14 n.1, is misleading. Plaintiffs' list includes cases where, in an effort to conserve judicial and governmental resources, the government did not oppose the entry of preliminary injunctive relief. *See id.* (citing, for example, *Tonn & Blank Constr., LLC v. Sebelius*, No. 1:12-cv-325 (N.D. Ind. Apr. 1, 2013)). Those cases were in the Seventh, Eighth and D.C. Circuits, and they were filed after motions panels in those circuits had preliminary enjoined the regulations pending appeal in similar cases. *See Mersino Mgmt Co. v. Sebelius*, No. 2:13-cv-11296, 2013 WL 3546702, at *16 (E.D. Mich. July 11, 2013) ("[W]here the government has conceded to injunctive relief, it appears that it has generally done so in jurisdictions where the legal landscape has been set against them, and continuing to litigate the claims in those jurisdictions would be a waste of both judicial and client resources."). In fact, in cases where the government has *opposed* preliminary injunctions, a majority of courts have ruled in the government's favor. *See, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641 (2012)

plaintiffs, and certainly do not require plaintiffs to modify their behavior in any meaningful way, the regulations cannot be deemed to impose any more than a *de minimis* burden on plaintiffs—let alone a substantial one. Second, even if this Court were to find that the regulations impose some burden on plaintiffs' religious exercise, any such burden would be far too attenuated to be substantial.

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

To put this case in its simplest terms, plaintiffs challenge regulations that require them to do next to nothing, except what they would have to do even in the absence of the regulations. The Diocese is entirely exempt from the contraceptive coverage requirement.[3] And the

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(Sotomayor, J., in chambers) (denying application for injunction pending appellate review); *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013); *Autocam*, 2013 WL 5182544.

[3] Plaintiffs state that the scope of the religious employer exemption adopted in the 2013 final rules is narrower than that contemplated in the ANPRM. *See, e.g.*, Pls.' Mem. at 1-2, 6. This contention is both false and irrelevant. Plaintiffs contend that, in the ANPRM, the government suggested that non-exempt organizations that participate in the health plan of an exempt organization would benefit from the exemption. But defendants *never* advanced that interpretation of the exemption. Plaintiffs' misleading quotation from the ANPRM, *see id.* at 6, does not indicate otherwise when read in full. In the ANPRM, defendants said:

> In addition, we note that this exemption is available to religious employers in a variety of arrangements. For example, a Catholic elementary school may be a distinct common-law employer from the Catholic diocese with which it is affiliated. If the school's employees receive health coverage through a plan established or maintained by the school, *and the school meets the definition of a religious employer in the final regulations*, then the religious employer exemption applies. If, instead, *the same school* provides health coverage for its employees through the same plan under which the diocese provides coverage for its employees, and the diocese is exempt from the requirement to cover contraceptive services, then neither the diocese nor the school is required to offer contraceptive coverage to its employees.

77 Fed. Reg. at 16,502 (emphasis added), AR at 187. This passage in no way suggests that a non-exempt employer (i.e., one that does not meet the definition of "religious employer" in the final rules) would become exempt simply by providing coverage through the same plan as an exempt employer. Far from it, both hypotheticals presented in the ANPRM deal with a school—the "same" school—that itself meets the definition of an exempt religious employer. Defendants' decision to exempt entities on an employer-by-employer basis is thus consistent with defendants' prior statements in the ANPRM. Moreover, the agencies expressly "propose[d] to make the accommodation or the religious employer exemption available on an employer-by-employer

remaining plaintiff, Catholic Charities, as an eligible organization, is not required to contract, arrange, pay, or refer for contraceptive coverage. To the contrary, Catholic Charities is free to continue to refuse to do so, to voice its disapproval of contraception, and to encourage its employees to refrain from using contraceptive services. Catholic Charities need only fulfill the self-certification requirement and provide the completed self-certification to its TPA. Catholic Charities need not pay for contraceptive services to its employees. Instead, a third party—Catholic Charities' TPA—provides payments for contraceptive services, at no cost to Catholic Charities. In short, with respect to contraceptive coverage, plaintiffs need not do anything more than they did prior to the promulgation of the challenged regulations—that is, to inform their TPA that they object to providing contraceptive coverage in order to ensure that they are not responsible for contracting, arranging, paying, or referring for such coverage. Thus, the regulations do not require plaintiffs "to modify [their] religious behavior in any way." *Kaemmerling*, 553 F.3d at 679. The Court's inquiry should end here. A law cannot be a substantial burden on religious exercise when "it involves no action or forbearance on [plaintiffs'] part, nor . . . otherwise interfere[s] with any religious act in which [plaintiffs] engage[]." *Id.*; *see also Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003) (holding, in the context of RLUIPA, that "a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable").

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

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basis" in the NPRM. 78 Fed. Reg. 8456, 8467 (Feb. 6, 2013), AR at 176. Finally, even if the scope of the exemption in the final rules were different from what was originally proposed in the ANPRM—which it is not—plaintiffs have not indicated why that would be improper. In fact, that is the very purpose of the rulemaking process. *See, e.g.*, *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951 (D.C. Cir. 2004).

plaintiffs would also prevent *anyone else* from providing such coverage to their employees, who might not subscribe to plaintiffs' religious beliefs. That this is the *de facto* impact of plaintiffs' stated objections is made clear by their suggestion that RFRA is violated whenever they are the "but-for cause of the provision of the objectionable products and services." Compl. ¶ 115, ECF No. 1. This theory would mean, for example, that even the government would not realistically be able to provide contraceptive coverage to plaintiffs' employees (as plaintiffs elsewhere suggest), because it would be "trigger[ed]," Pls.' Mem. at 7, by plaintiffs' refusal to provide such coverage themselves. But RFRA is a shield, not a sword, *see O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1158-60 (E.D. Mo. 2012), *appeal pending*, No. 12-3357 (8th Cir.), and accordingly it does not prevent the government from providing alternative means of achieving important statutory objectives once it has provided a religious accommodation. *Cf. Bowen v. Roy*, 476 U.S. 693, 699 (1986) ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.").

Plaintiffs' RFRA challenge is similar to the claim that the D.C. Circuit rejected in *Kaemmerling*. There, a federal prisoner objected to the FBI's collection of his DNA profile. 553 F.3d at 678. In concluding that this collection did not substantially burden the prisoner's religious exercise, the court concluded that "[t]he extraction and storage of DNA information are entirely activities of the FBI, in which Kaemmerling plays no role and which occur after the BOP has taken his fluid or tissue sample (to which he does not object)." *Id.* at 679. In the court's view, "[a]lthough the government's activities with his fluid or tissue sample after the BOP takes it may offend Kaemmerling's religious beliefs, they cannot be said to hamper his religious exercise because they do not pressure [him] to modify his behavior and to violate his beliefs." *Id.* (internal citation and quotation marks omitted). The same is true here, where the provision of contraceptive services is "entirely [an] activit[y] of [a third party], in which [plaintiffs] play[] no role." *Id.* As in *Kaemmerling*, "[a]lthough the [third party]'s activities . . . may offend [plaintiffs'] religious beliefs, they cannot be said to hamper [their] religious exercise." *Id.*

Perhaps understanding the tenuous ground on which their RFRA claim rests, given that the regulations do not require them to contract, arrange, pay, or refer for contraceptive services, plaintiffs attempt to circumvent this problem by advancing the novel theory that the regulations require them to somehow "facilitate access" to contraceptive coverage, and that it is this "facilitation" that violates plaintiffs' religious beliefs. *See, e.g.*, Pls.' Mem. at 1, 8, 10. But the challenged regulations do not require the Diocese to do anything, and require Catholic Charities *only* to self-certify that it objects to providing coverage for contraceptive services and that it otherwise meets the criteria for an eligible organization, and to share that self-certification with its TPA. In other words, Catholic Charities is required to inform its TPAs that it objects to providing contraceptive coverage, which plaintiffs have done or would have to do voluntarily anyway even absent these regulations in order to ensure that they are not responsible for contracting, arranging, paying, or referring for contraceptive coverage. The sole difference is that they must inform their TPA that Catholic Charities's objection is for religious reasons—a statement plaintiffs have already made repeatedly in this litigation and elsewhere.

Furthermore, any burden imposed by the purely administrative self-certification requirement—which should take plaintiffs a matter of minutes—is, at most, *de minimis*, and thus cannot be "substantial" under RFRA. The substantial burden hurdle is a high one. *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007); *see also Kaemmerling*, 553 F.3d at 678 ("An inconsequential or *de minimis* burden on religious practice does not rise to this level [of a substantial burden]."); *Washington v. Klem*, 497 F.3d 272, 279-81 (3d Cir. 2007); *McEachin v. McGuinnis*, 357 F.3d 197, 203 n.6 (2d Cir. 2004); *Civil Liberties for Urban Believers*, 342 F.3d at 761. Indeed, if this is not a *de minimis* burden, it is hard to see what would be. In fact, plaintiffs' alternative proposals only confirm that the alleged "burden" of self-certification is *de minimis*. They contend that, as an alternative to the accommodations developed by the Departments, the federal government should somehow expand or create other public programs so as to provide contraceptive coverage to the women who participate in plaintiffs' group health plans. RFRA plainly does not require defendants to expand or create government

programs, particularly where, as here, there is no statutory authority to do so. *See infra* Section I.A.2. But, in any event, plaintiffs' own proposals would entail the same putative "burden" as the existing accommodations, or an even greater burden: One way or another, Catholic Charities would have to certify its eligibility for an accommodation, and the result would be that the women who participate in its plan would get contraceptive coverage through another source such as Medicaid. The government would of course, as it does with Medicaid, have to verify employment and/or dependent beneficiary status with the eligible organization. The current accommodations are thus likely to require less of plaintiffs' involvement than would a government program to separately provide contraceptive coverage for their employees and dependents.[4]

Contrary to plaintiffs' suggestion, the mere fact that plaintiffs claim that the self-certification requirement imposes a substantial burden on their religious exercise by requiring them to "facilitate" access to contraception does not make it so. *See Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 413 (E.D. Pa. 2013) ("[W]e reject the notion . . . that a plaintiff shows a burden to be substantial simply by claiming that it is."), *aff'd*, 724 F.3d 377 (3d Cir. 2013). Under RFRA, plaintiffs are entitled to their sincere religious beliefs, but they are not entitled to decide what does and does not impose a substantial burden on such beliefs. Although "[c]ourts are not arbiters of scriptural interpretation," *Thomas*, 450 U.S. at 716, "RFRA still requires the court to determine whether the burden a law imposes on a plaintiff's stated religious belief is 'substantial.'" *Conestoga*, 917 F. Supp. 2d at 413. Plaintiffs would limit the Court's inquiry to two prongs: first, whether plaintiffs' religious objections to the regulations are sincere,

[4] Plaintiffs state that, for self-insured eligible organizations, the self-certification form acts "as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879, AR at 11; Pls.' Mem. at 20. It is not clear what legal significance plaintiffs attach to this statement, but what is clear is that self-insured entities are subject to the same self-certification requirement as third-party-insured entities; they will use the same self-certification form, on which they will state only that they are non-profit religious organizations with a religious objection to providing contraceptive coverage—nothing more. As noted above, this self-certification requirement is, at most, a *de minimis* administrative burden that requires no more of eligible entities—whether self-insured or third-party-insured—than what they would have to do anyway absent the challenged regulations.

and second, whether the regulations apply significant pressure to plaintiffs to comply. But plaintiffs ignore a critical third criterion of the "substantial burden" test, which gives meaning to the term "substantial": whether the challenged regulations actually require plaintiffs to modify their behavior in a significant—or more than *de minimis*—way. *See Living Water Church of God*, 258 F. App'x at 734-36; *see also, e.g.*, *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 997 (7th Cir. 2006) (noting, in the RLUIPA context, that "the Supreme Court has found a 'substantial burden' to exist when the government puts 'substantial pressure on an adherent to *modify his behavior* and to violate his beliefs'" (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987))) (emphasis added); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348-49 (2d Cir. 2007); *Church of Scientology of Ga., Inc. v. City of Sandy Springs, Ga.*, 843 F. Supp. 2d 1328, 1353-54 (N.D. Ga. 2012). As plaintiffs themselves appear to recognize, a "law 'substantially burdens' an exercise of religion if it compels one 'to *perform acts* undeniably at odds with fundamental tenets of [one's] religious beliefs,'" Pls.' Mem. at 22 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)) (emphasis added), "or 'put[s] substantial pressure on an adherent to *modify his behavior* and violate his beliefs.'" *Id.* (quoting *Thomas*, 450 U.S. at 717-18) (emphasis added). This test does not require the Court to delve into the theological merits of a belief, but instead requires the Court to examine the operation of the regulations and their impact on plaintiffs' religious practice.[5]

Under plaintiffs' alternative interpretation of RFRA, courts would play virtually no role in determining whether an alleged burden is "substantial"—as long as a plaintiff's religious

[5] In *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), a bare majority of the en banc Tenth Circuit concluded that, in determining whether a burden is substantial, a court's "only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." *Id.* at 1137. The government believes that the majority's ruling in *Hobby Lobby* was wrong on this and many other points. However, even if this Court were inclined to agree with the Tenth Circuit, the majority proceeded to rely on *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010), which makes clear that in order for a law to impose a substantial burden, it must require some actual change in religious behavior—either forced participation in conduct or forced abstention from conduct. *See Hobby Lobby*, 723 F.3d at 1138 (citing *Abdulhaseeb*, 600 F.3d at 1315). The *Hobby Lobby* substantial burden analysis is also inapposite because for-profit corporations are not eligible for the accommodations.

belief is sincere, that would be the end of the inquiry. *See* Pls.' Mem. at 16. Plaintiffs would thus be allowed to evade RFRA's threshold by simply asserting that the burden on their religious exercise is "substantial," thereby paradoxically reading the term "substantial" out of RFRA. *See Gilardi v. Sebelius*, 926 F. Supp. 2d 273, 282 (D.D.C. 2013); *Autocam*, 2012 WL 6845677, at *6 ("The Court does not doubt the sincerity of Plaintiff Kennedy's decision to draw the line he does, but the Court still has a duty to assess whether the claimed burden—no matter how sincerely felt—really amounts to a substantial burden on a person's exercise of religion."). "If every plaintiff were permitted to unilaterally determine that a law burdened their religious beliefs, and courts were required to assume that such burden was substantial, simply because the plaintiff claimed that it was the case, then the standard expressed by Congress under the RFRA would convert to an 'any burden' standard." *Conestoga*, 917 F. Supp. 2d at 413-14; *see also Autocam*, 2012 WL 6845677, at *7; *Mersino Mgmt Co. v. Sebelius*, No. 2:13-cv-11296, 2013 WL 3546702, at *16 (E.D. Mich. July 11, 2013).[6] The result would be to subject every act of Congress to strict scrutiny every time any plaintiff could articulate a sincerely held religious objection to compliance with that law.

In sum, the regulations do not impose a substantial burden on plaintiffs' religious exercise, and thus plaintiffs' RFRA claim should be dismissed or summary judgment entered in favor of defendants.

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

Although the regulations do not require plaintiffs to contract, arrange, pay, or refer for contraceptive coverage, plaintiffs' complaint appears to be that the regulations require plaintiffs

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

to indirectly facilitate conduct on the part of their employees that they find objectionable (*i.e.*, the use of certain contraceptives). But this complaint has no limits. An employer provides numerous benefits, including a salary and other fringe benefits, to its employees and by doing so in some sense facilitates whatever use its employees make of those benefits. Plaintiffs not only seek to be free from the requirement to contract, arrange, pay, or refer for contraceptive coverage themselves—which they are under these regulations—but also seek to prevent anyone else from providing such coverage to their employees. But an employer has no right to control the choices of its employees, who may not share its religious beliefs, and who have a legitimate interest in access to the preventive services coverage made available under the challenged regulations.

Indeed, courts have held that claims raised by for-profit companies challenging the contraceptive coverage regulations, which require them to provide the relevant coverage themselves, are too attenuated to amount to a substantial burden under RFRA. Any burden on plaintiffs, which are eligible for the religious employer exemption or the accommodations, is *a fortiori* too attenuated to be substantial. For example, the district court in *Conestoga* reasoned that the ultimate decision of whether to use contraception "rests not with [the employer], but with [the] employees" and that "any burden imposed by the regulations is too attenuated to be considered substantial." 917 F. Supp. 2d at 414-15. The *Conestoga* court further explained that the indirect nature of any burden imposed by the regulations distinguished them from the statutes challenged in *Yoder*, *Sherbert*, *Thomas*, and *Gonzales*. *See Conestoga*, 917 F. Supp. 2d at 415; *see also, e.g.*, *Autocam*, 2012 WL 6845677, at *6; *O'Brien*, 894 F. Supp. 2d at 1158-60.[7]

As these courts concluded, the preventive services coverage regulations result in only an indirect impact on for-profit companies, which must provide contraceptive coverage themselves. Any burden on Catholic Charities and similar eligible organizations that qualify for the accommodations is even more attenuated. Not only is Catholic Charities separated from the use

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

of contraception by "a series of events" that must occur before the use of contraceptive services to which plaintiffs object would "come into play," *Conestoga*, 917 F. Supp. 2d at 414-15, but it is also further insulated by the fact that a third party—plaintiffs' TPA—and *not* Catholic Charities, will actually contract, arrange, pay, and refer for such services, and thus Catholic Charities is in no way subsidizing—even indirectly—the use of preventive services that plaintiffs find objectionable. Under plaintiffs' theory, their religious exercise is substantially burdened when one of their employees and her health care provider make an independent determination that the use of certain contraceptive services is appropriate, and such services are paid for exclusively by plaintiffs' TPA, with none of the cost being passed on to plaintiffs, and no administration of the payments by plaintiffs, solely because Catholic Charities self-certified that it has religious objections to providing contraceptive coverage and so informed its TPA.

But a burden cannot be "substantial" under RFRA when it is attenuated. Cases that find a substantial burden uniformly involve a direct burden on the plaintiff rather than a burden imposed on another entity. *See, e.g.*, *Potter v. Dist. of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009); *see also Grote*, 914 F. Supp. 2d at 951-52; *Conestoga*, 917 F. Supp. 2d at 413-14. A plaintiff cannot establish a substantial burden on his religious exercise by invoking this type of trickle-down theory; to constitute a substantial burden under RFRA, the burden must be imposed on the plaintiff himself. *See Conestoga*, 917 F. Supp. 2d at 411, 413; *Autocam*, 2012 WL 6845677, at *7.[8] Here, of course, there is no such direct burden. In fact, given that any payment

[8] *Thomas* is not to the contrary. In *Thomas*, the Supreme Court recognized that "a *compulsion* may certainly be indirect and still constitute a substantial burden, such as the denial of a benefit found in *Thomas*." *Conestoga*, 917 F. Supp. 2d at 415 n.15. But that is not so where the *burden* itself is indirect, as it is here. *See id.*; *Gilardi*, 926 F. Supp. 2d at 283. As previously explained, *see supra* note 5, in *Hobby Lobby*, 723 F.3d 1114, a bare majority of the en banc Tenth Circuit concluded that the word "substantial" in RFRA refers to the "intensity of coercion" rather than to the directness or indirectness of the burden, if any, on a plaintiff's religious exercise. *Id.* at 1137-40. The Tenth Circuit's conclusion that the substantial burden requirement relates to the intensity of the coercion, however, is inconsistent with *Kaemmerling*, discussed above, as well as other decisions that have analyzed "substantial burden" in terms of the degree to which the challenged law directly imposes a requirement or prohibition on religious practice. *See* 553 F.3d at 678-79; *Living Water Church of God*, 258 F. App'x at 734; *McEachin*, 357 F.3d at 203 n.6; *Civil Liberties for Urban Believers*, 342 F.3d at 761. And, again, the *Hobby Lobby* substantial burden analysis is inapplicable to this case. *See supra* note 5.

for contraceptive services is made by plaintiffs' TPAs, the regulations have even less impact on plaintiffs' religious exercise than plaintiffs' payment of salaries to their employees, which those employees can use to purchase contraceptives. *See O'Brien*, 894 F. Supp. 2d at 1160; *Conestoga*, 917 F. Supp. 2d at 414; *Grote*, 708 F.3d at 861 (Rovner, J., dissenting); *Autocam*, 2012 WL 6845677, at *6.

Plaintiffs remain free to refuse to contract, arrange, pay, or refer for contraceptive coverage; to voice their disapproval of contraception; and to encourage their employees to refrain from using contraceptive services. The regulations therefore affect plaintiffs' religious practice, if at all, in a highly attenuated way. In short, because the preventive services coverage regulations "are several degrees removed from imposing a substantial burden on [plaintiffs]," *O'Brien*, 894 F. Supp. 2d at 1160, the Court should dismiss plaintiffs' RFRA claim, or grant summary judgment to defendants, even if it finds—contrary to the government's argument—that the challenged regulations impose some burden on plaintiffs' religious excerise.

B. Even If There Were A Substantial Burden On Religious Exercise, The Regulations Serve Compelling Governmental Interests And Are The Least Restrictive Means To Achieve Those Interests

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

Even if plaintiffs were able to demonstrate a substantial burden on their religious exercise, they would not prevail because the challenged regulations are justified by two compelling interests, and are the least restrictive means to achieve those interests. First, the promotion of public health is unquestionably a compelling interest. *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011); *see also, e.g.*, *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir. 1998); *Dickerson v. Stuart*, 877 F. Supp. 1556, 1559 (M.D. Fla. 1995). And the challenged regulations further this compelling interest by "expanding access to and utilization of recommended preventive services for women." 78 Fed. Reg. 39,870, 39,887 (July 2, 2013), AR at 19.

The primary predicted benefit of the preventive services coverage regulations is that "individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of disease." 75 Fed. Reg. 41,726, 41,733 (July 19, 2010), AR at 233; *see also* 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012), AR at 215; 78 Fed. Reg. at 39,872, 39,887, AR at 4, 19. "By expanding coverage and eliminating cost sharing for recommended preventive services, [the regulations are] expected to increase access to and utilization of these services, which are not used at optimal levels today." 75 Fed. Reg. at 41,733, AR at 233; *see also* 78 Fed. Reg. at 39,873 ("Research [ ] shows that cost sharing can be a significant barrier to access to contraception." (citation omitted)), AR at 5.[9]

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

[9] Plaintiffs miss the point when they attempt to minimize the magnitude of these interests by arguing that contraception is readily available from other sources. *See* Pls.' Mem. at 27-28. Although a majority of employers cover FDA-approved contraceptives, *see* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 109 (2011) ("IOM REP."), AR at 407, many women forgo preventive services because of cost-sharing imposed by their health plans, *see id.* at 19-20, 109, AR at 317-18, 407. The challenged regulations eliminate that cost-sharing. 78 Fed. Reg. at 39,873, AR at 5.

IOM REP. at 103-04 ("[P]regnancy may be contraindicated for women with serious medical conditions such as pulmonary hypertension . . . and cyanotic heart disease, and for women with the Marfan Syndrome."), AR at 401-02.

Closely tied to this interest is a related, but separate, compelling interest that is furthered by the regulations: assuring that women have equal access to health care services. 78 Fed. Reg. at 39,872, 39,887, AR at 4, 19. As the Supreme Court explained in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), there is a fundamental "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." *Id.* at 626. Thus, "[a]ssuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests." *Id.* By including in the ACA preventive health services for women, Congress made clear that the goals and benefits of effective preventive health care apply equally to women, who might otherwise be excluded from such benefits if their unique health care needs were not taken into account in the ACA. As explained by members of Congress, "women have different health needs than men, and these needs often generate additional costs. Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009) (statement of Sen. Mikulski); 78 Fed. Reg. at 39,887, AR at 19; IOM REP. at 19, AR at 317. These costs result in women often forgoing preventive care and place women in the workforce at a disadvantage compared to their male coworkers. *See, e.g.*, 155 Cong. Rec. S12265-02, S12274 (daily ed. Dec. 3, 2009); 78 Fed. Reg. at 39,887, AR at 19; IOM REP. at 20, AR at 318. Congress's attempt to equalize the provision of preventive health care services, with the resulting benefit of women being able to contribute to the same degree as men as healthy and productive members of society, furthers a compelling governmental interest. *Cf. Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 92-93 (Cal. 2004).[10]

[10] In arguing that the government's interests are not compelling, plaintiffs suggest the government must separately analyze the impact of and need for the regulations as to each and every employer and employee in America. *See* Pls.' Mem. at 25. But this level of specificity

Although the challenged regulations further these two compelling governmental interests, while simultaneously accommodating the religious objections of eligible organizations, plaintiffs maintain that the interests underlying the regulations cannot be considered compelling when millions of people are not protected by the regulations at the moment. Pls.' Mem. at 25-27. But this is not a case where underinclusive enforcement of a law suggests that the government's "supposedly vital interest" is not really compelling. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993). For the most part, the "exemptions" referred to by plaintiffs are not exemptions from the preventive services coverage regulations at all, but are instead provisions of the ACA that exclude individuals and entities from other requirements imposed by the ACA. Or they reflect the government's attempts to balance the compelling interests underlying the challenged regulations against other significant interests supporting the complex administrative scheme created by the ACA. *See United States v. Lee*, 455 U.S. 252, 259

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would be impossible to establish and would render this regulatory scheme—and potentially every regulatory scheme that is challenged due to religious objections—completely unworkable. *See United States v. Lee*, 455 U.S. 252, 259-60 (1982). In practice, courts have not required the government to analyze the impact of a regulation on the single entity seeking an exemption, but have conducted the inquiry with respect to all similarly situated individuals or organizations. *See, e.g.*, *id*. at 260 (considering the impact on the tax system if all religious adherents—not just the plaintiff—could opt out); *United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001) (per curiam) ("Oliver has argued a one-man exemption should be made, however, there is nothing so peculiar or special with Oliver's situation which warrants an exception. There are no safeguards to prevent similarly situated individuals from asserting the same privilege and leading to uncontrolled eagle harvesting."); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990) ("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 v. Comm'r*, 822 F.2d 844, 853 (9th Cir. 1987), *overruled in part on other grounds by Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1033 (9th Cir. 2007) (en banc); *United States v. Winddancer*, 435 F. Supp. 2d 687, 697 (M.D. Tenn. 2006). *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 435 (2006), is not to the contrary. To be sure, the Court rejected "slippery-slope" arguments for refusing to accommodate a particular claimant. *See* 546 U.S. at 435-36. But it construed the scope of the requested exemption as encompassing all members of the plaintiff religious sect. *See id.* at 433. Similarly, the exemption in *Yoder*, 406 U.S. 205, encompassed *all* Amish children; and the exemption in *Sherbert v. Verner*, 374 U.S. 398 (1963), encompassed *all* individuals who had a religious objection to working on Saturdays. *See O Centro*, 546 U.S. at 431. The Court's warning in *O Centro* against "slippery-slope" arguments was a rejection of arguments by analogy—that is, speculation that providing an exemption to one group will lead to exemptions for other *non*-similarly situated groups. It was not an invitation to ignore the reality that an exemption for a particular claimant might necessarily lead to an exemption for an entire category of similarly situated entities.

(1982) ("The Court has long recognized that balance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions."); *Winddancer*, 435 F. Supp. 2d at 695-98 (recognizing that the regulations governing access to eagle parts "strike a delicate balance" between competing interests). And, unlike the exemption plaintiffs seek for employers that object to the regulations on religious grounds, the existing exceptions do not undermine the government's interests in a significant way. *See Lukumi*, 508 U.S. at 547; *S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1208-09 (6th Cir. 1990); *see also* 78 Fed. Reg. at 39,887, AR at 19.

For example, the grandfathering of certain health plans with respect to certain ACA provisions is not limited to the preventive services coverage regulations. *See* 42 U.S.C. § 18011; 45 C.F.R. § 147.140. In fact, the effect of grandfathering is not really a permanent "exemption," but rather, over the long term, a transition in the marketplace with respect to several provisions of the ACA, including the preventive services coverage provision. *See* 78 Fed. Reg. at 39,887 n.49, AR at 19. The grandfathering provision reflects Congress's attempts to balance competing interests—specifically, the interest in spreading the benefits of the ACA, including those provided by the preventive services coverage provision, and the interest in maintaining existing coverage and easing the transition into the new regulatory regime established by the ACA—in the context of a complex statutory scheme. *See* 75 Fed. Reg. 34,538, 34,546 (June 17, 2010).

This incremental transition does not 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 over time. Defendants have estimated that a majority of group health plans will have lost their grandfather status by the end 2013. *See id.* at 34,552; *see also* Kaiser Family Foundation and Health Research & Educational Trust, Employer Health Benefits 2012 Annual Survey at 7-8, 190, AR at 663-64, 846. Thus, any purported adverse effect on the compelling interests underlying the regulations will be quickly mitigated, which is in stark contrast to the *permanent*

exemption plaintiffs seek. Plaintiffs would have this Court believe that an interest cannot truly be "compelling" unless Congress is willing to impose it on everyone all at once despite competing interests, but plaintiffs offer no support for that untenable proposition. *See Legatus v. Sebelius*, 901 F. Supp. 2d 980, 994 (E.D. Mich. 2012) ("[T]he grandfathering rule seems to be a reasonable plan for instituting an incredibly complex health care law while balancing competing interests.").

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

Granting plaintiffs the much broader exemption they request would undermine defendants' ability to enforce the regulations in a rational manner. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 435 (2006). We are a "cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld*, 366 U.S. at 606; *see also S. Ridge Baptist Church*, 911 F.2d at 1211, and many people object to various medical services. If any organization with a religious objection were able to claim an exemption from the operation of the preventive services coverage regulations—even where the regulations require virtually nothing of the organization—it is difficult to see how defendants could administer the regulations in a manner that would achieve Congress's goals of improving the

health of women and newborn children and equalizing the coverage of preventive services for women. *See United States v. Israel*, 317 F.3d 768, 772 (7th Cir. 2003) (recognizing that 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 employers like plaintiffs would face negative health and other outcomes because they had obtained employment with an organization that objects to its employees' use of contraceptive services, even when those services are paid for and administered by a third party. *See id.* (noting consequences "for the public and the government"); 77 Fed. Reg. at 8728, AR at 215; 78 Fed. Reg. at 39,887, AR at 19.

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

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

Instead of explaining how plaintiffs and similarly situated eligible organizations could be exempted from the regulations without significant damage to the government's compelling interests, plaintiffs conjure up, without any statutory support, several brand new statutory and regulatory schemes—most of which would require the government to pay for contraceptive coverage—that they claim would be less restrictive. *See* Pls.' Mem. at 29-30. Yet plaintiffs fail to recognize that such alternatives would be incompatible with the fundamental statutory scheme set forth in the ACA, which plaintiffs do not challenge in this lawsuit. Congress did not adopt a single (government) payer system financed through taxes and instead opted to build on the

existing system of employment-based coverage. *See* H.R. Rep. No. 111-443, pt. II, at 984-86 (2010). Plaintiffs point to no statutory authority for any of their proffered less restrictive alternatives. Nor is there any indication that Congress would have contemplated that agency action could be invalidated under RFRA because the agency in discharging its statutorily delegated authority failed to adopt an alternative scheme absent any statutory authority for doing so. Thus, even if defendants wanted to adopt one of plaintiffs' non-employer-based alternatives, they would be constrained by the statute from doing so. *See* 78 Fed. Reg. at 39,888, AR at 20.

Furthermore, plaintiffs themselves indicate that they would "oppose many of" the alternatives that they put forth. Pls.' Mem. at 29. Indeed, as noted above, it is not clear why the government's provision of contraceptive coverage to women based upon their employer's objection to providing it would not be subject to exactly the same RFRA claim that plaintiffs advance here. By their own admission then, plaintiffs' proposals would do little—if anything—to satisfy their religious objections, and therefore should not be considered viable less restrictive alternatives. *See New Life Baptist Church Acad. v. Town of E. Longmeadow*, 885 F.2d 940, 950-51 (1st Cir. 1989) (Breyer, J.) (considering the limited extent to which an alternative would alleviate a religious burden in rejecting it as a "less restrictive alternative," even though the plaintiff had expressed a preference for the alternative over the challenged requirements). An eligible organization's religious objection to contraceptive coverage would still "facilitate" the availability of such coverage—in this case, by the government—and the eligible organization would likely be called upon to verify or certify matters such as the religious objection to contraceptive coverage, and employment or plan beneficiary status. Plaintiffs cannot plausibly contend that the regulations are not the least restrictive means while simultaneously asserting that they would oppose their own suggested alternatives.

Finally, even if plaintiffs would be satisfied by their proposed alternative schemes, just because plaintiffs can devise an entirely new legislative and administrative scheme does not make that scheme a feasible less restrictive means, *see Wilgus*, 638 F.3d at 1289; *Adams v. Comm'r of Internal Revenue*, 170 F.3d 173, 180 n.8 (3d Cir. 1999), particularly where such

alternatives would come at enormous administrative and financial cost to the government. A proposed alternative scheme is not an adequate alternative—and thus not a viable less restrictive means to achieve a compelling interest—if it is not feasible. *See, e.g.*, *New Life Baptist*, 885 F.2d at 947; *Graham*, 822 F.2d at 852. In determining whether a proposed alternative scheme is feasible, courts often consider the additional administrative and fiscal costs of the scheme. *See, e.g.*, *S. Ridge Baptist Church*, 911 F.2d at 1206; *Fegans v. Norris*, 537 F.3d 897, 905-06 (8th Cir. 2008); *United States v. Lafley*, 656 F.3d 936, 942 (9th Cir. 2011); *New Life Baptist*, 885 F.2d at 947. Defendants considered plaintiffs' alternatives and determined that they were not feasible because the agencies lacked statutory authority to implement them; they would impose considerable new costs and other burdens on the government; and they would otherwise be impractical. *See* 78 Fed. Reg. at 39,888, AR at 20; *see also, e.g.*, *Lafley*, 656 F.3d at 942; *Gooden v. Crain*, 353 F. App'x 885, 888 (5th Cir. 2009); *Adams*, 170 F.3d at 180 n.8.

Nor would the proposed alternatives be equally effective in advancing the government's compelling interests. *See* 78 Fed. Reg. at 39,888, AR at 20; *see also, e.g.*, *Kaemmerling*, 553 F.3d at 684 (finding that means was least restrictive where no alternative means would achieve compelling interests); *Murphy v. State of Ark.*, 852 F.2d 1039, 1042-43 (8th Cir. 1988) (same). As discussed above, Congress determined that the best way to achieve the goals of the ACA, including expanding preventive services coverage, was to build on the existing employer-based system. 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 existing ones, and would almost certainly require women to take burdensome steps to find out about the availability of and sign up for a new benefit, thereby ensuring that fewer women would take advantage of it. *See* 78

Fed. Reg. at 39,888, AR at 20. Nor do plaintiffs offer any suggestion as to how these programs could be integrated with the employer-based system or how women would obtain government-provided preventive services in practice. Thus, plaintiffs' proposals—in addition to raising myriad administrative and logistical difficulties and being unauthorized by any statute and not funded by any appropriation—are less likely to achieve the compelling interests furthered by the regulations, and therefore do not represent reasonable less restrictive means. *Id.*

Because plaintiffs have failed offer viable less restrictive alternatives, the Court should reject plaintiffs' argument that the regulations fail strict scrutiny.[11]

II. THE REGULATIONS DO NOT VIOLATE THE FREE EXERCISE CLAUSE

The Supreme Court has made clear that a law that is neutral and generally applicable does not run afoul of the Free Exercise Clause even if it prescribes conduct that an individual's religion proscribes or has the incidental effect of burdening a particular religious practice. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990); *see also Lukumi*, 508 U.S. at 531-32. "Neutrality and general applicability are interrelated." *Lukumi*, 508 U.S. at 531. A law is neutral if it does not target religiously motivated conduct either on its face or as applied. *Id*. at 533. A neutral law has as its purpose something other than the disapproval of a particular religion, or of religion in general. *Id*. at 545. A law is generally applicable so long as it does not selectively impose burdens only on conduct motivated by religious belief. *Id*.

Unlike such selective laws, the preventive services coverage regulations are neutral and generally applicable. Indeed, nearly every court to have considered a free exercise challenge to the prior version of the regulations has rejected it, concluding that the regulations are neutral and

[11] Plaintiffs rely on a law review article for the proposition that "recent scholarship" undermines the conclusions of the IOM Report. Pls.' Mem. at 28 (quoting Helen M. Alvare, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 389 (2013)). Of course, a law review article is a poor substitute for the scientific studies relied on by the IOM. Furthermore, it was not part of the administrative record, and therefore should not be considered in the course of the Court's review of agency regulations. *See, e.g.*, *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963). The Court should disregard this law review article and any other such extra-record material offered by plaintiffs.

generally applicable.[12] "The regulations were passed, not with the object of interfering with religious practices, but instead to improve women's access to health care and lessen the disparity between men's and women's healthcare costs." *O'Brien*, 894 F. Supp. 2d at 1161. The regulations reflect expert medical recommendations about the medical necessity of contraceptive services, without regard to any religious motivations about such services. *See, e.g.*, *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 410 (E.D. Pa. 2013) ("It is clear from the history of the regulations and the report published by [IOM] that the purpose of the [regulations] is not to target religion, but instead to promote public health and gender equality."); *Grote Industries, LLC v. Sebelius*, 914 F. Supp. 2d 943, 952-53 (S.D. Ind. 2012) ("[T]he purpose of the regulations is a secular one, to wit, to promote public health and gender equality.").

The regulations, moreover, do not pursue their purpose "only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545; *see United States v. Amer*, 110 F.3d 873, 879 (2d Cir. 1997) (concluding law that "punishe[d] conduct within its reach without regard to whether the conduct was religiously motivated" was generally applicable). The regulations apply to all non-grandfathered health plans that do not qualify for the religious employer exemption or the accommodations for eligible organizations. Thus, "it is just not true . . . that the burdens of the [regulations] fall on religious organizations 'but almost no others.'" *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (quoting *Lukumi*, 508 U.S. at 536); *see O'Brien*, 894 F. Supp. 2d at 1162; *Autocam Corp. v. Sebelius*, 2012 WL 6845677, at *5 (W.D. Mich. Dec. 24, 2012); *Grote*, 914 F. Supp. 2d at 953.

[12] *See MK Chambers Co. v. U.S. Dep't of Health & Human Servs.*, No. 13-cv-11379, 2013 WL 1340719, at *5 (E.D. Mich. Apr. 3, 2013); *Eden Foods*, 2013 WL 1190001, at *5; *Conestoga*, 917 F. Supp. 2d at 409-10; *Autocam*, 2012 WL 6845677, at *5; *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1289-90 (W.D. Okla. 2012), *rev'd on other grounds*, 723 F.3d 1114 (10th Cir. 2013); *O'Brien*, 894 F. Supp. 2d at 1160-62; *see also Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468-69 (N.Y. 2006) (rejecting similar challenge to state law); *Catholic Charities of Sacramento*, 85 P.3d at 81-87 (same). *But see Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-CV-92-DDN, 2012 WL 6738489, at *5 (E.D. Mo. Dec. 31, 2012); *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 437 (W.D. Penn. 2013).

The existence of express exceptions or accommodations for objectively defined categories of entities, like grandfathered plans, religious employers, and eligible organizations, "does not mean that [the regulations do] not apply generally." *Autocam*, 2012 WL 6845677, at *5. "General applicability does not mean absolute universality." *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008); *accord Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004); *Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 960-61 (9th Cir. 1991) (concluding employer verification statute was generally applicable even though it exempted independent contractors, household employees, and employees hired prior to November 1986 because exemptions "exclude[d] entire, objectively-defined categories of employees"); *Intercommunity Ctr. for Justice & Peace v. INS*, 910 F.2d 42, 44 (2d Cir. 1990) (same). "Instead, exemptions undermining 'general applicability' are those tending to suggest disfavor of religion." *O'Brien*, 894 F. Supp. 2d at 1162. The exception for grandfathered plans is available on equal terms to all employers, whether religious or secular. And the religious employer exemption and eligible organization accommodations serve to accommodate religion, not to disfavor it. *Id.*; *see also Conestoga*, 917 F. Supp. 2d at 410.[13] Thus, these categorical exceptions and accommodations do not trigger strict scrutiny.

Carving out an exemption for defined religious entities also does not make a law nonneutral as to others. Indeed, the religious employer exemption "presents a strong argument in favor of neutrality" by "demonstrating that the object of the law was not to infringe upon or restrict practices because of their religious motivation." *O'Brien*, 894 F. Supp. 2d at 1161 (quotations omitted); *see Conestoga*, 917 F. Supp. 2d at 410 ("The fact that exemptions were made for religious employers . . . . shows that the government made efforts to accommodate religious beliefs, which counsels in favor of the regulations' neutrality.").

[13] Plaintiffs' reliance on *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), *see* Pls.' Mem. at 31, is misplaced. That case addressed policies that created a secular exemption but refused all religious exemptions. *See id.* at 365. The preventive services coverage regulations, in contrast, contain both secular and religious exemptions. Thus, there is simply no basis in this case to infer "discriminatory intent" on the part of the government. *Id.*

Plaintiffs' reliance on *Lukumi*, 508 U.S. 520, is of no help, as this case is a far cry from *Lukumi*, where the legislature specifically targeted the religious exercise of members of a single church (Santeria) by enacting ordinances that used terms such as "sacrifice" and "ritual," *id*. at 533-34, and prohibited few, if any, animal killings other than Santeria sacrifices, *id*. at 535-36. Here, there is no indication that the regulations are anything other than an effort to increase women's access to and utilization of recommended preventive services. *See O'Brien*, 894 F. Supp. 2d at 1161; *Conestoga*, 917 F. Supp. 2d at 410. Plaintiffs' unsupported assertions that the regulations are "part of a conscious political strategy to marginalize and delegitimize Plaintiffs' religious views by holding them up for ridicule on the national stage," Pls.' Mem. at 32-33, is mere rhetorical bluster. And it cannot be disputed that defendants have made extensive efforts—through the religious employer exemption and the eligible organization accommodations—to accommodate religion in ways that will not undermine the goal of ensuring that women have access to coverage for recommended preventive services without cost sharing.

Finally, plaintiffs maintain that the challenged regulations are subject to strict scrutiny under a "hybrid rights" theory because they also infringe on plaintiffs' freedom of speech and association. Pls.' Mem. at 33. The Supreme Court, however, has never invoked this so-called "hybrid rights theory" to justify applying strict scrutiny to a free exercise claim. *See Lukumi*, 508 U.S. at 567 (Souter, J., concurring in part and concurring in the judgment) (noting the hybrid rights exception would either swallow the *Smith* rule or be entirely unnecessary). And several circuits have specifically rejected the theory. *See Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001); *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993). Nevertheless, assuming arguendo that the hybrid rights theory is valid, it applies only where the plaintiff's non-free-exercise claims are "independently viable." *Mahoney v. Dist. of Columbia*, 662 F. Supp. 2d 74, 95 n.12 (D.D.C. 2009). Here, plaintiffs assert in their brief that the preventive services coverage provision violates both the right to free exercise of religion and their rights to free speech and free association. Pls.' Mem. at 33. Yet, plaintiffs do not even raise a separate free association claim and, as explained below, their free speech claims are meritless.

"'[A] plaintiff does not allege a hybrid rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right.'" *Civil Liberties for Urban Believers*, 342 F.3d at 765 (quoting *Miller v. Reed*, 176 F.3d 1202, 1207-08 (9th Cir. 1999)); *see also Henderson*, 253 F.3d at 19 ("[T]he combination of two untenable claims" does not "equal[] a tenable one."). Thus, even if the hybrid rights theory were valid, it would not trigger strict scrutiny in this case.

For these reasons, plaintiffs' free exercise claim—Count II of the complaint—fails.[14]

III. THE REGULATIONS DO NOT VIOLATE THE FREE SPEECH CLAUSE

Plaintiffs' free speech claims fare 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 compel speech—by plaintiffs or any other person, employer, or entity—in violation of the First Amendment. Nor do they limit what plaintiffs may say. Plaintiffs remain free under the regulations to express whatever views they may have on the use of contraceptive services (or any other health care services) as well as their views about the regulations. Plaintiffs, moreover, may encourage their employees not to use contraceptive services.

Plaintiffs contend that the regulations violate their free speech rights in three ways, none of which has merit. First, plaintiffs are wrong to contend that the regulations require plaintiffs to "facilitate 'counseling' in favor of" preventive services to which they object. Pls.' Mem. at 34. The regulations simply require coverage of "education and counseling for all women with reproductive capacity." *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), AR at 283-84. There is no requirement that such education and counseling be "in favor of" any particular contraceptive service, or even in support of contraception in general. The conversations that may take place between a patient and her doctor cannot be known or screened in advance and may cover any number of options. To the

[14] Even if the regulations were not neutral or generally applicable, plaintiffs' free exercise challenge still would fail because the regulations satisfy strict scrutiny. *See supra*.

extent that plaintiffs intend to argue that the covered education and counseling is objectionable because some of the conversations between a doctor and one of plaintiffs' employees *might* be supportive of contraception, accepting this theory would mean that the First Amendment is violated by the mere possibility of an employer's disagreement with a potential subject of discussion between an employee and her doctor, and would extend to all such interactions, not just those that are the subject of the challenged regulations. The First Amendment does not require such a drastic result. *See, e.g.*, *Conestoga*, 917 F. Supp. 2d at 418-19.

Second, plaintiffs note that, in order to avail itself of an accommodation, an organization must self-certify that it meets the definition of "eligible organization." Pls.' Mem. at 35. But completion of the simple self-certification form is "plainly incidental to the . . . regulation of conduct," *FAIR*, 547 U.S. at 62, not speech. Indeed, every court to review a Free Speech challenge to the prior contraceptive-coverage regulations has rejected it, in part, because the regulations deal with conduct. *See MK Chambers Co.*, 2013 WL 1340719, at *6 ("Like the [law at issue in *FAIR*], the contraceptive requirement regulates conduct, not speech." (quotations omitted)); *Briscoe v. Sebelius*, 927 F. Supp. 2d 1109, 1120 (D. Colo. 2013) ("The plaintiffs cite no authority and I am not aware of any authority holding that such conduct qualifies as speech so as to trigger First Amendment protection."); *Conestoga*, 917 F. Supp. 2d at 418; *Grote*, 914 F. Supp. at 955; *Autocam*, 2012 WL 6845677, *8; *O'Brien*, 894 F. Supp. 2d at 1165-67; *see also Catholic Charities of Sacramento*, 85 P.3d at 89 (rejecting similar claim); *Diocese of Albany*, 859 N.E.2d at 465 (same). The accommodations likewise regulate conduct by relieving an eligible organization of the obligation "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874, AR at 6.[15] Plaintiffs'

[15] Indeed, self-certifying eligibility for a religious accommodation is a far cry from the laws at issue in the cases plaintiffs cite, which mandated the posting of specific written messages throughout an organization's building and advertisements, as well as speaking oral messages to the organization's clients. *See* Pls.' Mem. at 35 (citing *Evergreen Ass'n v. City of New York*, 801 F. Supp. 2d 197 (S.D.N.Y. 2011), and *Centro Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 2d 456 (D. Md. 2011)).

suggestion that self-certifying their eligibility for an accommodation, which is incidental to the regulation of conduct, violates their speech rights lacks merit. *See FAIR*, 547 U.S. at 61-63.

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

Finally, plaintiffs' claim that the regulations impose a so-called "gag order" that interferes with their free-speech rights, *see* Pls.' Mem. at 35-36, is wholly without merit. Defendants have been clear that "[n]othing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraception." 78 Fed. Reg. at 39,880 n.41, AR at 12. What the regulations prohibit is an employer's improper attempt to interfere with its employees' ability to obtain contraceptive coverage from a third party by, for example, threatening the TPA with a termination of its relationship with the employer because of the TPA's "arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries." *See* 26 C.F.R. § 54.9815-2713A(b)(1)(iii); 29 C.F.R. § 2590.715-2713A(b)(1)(iii). Addressing an analogous argument in the context of the National Labor Relations Act, the Supreme Court concluded that an employer's threatening statements to its

employees regarding the effects of unionization fell outside the protection of the First Amendment because they interfered with employee rights. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). The Court explained that there was no First Amendment violation because the employer was "free to communicate . . . any of his general views . . . so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Id.*; *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." (quotation omitted)). The same is true here. Because the regulations do not prevent plaintiffs from expressing their views regarding the use of contraceptive services, but, rather, protect employees' right to obtain payments for contraceptive services through TPAs, there is no infringement of plaintiffs' right to free speech.

Accordingly, the regulations do not violate the Free Speech Clause.

IV. THE REGULATIONS DO NOT VIOLATE THE ESTABLISHMENT CLAUSE

"The clearest command of the Establishment Clause is that one religious *denomination* cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982) (emphasis added). A law that discriminates among religions by "aid[ing] one religion" or "prefer[ring] one religion over another" is subject to strict scrutiny. *Id*. at 246; *see also Olsen v. DEA*, 878 F.2d 1458, 1461 (D.C. Cir. 1989). Thus, for example, the Supreme Court has struck down on Establishment Clause grounds a state statute that was "drafted with the explicit intention" of requiring "particular religious denominations" to comply with registration and reporting requirements while excluding other religious denominations. *Larson*, 456 U.S. at 254; *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703-07 (1994) (striking down statute that created special school district for religious enclave of Satmar Hasidim because it "single[d] out a particular religious sect for special treatment"). The Court, on the other hand, has upheld a statute that provided an exemption from military service for persons who had a conscientious objection to all wars, but not those who objected to only a particular

war. *Gillette v. United States*, 401 U.S. 437 (1971). The Court explained that the statute did not discriminate among religions because "no particular sectarian affiliation" was required to qualify for conscientious objector status. *Id*. at 450-51. "[C]onscientious objector status was available on an equal basis to both the Quaker and the Roman Catholic." *Larson*, 456 U.S. at 247 n.23; *see also Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (upholding RLUIPA against Establishment Clause challenge because it did not "confer[] . . . privileged status on any particular religious sect" or "single[] out [any] bona fide faith for disadvantageous treatment").

Like the statutes at issue in *Gillette* and *Cutter*, the preventive services coverage regulations do not grant any denominational preference or otherwise discriminate among religions. It is of no moment that the religious employer exemption and accommodations for eligible organizations apply to some employers but not others. "[T]he Establishment Clause does not prohibit the government from [differentiating between organizations based on their structure and purpose] when granting religious accommodations as long as the distinction[s] drawn by the regulations . . . [are] not based on religious affiliation." *Grote*, 914 F. Supp. 2d at 954; *accord O'Brien*, 894 F. Supp. 2d at 1163; *see also, e.g., Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1090-93 (8th Cir. 2000); *Droz v. Comm'r of IRS*, 48 F.3d 1120, 1124 (9th Cir. 1995); *Diocese of Albany*, 859 N.E.2d at 468-69. Here, the distinctions established by the regulations are not so drawn.

The regulations' definitions of religious employer and eligible organization "do[] not refer to any particular denomination." *Grote*, 914 F. Supp. 2d at 954. The exemption and accommodations are available on an equal basis to organizations affiliated with any and all religions. The regulations, therefore, do not discriminate among religions in violation of the Establishment Clause. Indeed, every court to have considered an Establishment Clause challenge to the prior version of the regulations has rejected it. *See, e.g., O'Brien*, 894 F. Supp. 2d at 1162 (upholding prior version of religious employer exemption because it did "not differentiate between religions, but applie[d] equally to all denominations"); *Conestoga*, 917 F. Supp. 2d at 416-17 (same); *Grote*, 914 F. Supp. 2d at 954 (same); *see also Liberty Univ., Inc. v. Lew*, __ F.3d

__, 2013 WL 3470532, at *18 (4th Cir. July 11, 2013) (upholding another religious exemption contained in the ACA against an Establishment Clause challenge).[16]

"As the Supreme Court has frequently articulated, there is space between the religion clauses, in which there is 'room for play in the joints;' government may encourage the free exercise of religion by granting religious accommodations, even if not required by the Free Exercise Clause, without running afoul of the Establishment Clause." *O'Brien*, 894 F. Supp. 2d at 1163 (citations omitted). Accommodations of religion are possible because the type of legislative line-drawing to which the plaintiffs object in this case is constitutionally permissible. *Id*.; *Conestoga*, 917 F. Supp. 2d at 417; *see, e.g., Walz v. Tax Comm'n of NY*, 397 U.S. 664, 666 (1970); *Amos*, 483 U.S. at 334 (upholding Title VII's exemption for religious organizations).[17]

Plaintiffs also claim that the regulations' definition of religious employer violates the Establishment Clause because, more than thirty-five years ago, the Internal Revenue Service (IRS) developed a non-exhaustive list of fourteen facts and circumstances that may be considered, in addition to "any other facts and circumstances which may bear upon the

[16] Plaintiffs stretch *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), well beyond its facts in suggesting that the case stands for the proposition that the Establishment Clause prohibits the government from distinguishing among different types of organizations that adhere to the same religion. Pls.' Mem. at 37. The court's decision in *Weaver* was limited to "laws that facially regulate religious issues," *id*. at 1257, and, particularly, those that do so in a way that denies certain religious institutions public benefits that are afforded to all other institutions, whether secular or religious. The court in *Weaver* said nothing about the constitutionality of exemptions from generally applicable laws that are designed to accommodate religion, as opposed to discriminate against religion. A requirement that any religious exemption that the government creates must extend to all organizations—no matter their structure or purpose—would severely hamper the government's ability to accommodate religion. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987) ("There is ample room under the Establishment Clause for 'benevolent' neutrality which will permit religious exercise to exist without sponsorship and without interference."); *Diocese of Albany*, 859 N.E.2d at 464 ("To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions – and thus to restrict, rather than promote, freedom of religion."). And the manner in which the law at issue in *Weaver* was administered required the government to make intrusive inquiries into a school's religious beliefs and practices by, for example, reading syllabi to determine if a school's theology courses were likely to convince students of religious truths. *See* 534 F.3d at 1261-62. The religious employer exemption requires no such inquiry. Qualification for the exemption does not require the government to make any determination, much less an unconstitutionally intrusive one.

[17] 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*; *Larson*, 456 U.S. at 251-52.

organization's claim for church status," in assessing whether an organization is a church. *See Found. of Human Understanding v. Comm'r of IRS*, 88 T.C. 1341, 1357-58 (1987); Internal Revenue Manual (IRM) 7.26.2.2.4. Although plaintiffs do not appear to have ever before challenged the constitutionality of this non-exhaustive list, they now contend that it acts to require the government to make impermissible "judgments regarding religious beliefs, practices, and organizational structure." Pls.' Mem. at 39-40. This claim fails for numerous reasons.

As an initial matter, the claim is not ripe for adjudication. The non-exhaustive list that plaintiffs seek to challenge is not set out in any statute, regulation, or other binding source of law. It is instead contained in the IRM, which serves as a source of guidance for the internal administration of the IRS and is not binding on the IRS or courts. *United States v. Will*, 671 F.2d 963, 967 (6th Cir. 1982); *Capital Fed. Sav. & Loan Ass'n v. Comm'r of Internal Revenue*, 96 T.C. 204, 216-17 (1991). A party can challenge such guidance "only if and when the directive has been applied specifically to them." *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987); *see also, e.g.*, *Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Eng'rs*, 335 F.3d 607, 619 (7th Cir. 2003) (concluding general statement of policy was not ripe for review). Plaintiffs do not challenge any determination by the IRS that was based on this IRM provision. Because defendants have not applied a similar non-exhaustive list of facts and circumstances to plaintiffs, plaintiffs' challenge is not ripe.

Indeed, qualification for the religious employer exemption does not require the government to make any determination, whether as a result of the application of the non-exhaustive list or otherwise. If an organization "is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended," it qualifies for the exemption, without any government action whatsoever. 45 C.F.R. § 147.131(a). Plaintiffs, moreover, have no difficulty determining whether they qualify for the exemption. Catholic Charities alleges that it does not qualify for the exemption, Compl. ¶ 45, while the Diocese alleges that it does qualify for the exemption, *id.* ¶ 46. Any claim—which plaintiffs do not in fact make—that the government will dispute these allegations and

therefore need to undertake any sort of intrusive inquiry into whether plaintiffs qualify for the exemption is entirely speculative and thus unripe for this reason as well.

Finally, even assuming plaintiffs could mount a facial challenge to a non-exhaustive list of facts and circumstances that the defendant agencies have never applied to plaintiffs, any such challenge would be meritless. Any interaction between the government and religious organizations that may be necessary to enforce the religious employer exemption is not so "comprehensive," *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971), or "pervasive," *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (quotations omitted), as to result in excessive entanglement. The Supreme Court has upheld laws that require government monitoring that is more onerous than any monitoring that may be required to enforce the religious employer exemption. *See Bowen v. Kendrick*, 487 U.S. 589, 615-617 (1988) (no excessive entanglement where the government reviewed and monitored programs and materials); *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 764–765 (1976) (no excessive entanglement where the state conducted annual audits); *see also United States v. Corum*, 362 F.3d 489, 496 (8th Cir. 2004). And every court to address the issue upheld the prior version of the religious employer exemption, which contained the same requirement that the organization be one that is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended, against an entanglement challenge. *See Conestoga*, 917 F. Supp. 2d at 417; *O'Brien*, 894 F. Supp. 2d at 1164-65; *Geneva Coll.*, 929 F. Supp. 2d at 439-40.[18] For all of these reasons, plaintiffs' Establishment Clause claim—Count V of the Complaint—fails.

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

V. THE REGULATIONS DO NOT INTERFERE WITH CHURCH GOVERNANCE

Plaintiffs also assert that, by allegedly requiring plaintiffs to facilitate practices in violation of their religious beliefs, the regulations interfere with plaintiffs' "internal church governance" in violation of the Religion Clauses. *See* Pls.' Mem. at 40-41; *see also* Compl. ¶¶ 240-54. But that is merely a restatement of plaintiffs' substantial burden theory, which fails for reasons explained already. Indeed, the lone case cited by plaintiffs on this point, *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 132 S. Ct. 694 (2012), is inapposite. In *Hosanna-Tabor*, the Supreme Court held that allowing a minister employee to sue her church employer under the Americans with Disabilities Act—thereby interfering with "a church's ability to select its own ministers"—violates the Free Exercise and Establishment Clauses. *Id.* at 704, 706. But this case is not about the selection of clergy, nor any other matters of church governance apart from plaintiffs' religious objection to providing contraceptive coverage (which, again, is subsumed by plaintiffs' substantial burden argument). Nor is this case about any law that regulates the structure of the church—plaintiffs may choose whatever organizational structure they wish. Thus, Count VI of plaintiffs' complaint should be dismissed or summary judgment granted to defendants.

VI. PLAINTIFFS' APA AND REGULATORY INTERPRETATION CLAIMS FAIL

A. The Regulations Do Not Violate Restrictions Relating To Abortion

Plaintiffs contend the regulations violate the APA because they conflict with two federal statutes dealing with abortion: section 1303(b)(1) of the ACA, and the Weldon Amendment to the Consolidated Appropriations Act of 2012. Plaintiffs appear to reason that, because the preventive services regulations require group health plans to cover emergency contraception, such as Plan B, they require plaintiffs to provide coverage for abortions in violation of federal law.

Plaintiffs' premise that the contraceptive coverage regulations require abortion coverage is fundamentally incorrect. The regulations do not require that any health plan cover abortion at all, much less as a preventive service. The regulations require only that non-grandfathered, non-

exempt and non-accommodated 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, AR at 283-84. And the government has made clear that the preventive services covered by the regulations do not include abortifacient drugs.[19] Although plaintiffs are certainly entitled to believe that emergency contraceptives and certain IUDs are abortifacient drugs or cause abortions, neither the government nor this Court is required to accept that characterization, which is inconsistent with the FDA's scientific assessment and with federal law. While plaintiffs' religious beliefs may define abortion more broadly than federal law, statutory interpretation requires that terms be construed as a matter of law and not in accordance with any particular individual's personal views or beliefs. *E.g.*, *GEICO v. Benton*, 859 F.2d 1147, 1149 (3d Cir. 1988).

In recommending what contraceptive services should be covered by health plans without cost-sharing, the IOM Report identified the contraceptives that have been approved by the FDA as safe and effective. *See* IOM REP. at 10, AR at 308. And the list of FDA-approved contraceptives includes emergency contraceptives such as Plan B. *See id.* at 105, AR at 403. The basis for the inclusion of such drugs among 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. *See* Prescription Drug Products; Certain Combined Oral Contra for Use as Postcoital Emergency Contraception, 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997); 45 C.F.R. § 46.202(f). In light of this conclusion by the FDA, HHS informed Title X grantees, which are required to offer a range of acceptable and effective family planning methods—and, except under limited circumstances, 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

[19] HealthCare.gov, Affordable Care Act Rules on Expanding Access to Preventive Services for Women (August 1, 2011), *available at* http://www.hhs.gov/healthcare/facts/factsheets/2011/08/womensprevention08012011a.html (last visited Sept. 11, 2013); *see also* IOM REP. at 22 (recognizing that abortion services are outside the scope of recommendations), AR at 320.

and effective." Office of Population Affairs, Memorandum (Apr. 23, 1997), http://www.hhs.gov/opa/pdfs/opa-97-02.pdf (last visited Sept. 11, 2013); *see also* 42 U.S.C. §§ 300, 300a-6.

Thus, the regulations are consistent with over a decade of regulatory policy and practice and thus cannot be deemed contrary to any law dealing with abortion. *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).[20] Count VII of the complaint should therefore be dismissed or summary judgment granted to defendants.

B. Defendants' Interpretation of the Regulations Is Not Erroneous

Plaintiffs allege that defendants have incorrectly interpreted the religious employer exemption with respect to "multi-employer plans"—plans that, as relevant here, are co-established or co-maintained by an entity that qualifies for the religious employer exemption and by non-exempt entities as well. As to these non-exempt entities, the preamble to the final rules explains that "[t]he final regulations continue to provide that the availability of the exemption or an accommodation be determined on an employer-by-employer basis, which the Departments continue to believe best balances the interests of religious employers and eligible organizations and those of employees and their dependents." 78 Fed. Reg. at 39,886, AR at 18. Plaintiffs claim that the religious employer exemption regulatory text's reference to "group health plan[s]," 45 C.F.R. § 147.131(a), unambiguously requires that the exemption be applied instead on a plan-by-plan basis—in other words, that all employers participating in such a plan must be exempt from the contraceptive coverage requirement regardless of whether they themselves satisfy the "religious employer" criteria. This is incorrect.

[20] Representative Weldon, the sponsor of the Weldon Amendment, himself did not consider the word "abortion" in the statute to include FDA-approved emergency contraceptives. *See* 148 Cong. Rec. H6566, H6580 (daily ed. Sept. 25, 2002) ("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. . . . [U]nder the current FDA policy[,] that is considered contraception, and it is not affected at all by this statute.").

The regulations speak of "group health plan[s]" simply because the contraceptive coverage requirement, like all of the other preventive services coverage requirements, applies to group health plans and not to employers themselves. *See, e.g.*, 45 C.F.R. § 147.130(a) (generally setting out the requirement that "a group health plan" must provide coverage for certain preventive services). Use of the phrase "group health plan" is thus nothing more than a matter of consistency with the structure of the broader regulatory scheme. Moreover, the very title of the relevant subsection—"religious *employers*," *id.* § 147.131(a) (emphasis added)—indicates that the exemption set out in that provision is one that relates to the nature of the relevant employer. Given this context, the phrase "group health plan" cannot bear the more expansive definition that plaintiffs would ascribe to it. At the very least, the phrase is ambiguous in context, and defendants' interpretation of the applicability of the provision as dependent on the individual qualifications of the particular employer is entitled to deference because it is neither "plainly erroneous [n]or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

Indeed, defendants have *never* suggested that the regulations would require or do require a plan-by-plan approach. Plaintiffs' misleading quotation from the ANPRM does not indicate otherwise when read in full. In the ANPRM, defendants said:

> For example, a Catholic elementary school may be a distinct common-law employer from the Catholic diocese with which it is affiliated. If the school's employees receive health coverage through a plan established or maintained by the school, *and the school meets the definition of a religious employer in the final regulations*, then the religious employer exemption applies. If, instead, *the same school* provides health coverage for its employees through the same plan under which the diocese provides coverage for its employees, and the diocese is exempt from the requirement to cover contraceptive services, then neither the diocese nor the school is required to offer contraceptive coverage to its employees.

77 Fed. Reg. 16,501, 16,502 (Mar. 21, 2012) (emphasis added), AR at 187. This passage in no way suggests that a non-exempt employer (i.e., one that does not meet the definition of "religious employer" in the final rules) would become exempt simply by providing coverage through the same plan as an exempt employer. Far from it, both hypotheticals presented in the ANPRM deal with a school—the "same" school—that itself meets the definition of an exempt religious

employer. Defendants' interpretation of the regulations to exempt entities on an employer-by-employer basis is thus consistent with both the regulatory text and with defendants' prior statements in the ANPRM. Moreover, the agencies expressly "propose[d] to make the accommodation or the religious employer exemption available on an employer-by-employer basis" in the NPRM. 78 Fed. Reg. at 8467, AR at 176. Plaintiffs' apparent attempt to undermine the deference owed to the agencies' interpretation of the final regulations is thus unpersuasive on its face. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (deferring to agency's interpretation of its own ambiguous regulations where "petitioner fail[ed] to present persuasive evidence that the Secretary has interpreted the . . . provision in an inconsistent manner"). Because defendants' interpretation of the regulations is consistent with the text and entitled to deference, Count VIII of the Amended Complaint should be dismissed or summary judgment granted to defendants.

CONCLUSION

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

Respectfully submitted this 8th day of November, 2013,

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