

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

AVE MARIA FOUNDATION, *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-15198-SJM-MAR

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS'
MOTION FOR TEMPORARY RESTRAINING ORDER**

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ISSUES PRESENTED

1. Have plaintiffs shown a likelihood of success on their claim that the preventive services coverage regulations substantially burden their religious exercise under the Religious Freedom Restoration Act?
2. Assuming the regulations substantially burden plaintiffs' religious exercise, have plaintiffs shown a likelihood of success on their claim that the regulations do not serve compelling governmental interest or are not the least restrictive means to achieve those interest?
3. Assuming plaintiffs have shown a likelihood of success on the merits, have plaintiffs established irreparable harm and that the public interest weights in favor of granting a preliminary injunction?

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

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INTRODUCTION

Plaintiffs—The Ave Maria Foundation, Ave Maria Communications, Domino’s Farms Petting Farm, Rhodora J. Donahu Academy, Inc., and Thomas More Law Center—challenge regulations related to the provision of contraceptive coverage that do not burden their religious exercise and, indeed, require them only to take the *de minimis* step that they would have to take in the absence of such regulations: convey to their health insurance insurer that they object to providing contraceptive services. Plaintiffs are eligible for a regulatory accommodation that relieves them from having to contract, arrange, pay or refer for contraceptive coverage, and that in no way prevents them from continuing to voice their disapproval of contraception or from encouraging their employees to refrain from using contraception. To avail themselves of this significant accommodation, plaintiffs need do nothing more than provide their insurer with a copy of a self-certification that they are eligible for the accommodation and do not wish to provide contraception. Such a minimal requirement is no “burden” at all, let alone one sufficient to invalidate the regulations.

Specifically, plaintiffs ask this Court to preliminarily enjoin regulations that are intended to accommodate religious exercise while helping to ensure that women have access to health coverage, without cost-sharing, for preventive services that medical experts deem necessary for women’s health and well-being. Subject to an exemption for houses of worship and their integrated auxiliaries, and accommodations for certain other non-profit religious organizations, as discussed below, the regulations that plaintiffs challenge require certain group health plans and health insurance issuers and third-party administrators 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 objected on religious grounds to having to provide contraceptive coverage in the group health plans they offer to 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). In addition, defendants established accommodations for the group health plans of eligible non-profit religious organizations, like the plaintiffs here (and any associated group health insurance coverage), that relieve them of responsibility to contract, arrange, pay, or refer for contraceptive coverage or services, but that also ensure that the women who participate in these plans are not denied access to contraceptive coverage without cost-sharing. To be eligible for an accommodation, the organization merely needs to certify that it meets the eligibility criteria, *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 organization has third-party insurance—like the plaintiffs here—the third-party insurer takes on the responsibility to provide contraceptive coverage to the organization's employees and covered dependents. The objecting employer bears none of the cost (if any) of providing contraceptive coverage; nor does it administer such coverage; nor does it

contract or otherwise arrange for such coverage; nor does it refer for such coverage.

Remarkably, plaintiffs now declare that these accommodations themselves violate their rights under RFRA and the First Amendment. They contend that the mere act of certifying that they are eligible for an accommodation is a substantial burden on their religious exercise because, once they make the certification, their employees will be able to obtain contraceptive coverage through other parties. 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 religious beliefs prohibiting them from providing or facilitating health coverage for certain contraceptive services, and that the challenged regulations violate RFRA, the First Amendment, and the Administrative Procedure Act (APA).

With respect to plaintiffs' RFRA claim, which is the only claim that plaintiffs raise in their motion for a temporary restraining order, 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 to obtain the accommodation is itself a burden on their religious exercise. But the challenged regulations require plaintiffs *only* to self-certify that they have a religious objection to providing contraceptive coverage and otherwise meet the criteria for an eligible organization, and to share that self-certification with their

issuer. In other words, plaintiffs are required only to inform their issuer that they object to providing contraceptive services, which they 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 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. *See Univ. of Notre Dame v. Sebelius*, No. 3:13-cv-01276-PPS-CAN, slip op. at 17-24 (N.D. Ind. Dec. 20, 2013) (concluding that the accommodation at issue here does not impose a substantial burden on the plaintiff's religious exercise); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-1261-EGS, 2013 WL 6672400, at *6-10 (D.D.C. Dec. 19, 2013) (same); *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-cv-1303, slip op at 6-10 (M.D. Tenn. Dec. 26, 2013) (same).

Further, plaintiffs' challenge rests largely on the theory that even the extremely attenuated connection between them and the independent provision by insurers 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*, 730 F.3d 618 (6th Cir. 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 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.

Thus, and as explained below, the Court should deny plaintiffs' motion for a temporary restraining order.

BACKGROUND

Before the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), many Americans did not receive the preventive health care they needed to stay healthy, avoid or delay the onset of disease, lead productive lives, and reduce health care costs. Due largely to cost, Americans used preventive services at about half the recommended rate. *See* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 19-20, 109 (2011) ("IOM REP."), AR at 317-18, 407. ¹ Section 1001 of the ACA—which includes the preventive services coverage provision relevant here—seeks to cure this problem by making preventive care accessible and affordable for many more Americans. Specifically, the provision requires all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, "[for] women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]." 42 U.S.C. § 300gg-13(a)(4).

¹ Where appropriate, defendants have provided parallel citations to the Administrative Record (AR).

Because there were no existing HRSA guidelines relating to preventive care and screening for women, the Department of Health and Human Services (HHS) requested that the Institute of Medicine (IOM) develop recommendations to implement the requirement to provide coverage, without cost-sharing, of preventive services for women. IOM REP. at 2, AR at 300.² After conducting an extensive science-based review, IOM recommended that HRSA guidelines include, among other things, well-woman visits; breastfeeding support; domestic violence screening; and, as relevant here, “the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity.” *Id.* at 10-12, AR at 308-10. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives, and intrauterine devices (“IUDs”). *See id.* at 105, AR at 403. IOM determined that coverage, without cost-sharing, for these services is necessary to increase access to such services, and thereby reduce unintended pregnancies (and the negative health outcomes that disproportionately accompany unintended pregnancies) and promote healthy birth spacing. *See id.* at 102-03, AR at 400-01.³

On August 1, 2011, HRSA adopted guidelines consistent with IOM’s recommendations, subject to an exemption relating to certain religious employers authorized by regulations issued that same day (the “2011 amended interim final regulations”). *See* HRSA, Women’s Preventive Services: Required Health Plan

² IOM, which was established by the National Academy of Sciences in 1970, is funded by Congress to provide expert advice to the federal government on matters of public health. IOM REP. at iv, AR at 289.

³ At least twenty-eight states have laws requiring health insurance policies that cover prescription drugs to also provide coverage for FDA-approved contraceptives. *See* Guttmacher Institute, State Policies in Brief: Insurance Coverage of Contraceptives (June 2013), AR at 1023-26.

Coverage Guidelines (“HRSA Guidelines”), AR at 283-84.⁴ Group health plans established or maintained by these religious employers (and associated group health insurance coverage) are exempt from any requirement to cover contraceptive services consistent with HRSA’s guidelines. *See id.*; 45 C.F.R. § 147.131(a).

In February 2012, the government adopted in final regulations the definition of “religious employer” contained in the 2011 amended interim final regulations while also creating a temporary enforcement safe harbor for non-grandfathered group health plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage (and any associated group health insurance coverage). *See* 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012), AR at 213-14. The government committed to undertake a new rulemaking during the safe harbor period to adopt new regulations to further accommodate non-grandfathered non-profit religious organizations’ religious objections to covering contraceptive services. *Id.* at 8728, AR at 215. The regulations challenged here (the “2013 final rules”) represent the culmination of that process. *See* 78 Fed. Reg. 39,870 (July 2, 2013), AR at 1-31; *see also* 77 Fed. Reg. 16,501 (Mar. 21, 2012) (Advance Notice of Proposed Rulemaking (ANPRM)), AR at 186-93; 78 Fed. Reg. 8456 (Feb. 6, 2013) (Notice of Proposed Rulemaking (NPRM)), AR at 165-85.

⁴ To qualify for the religious employer exemption contained in the 2011 amended interim final regulations, an employer had to meet the following criteria:

- (1) The inculcation of religious values is the purpose of the organization;
- (2) the organization primarily employs persons who share the religious tenets of the organization;
- (3) the organization serves primarily persons who share the religious tenets of the organization; and
- (4) the organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011), AR at 220.

The 2013 final rules represent a significant accommodation by the government of the religious objections of certain non-profit religious organizations while promoting two important policy goals. First, the regulations provide women who work for non-profit religious organizations with access to contraceptive coverage without cost sharing, thereby advancing the compelling government interests in safeguarding public health and ensuring that women have equal access to health care. Second, the regulations advance these interests in a narrowly tailored fashion that does not require non-profit religious organizations with religious objections to providing contraceptive coverage to contract, pay, arrange, or refer for that coverage.

The 2013 final rules simplify and clarify the religious employer exemption by eliminating the first three criteria and clarifying the fourth criterion. *See supra* note 4. Under the 2013 final rules, a “religious employer” is “an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended,” which refers to churches, their integrated auxiliaries, and conventions or associations of churches, and the exclusively religious activities of any religious order. 45 C.F.R. § 147.131(a). The changes made to the definition of religious employer in the 2013 final rules are intended to ensure “that a n otherwise exempt plan is not disqualified because the employer’s purposes extend beyond the inculcation of religious values or because the employer hires or serves people of different religious faiths.” 78 Fed. Reg. at 39,874, AR at 6.

The 2013 final rules also establish accommodations with respect to the contraceptive coverage requirement for group health plans established or maintained by “eligible organizations” (and group health insurance coverage provided in connection with such plans). *Id.* at 39,875-81, AR at 7-13; 45 C.F.R.

§ 147.131(b), (f) (student health plans). An “eligible organization” is an organization that satisfies the following criteria:

- (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
- (2) The organization is organized and operates as a nonprofit entity.
- (3) The organization holds itself out as a religious organization.
- (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies.

45 C.F.R. § 147.131(b); *see also* 78 Fed. Reg. at 39,874-75, AR at 6-7.

Under the 2013 final rules, an eligible organization is not required “to contract, arrange, pay, or refer for contraceptive coverage” to which it has religious objections. 78 Fed. Reg. at 39,874, AR at 6. To be relieved of any such obligations, the rules require only that an eligible organization complete a self-certification form stating that it is an eligible organization and provide a copy of that self-certification to its issuer (or third-party administrator in the case of a self-insured group health plan). *Id.* at 39,878-79, AR at 10-11. Its participants and beneficiaries, however, will still benefit from separate payments for contraceptive services without cost sharing or other charge. *Id.* at 39,874, AR at 6. In the case of an organization with an insured group health plan, the organization’s health insurance issuer, upon receipt of the self-certification, must provide separate payments to plan participants and beneficiaries for contraceptive services without cost sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or its plan. *See id.* at 39,875-77, 39,881, AR at 7-9, 13.

The 2013 final rules generally apply to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014, *see id.* at 39,872, AR at 4, except that the amendments to the religious employer exemption

apply to group health plans and group health insurance issuers for plan years beginning on or after August 1, 2013, *see id.* at 39,871, AR at 3.

STANDARD OF REVIEW

A temporary restraining order is an “extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Id.* at 20; *Workman v. Bredsen*, 486 F.3d 896, 904-05 (6th Cir. 2012).

ARGUMENT

A. PLAINTIFFS’ RELIGIOUS 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)); *see also Notre Dame*, slip op. at 16-17; *Priests for Life*, 2013 WL 6672400, at *6-10; *Catholic Diocese of Nashville*, slip op. at 7-9. “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." *Id.* at 678; *see also Braunfeld v. Brown*, 366 U.S. 599, 606 (1961); *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 262 (3d Cir. 2008) (Scirica, C.J., concurring).

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

⁵ Plaintiffs rely heavily on two out-of-circuit cases—*Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), and *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013)—both of which involve for-profit companies and which conflict with the Sixth Circuit's *Autocam* decision. *See, e.g.*, Pls.' Mem. at 16-18, 22-23. Those cases are inapposite because for-profit corporations—unlike plaintiffs—do *not* qualify for the religious employer exemption or the accommodations for eligible organizations. *See* 78 Fed. Reg. at 39,875, AR at 7. Thus, for example, the regulations require for-profit companies to contract or otherwise arrange and pay for contraceptive coverage for the participants and beneficiaries of their group health plan. Plaintiffs, by contrast, are in a markedly different position than the *Hobby Lobby* and *Korte* plaintiffs. As previously explained, in order to be relieved of the obligation to contract or otherwise arrange and pay for contraceptive coverage, plaintiffs must take the simple step of completing the self-certification—which reiterates what they have already stated repeatedly in this case; that they are non-profit religious with religious objections to providing contraceptive coverage—and provide a copy of the self-certification to their issuers.

Similarly, the district court in *Zubik v. Sebelius*, Nos. 13cv1459, 13cv0303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013), was wrong to rely on cases involving claims of for-profit employers. The *Zubik* court's conclusion that the regulations at issue in that case (and in this one) impose a substantial burden on the plaintiffs in that case—which was rendered without citation to any legal authority, *id.* at *24-27—is unpersuasive. With respect to *Archdiocese of New York v. Sebelius*, No. 1:12-cv-2542-BMC (E.D.N.Y. Dec. 16, 2013), also cited by plaintiffs, the court's ruling was based on an erroneous interpretation of RFRA. The court held that "[w]here government action coerces a religious adherent to undertake affirmative acts contrary to his religious beliefs, the 'substantial burden' inquiry should focus primarily on the intensity of the coercion applied by the government to act." Slip op. at 22. Under this theory, the mere fact that a plaintiff sincerely believes that a challenged law violates his religious beliefs would be sufficient to amount to a substantial burden so long as there is an adverse consequence attached to violating the law. Courts would play no role in determining whether an alleged burden is "substantial." This expansive interpretation of RFRA has no limiting principle and is not supported by the case law or the legislative history.

even if this Court finds 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. Plaintiffs, as eligible organizations, are not required to contract, arrange, pay, or refer for contraceptive coverage. To the contrary, these plaintiffs are free to continue to refuse to do so, to voice their disapproval of contraception, and to encourage their employees to refrain from using contraceptive services. Plaintiffs need only fulfill the self-certification requirement and provide the completed self-certification to their issuer. Plaintiffs need not pay for contraceptive services to their employees. Instead, third parties—plaintiffs' issuer—provide payments for contraceptive services, at no cost to plaintiffs. In short, with respect to contraceptive coverage, the non-exempt plaintiffs need not do anything more than they did prior to the promulgation of the challenged regulations—that is, to inform their issuer 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 *Notre Dame*, slip op. at 17-24; *Priests for Life*, 2013 WL 6672400, at *8-10; *Catholic Diocese of Nashville*, slip op. at 7-9.

Because the regulations place no burden *at all* on plaintiffs, they plainly place no cognizable burden on their religious exercise. Plaintiffs' contrary argument rests on an unprecedented and sweeping theory of what it means for religious exercise to be burdened. Not only do plaintiffs want to be free from contracting, arranging, paying, or referring for contraceptive services for their employees—which, under these regulations, they are—but plaintiffs would also prevent *anyone else* from providing such coverage to their employees, who might not subscribe to plaintiffs' religious beliefs. Plaintiffs' expansive theory of RFRA would mean, for example, that even the government would not realistically be able to provide contraceptive coverage to plaintiffs' employees (as plaintiffs elsewhere suggest), because it would be “trigger[ed],” *id.* ¶ 169; Pls.' Mem. at 11, 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), 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] activity[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.*, Compl. ¶¶ 184, 211; Pls.’ Mem at 14, 19. But the challenged regulations require plaintiffs *only* to self-certify that they object to providing coverage for contraceptive services and that they otherwise meet the criteria for an eligible organization, and to share that self-certification with their issuer. In other words, plaintiffs are required to inform their issuer that they object to providing contraceptive coverage, which they 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 issuer that their objection is for religious reasons—a statement they have already made repeatedly in this litigation.

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 Sixth Circuit

and other courts have made clear that 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 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.b. But, in any event, plaintiffs’ own proposals would entail the same putative “burden” as the existing accommodations, or an even greater burden: One way or another, plaintiffs would have to certify their eligibility for an accommodation, and the result would be that the women who participate in the 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.

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.”). 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, 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). A law “substantially burdens” an exercise of religion if it compels a person to “perform *acts* undeniably at odds with fundamental tenets of [one’s] religious beliefs,” *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.” *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.⁶

Under plaintiffs' alternative interpretation of RFRA, courts would play a virtually no role in determining whether an alleged burden is "substantial"—as long as a plaintiff's religious belief is sincere, that would be the end of the inquiry. Plaintiffs would thus be allowed to evade RFRA's threshold by simply asserting that the burden on their religious exercise is "substantial," thereby paradoxically reading the term "substantial" out of RFRA. *See 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*

⁶ In *Hobby Lobby*, 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. For similar reasons, the Seventh Circuit's substantial burden analysis in *Korte*—which followed *Hobby Lobby*—is unpersuasive. *See Korte*, 735 F.3d at 683.

also *Autocam*, 2012 WL 6845677, at *7; *Mersino*, 2013 WL 3546702, at *16.⁷ 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. This is not the law.

Plaintiffs rely heavily on the recent decision in *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013). Defendants respectfully submit that *Legatus* was wrongly decided, for the reasons discussed above, and for the reasons stated in other recent cases rejecting similar RFRA claims. See *Notre Dame*, slip op. at 11-25; *Priests for Life*, 2013 WL 6672400, at *5-10; *Catholic Diocese of Nashville*, slip op. at 7-10. The *Legatus* court's discussion of the central issue in this case—the existence or not of a substantial burden on a plaintiff's religious exercise—is extraordinarily scant. See 2013 WL 6768607, at *7-8. The court did nothing more than “accep[t] the assertion” offered by the plaintiff that the regulations substantially burden its exercise of religion, *id.* at *8, but as defendants have explained, RFRA requires a court to undertake an objective inquiry into whether, as a legal matter, the nature of the burden imposed on a plaintiff is, in fact, substantial. See also *Conestoga*, 917 F. Supp. 2d at 413. Indeed, the opinion in *Legatus* illustrates that plaintiffs' limitless approach to RFRA would leave nearly nothing for a reviewing court to do, and would mean that every time a plaintiff could articulate a sincerely held religious objection to any law, that law would be found to impose a substantial burden on that plaintiff, and would be

⁷ 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).

subjected to strict scrutiny, the “most demanding test known to constitutional law.” *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

In sum, the regulations do not impose a substantial burden on plaintiffs’ religious exercise, and thus plaintiffs are not likely to succeed on the merits.

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 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—unlike here—actually require employers to contract, arrange, pay, or refer for 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 1158-60.⁸

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

⁸ See also *Korte*, 735 F.3d at *709-14 (Rovner, J., dissenting); *Eden Foods*, 2013 WL 1190001, at *4; *Annex Medical*, 2013 WL 101927, at *4-5.

issuer.

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 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 *7.⁹ Here, of course, there is no such direct burden. In fact, given that any payment for contraceptive services is made by plaintiffs’ issuer, 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 Catholic Diocese of Nashville*, slip op. at 9 n.8; *O’Brien*, 894 F. Supp. 2d at 1160; *Conestoga*, 917 F. Supp. 2d at 414; *Korte*, 735 F.3d at 715-16 (Rovner, J., dissenting); *Autocam*, 2012 WL 6845677, at *6.

⁹ *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 10, 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 substantial burden analysis in *Hobby Lobby* and *Korte* are inapplicable to this case. *See supra* notes 6 & 7.

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 most 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 deny plaintiffs' motion for a temporary restraining order, even if it finds—contrary to the government's argument—that the challenged regulations impose some burden on plaintiffs' religious exercise.

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. at 39,887, AR at 19.

The primary predicted benefit of the preventive services coverage regulations is that "individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of

disease.” 75 Fed. Reg. 41,726, 41,733 (July 19, 2010), AR at 233; *see also* 77 Fed. Reg. at 8728, 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.

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* 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
(Footnote continued on next page)

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 24. 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

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 22-23. But this level of specificity would be impossible to establish and would render this regulatory scheme—and potentially every regulatory scheme 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.

“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 Lee*, 455 U.S. at 259 (“The Court has long recognized that balance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions.”); *Winddancer*, 435 F. Supp. 2d at 695-98 (recognizing that the regulations governing access to eagle parts “strike a delicate balance” between competing 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 of 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.

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 O Centro*, 546 U.S. at 435. We are a "cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld*, 366 U.S. at 606; *see also S. Ridge Baptist Church*, 911 F.2d at 1211, and many people object to various medical services. If any organization with a religious objection were able to claim an exemption from the operation of the preventive services coverage regulations—even where the regulations require virtually nothing of the organization—it is difficult to see how defendants could administer the regulations in a manner that would achieve Congress's goals of improving the health of women and newborn children and equalizing the coverage of preventive services for women. *See United States v. Israel*, 317 F.3d 768, 772 (7th Cir. 2003) (recognizing that 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 25-26 (suggesting that defendants could provide contraceptive services through other programs). 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.

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. But 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). Under plaintiffs' proposals, 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.

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 to offer viable less restrictive alternatives, the Court should reject plaintiffs' argument that the regulations fail strict scrutiny.

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

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Even assuming *arguendo* that same rule applies to a statutory claim under RFRA, plaintiffs have not shown that the challenged regulations violate their First Amendment or RFRA rights, so there has been no “loss of First Amendment freedoms” for any period of time. *Id.* In this respect, the merits and irreparable injury prongs of the temporary restraining order analysis merge together, and plaintiffs cannot show irreparable injury without also showing a likelihood of success on the merits, which they cannot do. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012).

Turning to the final two temporary restraining order factors—the balance of equities and the public interest—“there is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce.” *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 296 (6th Cir. 1998) (indicating that granting an injunction against the enforcement of a likely constitutional statute would harm the government). Enjoining the preventive services coverage regulations as to plaintiffs would undermine the government's

ability to achieve Congress's goals of improving the health of women and newborn children and equalizing the coverage of preventive services for women and men.

It would also be contrary to the public interest to deny plaintiffs' employees (and their families) the benefits of the preventive services coverage regulations. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) (“[C]ourts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”). Many of the plaintiffs' employees may not share plaintiffs' objections to the challenged regulations. Those employees should not be deprived of the benefits of payments provided by a third party that is not their employer for the full range of FDA-approved contraceptive services, as prescribed by a health care provider, on the basis of their employers' religious objection. Many women do not use contraceptive services because they are not covered by their health plan or require costly copayments, coinsurance, or deductibles. IOM REP. at 19-20, 109, AR at 317-18, 407; 77 Fed. Reg. at 8727, AR at 214; 78 Fed. Reg. at 39,887, AR at 19. As a result, in many cases, both women and developing fetuses suffer negative health consequences. *See* IOM REP. at 20, 102-04, AR at 318, 400-02; 77 Fed. Reg. at 8728, AR at 215. And women are put at a competitive disadvantage due to their lost productivity and the disproportionate financial burden they bear in regard to preventive health services. 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009); *see also* IOM REP. at 20, AR at 318.

Enjoining defendants from enforcing, as to plaintiffs, the preventive services coverage regulations—the purpose of which is to eliminate these burdens, 75 Fed. Reg. at 41,733, AR at 233; *see also* 77 Fed. Reg. at 8728, AR at 215—would thus inflict a very real harm on the public and, in particular, a readily identifiable group of individuals: plaintiffs' employees and those employees' covered dependants. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) (vacating

preliminary injunction entered by district court and noting that “[t]here is a general public interest in ensuring that all citizens have timely access to lawfully prescribed medications”). Accordingly, even assuming plaintiffs were likely to succeed on the merits (which they are not for the reasons explained above), any potential harm to plaintiffs resulting from their offense at a third party providing payment for contraceptive services at no cost to, and with no administration by, plaintiffs’ would be outweighed by the significant harm an injunction would cause these employees and their families.

CONCLUSION

For the foregoing reasons, defendants respectfully ask that the Court deny plaintiffs’ motion for a temporary restraining order.

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Bradley P. Humphreys
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