IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PRIESTS FOR LIFE, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 1:13-cv-1261-EGS
U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, *et al.*,	)	
Defendants.	)	

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

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INTRODUCTION

Plaintiffs—Priests for Life, Father Frank Pavone, Alveda King, and Janet Morana[1]—challenge regulations related to the provision of contraceptive coverage that do not burden their religious exercise and, indeed, require Priests for Life to do nothing more than take the *de minimis* step that it would have to take in the absence of such regulations: tell its health insurance issuer that it objects to providing contraceptive services. The contraceptive coverage requirement does not apply to the individual plaintiffs at all. And the remaining plaintiff, Priests for Life, is covered by a regulatory accommodation that exempts the organization from having to contract, arrange, pay, or refer for contraceptive coverage, and that in no way prevents plaintiffs from continuing to voice their disapproval of contraception or from encouraging their employees to refrain from using contraception. To avail itself of this significant accommodation, Priests for Life needs do nothing more than certify to its issuer that it is eligible for the accommodation and does 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 the accommodations for certain other non-profit religious organizations mentioned above and discussed in more detail throughout this brief, 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.

[1] Father Pavone, Ms. King, and Ms. Morana will hereinafter be referred to collectively as the "individual plaintiffs."

When the contraceptive-coverage requirement was first established, in August 2011, certain non-profit religious organizations—including Priests for Life—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). In addition, they established accommodations for the group health plans of eligible non-profit religious organizations, like Priests for Life (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. For those organizations with a third-party insured group health plan—like Priests for Life—the third-party insurer takes on the responsibility to provide contraceptive coverage to the organization's employees and covered dependents. The objecting employer does not bear the cost (if any) of providing contraceptive coverage; nor does it administer such coverage; nor does it contract or otherwise arrange for such coverage; nor does it refer for such coverage.

Remarkably, plaintiffs now declare that these accommodations themselves violate their rights under RFRA and the First and Fifth Amendments. 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 sincerely held religious beliefs prohibiting them from providing or facilitating health coverage for certain contraceptive services. Plaintiffs move for summary judgment on all of their claims. Because all of plaintiffs' claims fail, plaintiffs' motion for summary judgment should be denied, and this case should be dismissed in its entirety or the Court should enter summary judgment in favor of the government.

As an initial matter, the individual plaintiffs lack standing to assert any of their claims. Because the challenged regulations *do not apply to the individual plaintiffs at all*, they cannot show any injury—as they must for purposes of standing—let alone an injury that is caused by the challenged regulations and redressable by this Court.

But even if the individual plaintiffs did have standing, their claims would fail on the merits for the same reason that Priests for Life's claims fail. With respect to plaintiffs' RFRA and free exercise claims, Priests for Life cannot establish a substantial burden on its religious exercise—as it must—because the regulations do not require the organization to change its behavior in any significant way. Priests for Life is not required to contract, arrange, pay, or refer for contraceptive coverage. To the contrary, the organization 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. Priests for Life contends that the need to self-certify in order to obtain the accommodation is itself a burden on its religious exercise. But the challenged regulations require Priests for Life *only* to self-certify that it has a religious objection to providing contraceptive coverage and otherwise meets the criteria for an eligible organization, and to share that self-certification with its health insurance issuer. In other words, Priests for Life is required only to inform its issuer that it objects to providing contraceptive coverage, which it has done or would have to do voluntarily anyway even absent these regulations in order to ensure that that it is not responsible for contracting, arranging, paying, or referring for such coverage.

Priests for Life can hardly claim that it is a violation of RFRA or the Free Exercise Clause to require it to do almost exactly what they would do in the ordinary course, absent the regulations.

Furthermore, plaintiffs' challenge rests largely on the theory that even the extremely attenuated connection between Priests for Life and the independent provision by its issuer of payments for contraceptive services to which Priests for Life objects on religious grounds—but for which the organization pays nothing—amounts to a substantial burden on Priests for Life's 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 Priests for Life's religious exercise, too slight and attenuated to be "substantial" under RFRA and the Free Exercise Clause, and little different from the organization's payment of salaries to its employees, which those employees can also use to purchase contraceptive services if they so choose.

Moreover, even if the challenged regulations were deemed to impose a substantial burden on plaintiffs' religious exercise, the regulations would not violate RFRA or the Free Exercise Clause 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' free exercise claim also fails because the regulations are neutral and generally applicable. And plaintiffs' other 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 Fifth Amendment equal protection claim. For these reasons, and those explained below, plaintiffs' motion summary judgment should be denied, and defendants' motion to dismiss or, in the alternative, for summary judgment should be granted.

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.[2] 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).

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.[3] 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).

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

[3] 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.

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.[4]

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 Coverage Guidelines ("HRSA Guidelines"), AR at 283-84.[5] 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

[4] At least 28 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.

[5] 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.

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.

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 5. 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 an 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 39,875-80, AR at 7-12; 45 C.F.R. § 147.131(b). An "eligible organization" is an organization that satisfies the following criteria:

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

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

Under the 2013 final rules, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874, AR at 6. To be relieved of any such obligations, the 2013 final rules require only that an eligible organization complete a self-certification form stating that it is an eligible organization and provide a copy of that self-certification to its issuer or TPA. *Id.* at 39,878-79, AR at 10-11. Its participants and beneficiaries, however, will still benefit from separate payments for contraceptive services without cost sharing or other charge. *Id.* at 39,874, AR at 6. In the case of an organization with an insured group health plan—such as Priests for Life—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, AR at 7-9.[6]

[6] Although it is not relevant to this case, in the case of an organization with a self-insured group health plan, the organization's TPA, upon receipt of the self-certification, must provide or arrange separate payments for contraceptive services for participants and beneficiaries in the plan; again, without cost-sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or its plan. *See* 78 Fed. Reg. at 39,879-80, AR at 11-12. Any costs incurred by the TPA will be reimbursed through an adjustment to Federally-facilitated Exchange (FFE) user fees. *See id.* at 39,880, AR at 12.

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

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

To the extent that the Court must consider the administrative record in addition to the face of the 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). This memorandum also responds to plaintiffs' motion for summary judgment.[7]

[7] Although plaintiffs filed a motion for preliminary injunction on September 19, 2013, *see* ECF No. 7, pursuant to this Court's Minute Order dated September 25, 2013, that motion has been consolidated with the merits. Therefore, in this brief, defendants respond to plaintiffs' motion for summary judgment. Suffice to say that, for the reasons articulated in this brief, plaintiffs cannot show a likelihood of success on the merits of their claims and thus would not be entitled to preliminary injunctive relief. Nor can plaintiffs satisfy any of the other prerequisites for a preliminary injunction. *See infra* Section III.

ARGUMENT

I. THE INDIVIDUAL PLAINTIFFS LACK STANDING TO ASSERT THEIR CLAIMS

At the outset, the claims of the individual plaintiffs should be dismissed because they lack standing. "[T]he irreducible constitutional minimum of standing" requires that a plaintiff (1) have suffered an injury in fact, (2) that is caused by the defendant's conduct, and (3) that is likely to be redressed by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). As to the injury prong, a plaintiff must demonstrate that it has "suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (quotations omitted). Allegations of possible future injury do not suffice; rather, "[a] threatened injury must be certainly impending to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (quotation omitted). The requirement of a causal connection between the defendant's conduct and the plaintiff's injury means that the injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (citation omitted). Further, for an injury to be redressable, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (citation omitted). Here, the individual plaintiffs have not shown—as it is their burden to do—that they are injured by the challenged regulations; nor have they shown that any alleged injury is caused by the law they challenge and that it could be redressed by this Court.

The individual plaintiffs cannot show that they are injured at all—let alone that their alleged injury stems from the challenged regulations—because the law that they challenge *does not apply to them*. The preventive services coverage provision applies to "group health plans" and "health insurance issuers." 42 U.S.C. § 300gg-13; 45 C.F.R. § 147.130(a)(1) ("[A] group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage for all of the following items and services."). The individual plaintiffs are neither. The only provision that plaintiffs challenge thus imposes no direct obligation or

requirement on the individual plaintiffs. They are not required to purchase a health insurance policy that covers contraception. They are not required to use contraception, and thus need never avail themselves of the separate payments for contraceptive services provided by Priests for Life's health insurance issuer. Nor will the individual plaintiffs be required to contribute financially to the use of contraceptive services—if any—by other employees of Priests for Life. The regulations specifically prohibit Priests for Life's issuer from charging any premium or otherwise passing on any costs to plan participants or beneficiaries with respect to the issuer's payments for contraceptive services. *See* 78 Fed. Reg. at 39,880, AR at 12. The individual plaintiffs are free to continue to voice their religious objections to the use of contraception, including through their work with Priests for Life. Thus, this case aptly illustrates the Supreme Court's observation that establishing standing in the case of such an indirect injury is "substantially more difficult" than it is when a law directly makes a plaintiff "the object" of government action. *Lujan*, 504 U.S. at 562 (citation omitted).

Indeed, based on their allegations and their brief in support of their motion, the nature of the individual plaintiffs' alleged injuries is far from clear. Because the challenged regulations impose no obligations on the individual plaintiffs, they cannot possibly be said to interfere with the individual plaintiffs' religious exercise. Plaintiffs allege that Priests for Life's employees—including the individual plaintiffs—would be harmed if Priests for Life elected to drop its health coverage rather than comply with the contraceptive coverage requirement. *See, e.g.*, Mem. of Points & Authorities in Supp. of Pls.' Mot. for Prelim. Inj. ("Pls.' Br.") at 16, 18, ECF No. 7. But for two reasons, this alleged injury is not sufficient for purposes of standing. First, it is entirely speculative, and thus not "certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147-50 (2013). While the individual plaintiffs repeatedly allege that they would be harmed if Priests for Life ceases to offer health coverage, plaintiffs never actually allege that Priests for Life *will in fact* cease to offer health coverage. Thus, the individual plaintiffs have not adequately alleged a "certainly impending" injury, as is their burden. *See id.* at 1150 ("We

decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors.").

Second, even were plaintiffs to allege that Priests for Life will no longer offer health coverage if required to comply with the challenged regulations, any injury to the individual plaintiffs could not fairly be said to be caused by the challenged regulations; nor could it be redressed by any action of this Court. It is these latter two elements—causation and redressability—that make establishing standing particularly difficult in a challenge to a law by which one is not personally regulated. As the Supreme Court explained in *Lujan*, "[w]hen . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." 504 U.S. at 562 (emphasis in original); *see also, e.g.*, *Chamber of Commerce of U.S. v. E.P.A.*, 642 F.3d 192, 200-01 (D.C. Cir. 2011); *Wieland v. U.S. Dep't of Health and Human Servs.*, No. 4:13-cv-1577, slip op. at 6-7 (E.D. Mo. Oct. 16, 2013).

A simple thought experiment illustrates the serious causation and redressability problem in this case. Presumably, Priests for Life would only discontinue health coverage for its employees if this Court were to find—as it should—that Priests for Life's claims lack merit and, thus, were to rule in the government's favor. In such a scenario, Priests for Life's decision to terminate health coverage in light of its religious objections would be the "unfettered choice[]," *id.*, of Priests for Life, and would not be required by the challenged regulations. Nor, in this scenario, could the Court do anything to redress the alleged injuries suffered by the individual plaintiffs. The individual plaintiffs do not challenge any law from which they could be relieved because, as discussed above, the preventive services coverage provision does not apply to them. And the Court certainly could not require Priests for Life to continue to offer health coverage. In short, this case does not fall into the limited set of cases finding causation and redressability in a challenge to government action where the alleged injury is based on third-party conduct. *See*

Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 940-42 (D.C. Cir. 2004); *see also, e.g., Renal Physicians Ass'n v. U.S. Dep't of Health and Human Servs.*, 489 F.3d 1267, 1275-77 (D.C. Cir. 2007).

Because the challenged regulations do not injure—indeed, do not even apply to—the individual plaintiffs, and any alleged injury is speculative, not caused by the challenged regulations, and not redressable by this Court, the individual plaintiffs' lack standing and all of their claims should be dismissed for lack of jurisdiction or, in the alternative, summary judgment granted to defendants.[8]

II. PRIESTS FOR LIFE'S CLAIMS LACK MERIT

A. Priests for Life's Religious Freedom Restoration Act Claim Is Without Merit

1. The regulations do not substantially burden Priests for Life's 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

[8] Because the individual plaintiffs do not have standing to bring any of their claims, when discussing the merits of plaintiffs' claims throughout the remainder of this brief, the government speaks only of Priests for Life's claims. However, if the Court were to conclude—contrary to defendants' arguments—that the individual plaintiffs do indeed have standing to assert some or all of their claims, those claims would fail on the merits for the same reasons that Priests for Life's claims fail. In fact, because the challenged regulations do not even apply to the individual plaintiffs at all, their claims suffer from this additional flaw. Defendants note that, based on the Complaint and plaintiffs' brief in support of their motion, the government cannot discern any difference between the claims raised by the individual plaintiffs and those raised by Priests for Life.

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, Priests for Life cannot show that the challenged regulations substantially burden its religious exercise.[9] First, because the regulations require virtually nothing of Priests for Life, and certainly do not require the organization to modify its behavior in any meaningful way, the regulations cannot be deemed to impose any more than a *de minimis* burden on Priests for Life—let alone a substantial one. Second, even if this Court were to find that the regulations impose some burden on Priests for Life's religious exercise, any such burden would be far too attenuated to be substantial.

a. The regulations impose no more than a de minimis *burden on Priests for Life's exercise of religion because the regulations require virtually nothing of the organization*

To put this case in its simplest terms, Priests for Life challenges regulations that require it to do next to nothing, except what it would have to do even in the absence of the regulations. Priests for Life, as an eligible organization, is not required to contract, arrange, pay, or refer for contraceptive coverage. To the contrary, Priests for Life 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. The organization need only fulfill the self-certification requirement and provide the completed self-certification to its health insurance issuer. Priests for Life need not pay for contraceptive services to its employees. Instead, a third party—Priests for Life's issuer—provides payments for contraceptive services, at no cost to Priests for Life. In short, with respect

[9] Plaintiffs repeatedly refer to cases involving for-profit companies that object to the contraceptive coverage regulations. *See, e.g.*, Pls.' Br. at 1 n.1, 21. But those cases are inapposite because for-profit corporations—unlike Priests for Life—do not qualify for the religious employer exemption or the accommodations for eligible organizations. Furthermore, plaintiffs' statement that "[t]he vast majority of courts that have reviewed requests for preliminary injunctions in the for-profit cases challenging the contraceptive services mandate have granted the injunctions," *id.* at 1 n.1, is misleading. 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) (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; *Grote Indus., LLC v. Sebelius*, 914 F. Supp. 2d 943 (S.D. Ind. 2012), *appeal pending* No. 13-1077 (7th Cir.); *Korte v. U.S. Dep't of Health & Human Servs.*, 912 F Supp. 2d 735 (S.D. Ill. 2012), *appeal pending*, No. 12-3841 (7th Cir.); *Gilardi v. Sebelius*, 926 F. Supp. 2d 273 (D.D.C. 2013), *appeal pending sub nom. Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069 (D.C. Cir.).

to contraceptive coverage, Priests for Life need not do anything more than it did prior to the promulgation of the challenged regulations—that is, to inform its issuer that it objects to providing contraceptive coverage in order to ensure that it is not responsible for contracting, arranging, paying, or referring for such coverage. Thus, the regulations do not require Priests for Life "to modify [its] 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 [plaintiff's] part, nor . . . otherwise interfere[s] with any religious act in which [plaintiff] engages." *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 Priests for Life, they plainly place no cognizable burden on the organization's religious exercise. Plaintiffs' contrary argument rests on an unprecedented and sweeping theory of what it means for religious exercise to be burdened. Not only does Priests for Life want to be free from contracting, arranging, paying, or referring for contraceptive services for its employees—which, under these regulations, it is—but the organization would also prevent *anyone else* from providing such coverage to its employees, who might not subscribe to plaintiffs' religious beliefs. That this is the *de facto* impact of plaintiffs' stated objections is made clear by their assertion that RFRA is violated whenever they are the "trigger"—or the but-for cause—of the provision to their employees of products or services to which they object. Pls.' Br. at 7. This theory would mean, for example, that even the government would not realistically be able to provide contraceptive coverage to Priests for Life's employees (as plaintiffs elsewhere suggest), because it would be "triggered," by the organization's refusal to provide such coverage itself. 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 [Priests for Life] plays no role." *Id.* As in *Kaemmerling*, "[a]lthough the [third party]'s activities . . . may offend [Priests for Life's] religious beliefs, they cannot be said to hamper [its] 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 Priests for Life to somehow "facilitate" access to contraceptive coverage, and that it is this "facilitation" that violates the organization's religious beliefs. *See, e.g.*, Pls.' Br. at 1, 8. But the challenged regulations require Priests for Life *only* to self-certify that it objects to providing coverage for contraceptive services and that the organization otherwise meets the criteria for an eligible organization, and to share that self-certification with its issuer. In other words, Priests for Life is required to inform its issuer that it objects to providing contraceptive coverage, which it has done or would have to do voluntarily anyway even absent these regulations in order to ensure that it is not responsible for contracting, arranging, paying, or referring for contraceptive

coverage. The sole difference is that the organization must inform its issuer that its objection is for religious reasons—a statement which it has already made repeatedly in this litigation and elsewhere.[10]

Furthermore, any burden imposed by the purely administrative self-certification requirement—which should take Priests for Life 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.

Contrary to plaintiffs' suggestion, the mere fact that Priests for Life claims that the self-certification requirement imposes a substantial burden on its religious exercise by requiring the organization to "facilitate" access to contraception does not make it so. *See See Gilardi v. Sebelius*, 926 F. Supp. 2d 273, 282 (D.D.C. 2013) ("[T]he Court declines to follow several recent cases suggesting that a plaintiff can meet his burden of establishing that a law creates a 'substantial burden' upon his exercise of religion simply because he claims it to be so."), *appeal pending sub nom. Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069 (D.C. Cir.); *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 413 (E.D. Pa. 2013) ("[W]e

[10] Priests for Life point to other activities—"identify[ing] its employees" to, and otherwise "coordinat[ing]" with, its issuer—that would allegedly be required by the challenged regulations. Pls.' Br. at 7-8. But these are undoubtedly activities that Priests for Life must already engage in as part of the working relationship with its issuer, and are necessary if the issuer is to provide *any* health coverage to Priests for Life's employees. Thus, they have nothing to do with these regulations. And the requirement that plan participants be given notice of the availability of separate payments provides absolutely no support for plaintiffs' claims. As plaintiffs appear to recognize, it is Priests for Life's *issuer* that is responsible for providing such notice. *See* 78 Fed. Reg. at 39,876, AR at 8; Pls.' Br. at 8 ("For each plan year to which the 'accommodation' applies, an issuer required to provide payments for contraceptive services must provide to Priests for Life's plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services."). Furthermore, such notice will be provided apart from the material that the issuer provides in conjunction with Priests for Life's group health plan. *See* 78 Fed. Reg. at 39,876, AR at 8. Thus, this notice requirement imposes no obligation whatsoever on Priests for Life.

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 objection to the challenged regulations are sincere, and second, whether the regulations apply significant pressure to Priests for Life 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 Priests for Life to modify its behavior in a significant—or more than *de minimis*—way. *See Living Water Church of God*, 258 F. App'x at 734-36 (reviewing cases); *see also, e.g.*, *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]."); *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).

In other words, even where the religious "practice at issue is indisputably an important component of the litigants' religious scheme," any alleged interference with such practice is not substantial where "the impact of the challenged law is *de minimis*." *Levitan v. Ashcroft*, 281 F.3d 1313, 1321 (D.C. Cir. 2002). The Supreme Court cases that plaintiffs rely on are not to the contrary, as they recognize that 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,"

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 merit of the belief in question, but instead requires the Court to examine the operation of the regulations and their impact on plaintiffs' religious practice.[11]

Under plaintiffs' alternative interpretation of RFRA, courts would play virtually no role in determining whether an alleged burden is "substantial"—as long as a Priests for Life's religious belief is sincere, that would be the end of the inquiry. *See* Pls.' Br. at 27. 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*, 926 F. Supp. 2d at 282; *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."); *see also Grote Indus., LLC v. Sebelius*, 914 F. Supp. 2d 943, 949 (S.D. Ind. 2012), *appeal pending*, No. 13-1077 (7th Cir.). "If every plaintiff were permitted to unilaterally determine that a law burdened their religious beliefs, and courts were required to assume that such burden was substantial, simply because the plaintiff claimed that it was the case, then the standard expressed by Congress 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; *Grote*, 914 F. Supp. 2d at 952; *Mersino Mgmt Co. v.*

[11] 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.

Sebelius, No. 2:13-cv-11296, 2013 WL 3546702, at *16 (E.D. Mich. July 11, 2013).[12] 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.

Finally, plaintiffs seem to suggest that the regulations will actually require Priests for Life to fund or subsidize access to contraceptive coverage because their issuer will find a way to pass on the costs of such coverage to Priests for Life. *See* Pls.' Br. at 10 n.7. But the regulations specifically prohibit Priests for Life's issuer from charging any premium or otherwise passing on any costs to Priests for Life with respect to the issuer's payments for contraceptive services. *See* 78 Fed. Reg. at 39,880, AR at 12. Any suggestion that Priests for Life's issuer will violate the law is purely speculative, and boils down to the baseless argument that the regulations impose a substantial burden under RFRA because a third party might violate those same regulations. This contention has no merit.[13]

For the reasons stated above, the regulations do not impose a substantial burden on Priests for Life's religious exercise, and thus plaintiffs' motion for summary judgment on their RFRA claim (Count II of the Complaint) should be denied, and this claim should be dismissed or summary judgment granted to defendants.

[12] 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).

[13] Plaintiffs' contention that Priests for Life's issuer will "artificially inflate the eligible organization's premium" and that, therefore, "the eligible organization will ultimately bear the cost of the required payments for the mandated contraceptive services," Pls.' Br. at 9 n.6, also misses the mark. As explained above, the regulations *specifically prohibit* Priests for Life's issuer from charging any premium or otherwise passing on any costs to Priests for Life with respect to the issuer's payments for contraceptive services. The government noted in the preamble to the challenged regulations that nothing prevents a health insurance issuer from charging premiums "as if no payments for contraceptive services had been provided to plan participants and beneficiaries." 78 Fed. Reg. at 39,877, AR at 9. In other words, an issuer is permitted—but not required—to charge the employer for *precisely the group policy that it wishes to purchase*—one that excludes contraceptive coverage. *See id.* This proposition is unremarkable. What is remarkable is plaintiffs' suggestion that, although Priests for Life objects to providing a policy that includes contraceptive coverage, the organization should be charged a lower premium as if its policy includes such coverage.

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

Although the regulations do not require Priests for Life to contract, arrange, pay, or refer for contraceptive coverage, plaintiffs' complaint appears to be that the regulations require Priests for Life to indirectly facilitate conduct on the part of its employees that it finds 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. Priests for Life not only seeks to be free from the requirement to contract, arrange, pay, or refer for contraceptive coverage itself—which it is under these regulations—but also seeks to prevent anyone else from providing such coverage to its 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 Priests for Life, which is eligible for the accommodations for non-profit religious organizations, 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 *O Centro*. *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.[14]

[14] *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-

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 Priests for Life and similar eligible organizations that qualify for the accommodations is even more attenuated. Not only is Priests for Life 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 it is also further insulated by the fact that a third party—Priests for Life's issuer—and *not* Priests for Life, will actually contract, arrange, pay, and refer for such services, and thus Priests for Life is in no way subsidizing—even indirectly—the use of preventive services that it finds objectionable. Under plaintiffs' theory, Priests for Life's religious exercise is substantially burdened when one of its 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 Priests for Life's issuer, with none of the cost being passed on to Priests for Life, and no administration of the payments by Priests for Life, solely because the organization self-certified that it has religious objections to providing contraceptive coverage and so informed its issuer.

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

2804, 2013 WL 101927, at *4-*5 (D. Minn. Jan. 8, 2013), *appeal pending*, No. 13-1118 (8th Cir.); *Grote*, 914 F. Supp. 2d at 949-52.

950-51.[15] Here, of course, there is no such direct burden. In fact, given that any payment for contraceptive services is made by Priests for Life's issuer, the regulations have even less impact on Priests for Life's religious exercise than the organization's payment of salaries to its 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 v. Sebelius*, 708 F.3d 850, 861 (7th Cir. 2013) (Rovner, J., dissenting); *Autocam*, 2012 WL 6845677, at *6.

Priests for Life remains free to refuse to contract, arrange, pay, or refer for contraceptive coverage; to voice its disapproval of contraception; and to encourage its employees to refrain from using contraceptive services. The preventive services coverage regulations therefore affect Priests for Life's 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 [Priests for Life]," *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 Priests for Life's religious exercise.

[15] *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 11, 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 11.

2. Even if there were a substantial burden on religious exercise, the regulations serve compelling governmental interests and are the least restrictive means to achieve those interests

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

Even if plaintiffs were able to demonstrate a substantial burden on Priests for Life's 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 demonstrative preventive health benefits from contraceptives relating to conditions other than pregnancy (for example, prevention of certain cancers, menstrual disorders, and acne)." 78 Fed. Reg. at 39,872, AR at 4; *see 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).[16]

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 the employees of exempt religious employers and organizations with grandfathered plans are not protected by the regulations at the moment. Pls.' Br. at 26. 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). The grandfathering of certain health plans with respect to certain provisions of

[16] 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.' Br. at 25. But this level of specificity would be impossible to establish and would render this regulatory scheme—and potentially every regulatory scheme that is challenged due to religious objections—completely unworkable. *See United States v. Lee*, 455 U.S. 252, 259-60 (1982). In practice, courts have not required the government to analyze the impact of a regulation on the single entity seeking an exemption, but have conducted the inquiry with respect to all similarly situated individuals or organizations. *See, e.g.*, *id.* at 260 (considering the impact on the tax system if all religious adherents—not just the plaintiff—could opt out); *United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001) (per curiam) ("Oliver has argued a one-man exemption should be made, however, there is nothing so peculiar or special with Oliver's situation which warrants an exception. There are no safeguards to prevent similarly situated individuals from asserting the same privilege and leading to uncontrolled eagle harvesting."); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990) ("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.

the ACA is not specifically limited to the preventive services coverage regulations and is not an exemption from the preventive services coverage regulations at all. *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.

Furthermore, 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). It is perfectly permissible for the government to balance the compelling interests underlying the challenged regulations against other significant interests supporting the complex administrative scheme created by the ACA. *See United States v. Lee*, 455 U.S. 252, 259 (1982) ("The Court has long recognized that balance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions."); *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 permanent exemption plaintiffs seek for employers that object to the regulations on religious grounds, the grandfathering provision's incremental transition does 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. Even under the grandfathering provision, it is projected that more group health plans will transition to the requirements under the regulations as time goes on. Defendants have estimated that a majority of group health plans will have lost their grandfather status by the end 2013. *See 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 such an untenable proposition. *See Legatus v. Sebelius*, 901 F. Supp. 2d 980, 994 (E.D. Mich. 2012) ("[T]he grandfathering rule seems to be a reasonable plan for instituting an incredibly complex health care law while balancing competing interests.").

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

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

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

Instead of explaining how Priests for Life and similarly situated eligible organizations could be exempted from the regulations without significant damage to the government's compelling interests, plaintiffs vaguely suggest, without any statutory support, that "the government could set up its own clinics to hand out free diaphragms or birth control pills, or

whatever favored contraceptive service it prefers." Pls.' Br. at 26. 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 their proffered less restrictive alternative. 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 plaintiffs' non-employer-based alternative, they would be constrained by the statute from doing so. *See* 78 Fed. Reg. at 39,888, AR at 20.

Furthermore, 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 alternative 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 Church Acad. v. Town of East Longmeadow*, 885 F.2d 940, 947 (1st Cir. 1989) (Breyer, J.); *Graham v. Comm'r*, 822 F.2d 844, 852 (9th Cir. 1987). 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' alternative and determined that it is not feasible because the agencies lacked statutory authority to implement it; it would impose considerable new costs and other burdens on the government; and it 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 alternative 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' alternative, by contrast, has none of these advantages. It 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 their proposed alternative could be integrated with the employer-based system or how women would obtain government-provided preventive services in practice. Thus, plaintiffs' proposal—in addition to raising myriad administrative and logistical difficulties and being unauthorized by any statute and not funded by any appropriation—is less likely to achieve the compelling interests furthered by the regulations, and therefore does not represent a reasonable less restrictive means. *Id.*

Because plaintiffs have failed to put forth viable less restrictive alternatives that would achieve the government's compelling interests, the Court should reject plaintiffs' argument that the regulations fail strict scrutiny.

B. 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 generally applicable.[17] "The regulations were passed, not with the object of interfering with religious practices, but instead to improve women's access to health care and lessen the disparity between men's and women's healthcare costs." *O'Brien*, 894 F. Supp. 2d at 1161. The regulations reflect expert medical recommendations about the medical necessity of contraceptive services, without regard to any religious motivations for or against such services. *See, e.g.*, *Conestoga*, 917 F. Supp. 2d at 410 ("It is clear from the history of the regulations and the report published by the Institute of Medicine that the purpose of the [regulations] is not to target religion, but instead to promote public health and gender equality."); *Grote*, 914 F. Supp. 2d at 952-53 ("[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

[17] *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; *Grote*, 914 F. Supp. 2d at 952-53; *Autocam*, 2012 WL 6845677, at *5; *Korte*, 912 F. Supp. 2d at 744-47; *Hobby Lobby*, 870 F. Supp. 2d at 1289-90, *rev'd on other grounds*, 2013 WL 3216103; *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. HHS*, 2012 WL 6738489, at *5 (E.D. Mo. Dec. 31, 2012); *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 435-37 (W.D. Pa. 2013).

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.

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; *Grote*, 914 F. Supp. 2d at 953. Thus, these categorical exceptions and accommodations do not trigger strict scrutiny.

"[C]arving out an exemption for defined religious entities [also] does not make a law non neutral as to others." *Grote*, 914 F. Supp. 2d at 953 (quotation omitted). 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."). The regulations are not rendered unlawful "merely because the [religious employer exemption] does not extend as far as Plaintiffs wish." *Grote*, 914 F. Supp. 2d at 953.

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; *Grote*, 914 F. Supp. 2d at 952-53. Plaintiffs' unsupported assertions that the regulations were "designed to target employers who refuse to provide contraceptive services to their employees based on the employers' religious beliefs," Pls.' Br. at 23-24, are 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.[18]

For these reasons, plaintiffs' free exercise claim—Count I of the Complaint—fails.[19]

[18] *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), on which plaintiffs rely, addressed a policy that created a secular exemption but refused all religious exemptions. The preventive services coverage regulations, in contrast, contain an exemption for houses of worship and accommodations for other non-profit religious organizations that specifically seek to accommodate religion. Thus, there is simply no basis in this case to infer a discriminatory purpose behind the regulations. *See Conestoga*, 917 F. Supp. 2d at 409-10.

[19] Even if the regulations were not neutral or generally applicable, plaintiffs' free exercise challenge still would fail because, as explained above, the regulations do not substantially burden Priests for Life's exercise of religion, *see Levitan*, 281 F.3d at 1320 ("[T]he First Amendment is implicated when a law or regulation imposes a substantial, as

C. The Regulations Do Not Violate the Right to Free Speech or Expressive Association

Plaintiffs' free speech and expressive association 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.

In order to avail itself of an accommodation, an organization must self-certify that it meets the definition of "eligible organization." 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. v. U.S. Dep't of Health & Human Servs.*, No. 13-cv-11379, 2013 WL 1340719, at *6 (E.D. Mich. Apr. 3, 2013) ("Like the [law at issue in *FAIR*], the contraceptive requirement regulates conduct, not speech." (quotations omitted)); *Briscoe v. Sebelius*, 927 F. Supp. 2d 1109 (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; *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 465 (N.Y. 2006). 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

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opposed to inconsequential, burden on the litigant's religious practice."), and because the regulations satisfy strict scrutiny.

objections. 78 Fed. Reg. at 39,874, AR at 6. Plaintiffs' suggestion that self-certifying their eligibility for an accommodation, which is incidental to the regulation of conduct, violates their free 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 Priests for Life's issuer from imposing any cost sharing, premium, fee, or other charge on Priests for Life with respect to the separate payments for contraceptive services made by the issuer. Plaintiffs, therefore, are not funding or subsidizing anything pertaining to contraceptive coverage. Moreover, even if plaintiffs played some role in an issuer'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).

Furthermore, plaintiffs are wrong when they contend that the regulations require Priests for Life to provide coverage for education and counseling "that advocates for and promotes the use of contraceptive services." Pls.' Br. at 31. The regulations simply require coverage—provided by Priests for Life's issuer, *not* Priests for Life—of "education and counseling for women with reproductive capacity." HRSA Guidelines, AR at 130-31. 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 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 Priests for Life's

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*, 2013 WL 140110, at *17.

And while plaintiffs are correct that the regulations "require[] that Priests for Life's plan participants and beneficiaries receive written notice of, *inter alia*, the availability of separate payments for contraceptive services," Pls.' Br. at 31, it is Priests for Life's issuer—and *not* Priests for Life itself—that is responsible for providing such notice. *See* 78 Fed. Reg. at 39,876, AR at 8. Furthermore, such notice will be provided apart from the material that the issuer provides in conjunction with Priests for Life's group health plan. *See id.* Thus, the notice requirement imposes no obligation on Priests for Life, and does not impact the organization's free speech rights in any conceivable way.

Finally, the regulations do not violate the right to expressive association. "The right to speak is often exercised most effectively by combining one's voice with the voices of others." *FAIR*, 547 U.S. at 68. "If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect." *Id*. The Supreme Court, therefore, has recognized a First Amendment right to associate for the purpose of speaking. *Roberts*, 468 U.S. at 618. The preventive services coverage regulations, however, do not interfere with plaintiffs' right of expressive association. The regulations do not interfere in any way with the composition of Priests for Life's workforce. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (holding Boy Scouts' freedom of expressive association was violated by law requiring organization to accept gay man as a scoutmaster); *Roberts*, 468 U.S. at 623 (concluding statute that forced group to accept women against its desires was subject to strict scrutiny). The regulations do not force Priests for Life to hire employees it does not wish to hire. Moreover, plaintiffs are free to associate to voice their disapproval of the use of

contraception and the regulations. Even the statute at issue in *FAIR*, which required law schools to allow military recruiters on campus if other recruiters were allowed on campus, did not violate the law schools' right to expressive association. 547 U.S. at 68-70. The preventive services coverage regulations certainly do not implicate plaintiffs' right. *See MK Chambers*, 2013 WL 1340719, at *6 (rejecting expressive association challenge to prior version of regulations); *Diocese of Albany*, 859 N.E. 2d at 465 (upholding similar state law because it "does [not] compel [plaintiffs] to associate, or prohibit them from associating, with anyone").

Accordingly, the regulations do not violate plaintiffs' rights to free speech and expressive association, and Count III of the Complaint should be dismissed or summary judgment granted to the government.

D. The Regulations Do Not Violate the Establishment Clause or the Equal Protection 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. Drug Enforcement Admin*, 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).

"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 N.Y.*, 397 U.S. 664, 666 (1970); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987) (upholding Title VII's exemption for religious organizations).[20]

Like plaintiffs' Establishment Clause claim, plaintiffs' equal protection claim is based on the theory that the regulations discriminate among religions. Because, as shown above, the regulations do not so discriminate, plaintiffs' equal protection claim warrants only rational basis review. *See, e.g.*, *Johnson v. Robison*, 415 U.S. 361, 375 n. 14 (1974); *St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 638 (7th Cir. 2007) (rejecting plaintiff's attempt "to repackage its free exercise argument in equal protection language": "Where a plaintiff's First Amendment Free Exercise claim has failed, the Supreme Court has applied only rational basis scrutiny in its subsequent review of an equal protection fundamental right to religious free exercise claim based on the same facts."); *Wirzberger v. Galvin*, 412 F.3d 271, 282-83 & n.6 (1st Cir. 2005) (concluding that challenged law did not violate the Equal Protection Clause because it did not draw distinctions based on religion); *Droz*, 48 F.3d at 1125; *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 868 (2d Cir. 1996) (applying rational basis test to law that did not discriminate among religions); *Cooper v. Tard*, 855 F.2d 125, 130 (3d Cir. 1988) (rejecting equal protection claim where "the challenged regulation makes no distinction based on the religious group or sect"). The regulations and, in particular, the religious employer exemption, easily satisfy rational basis review for the reasons explained above and in the final rules. *See* 78 Fed.

[20] 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.

Reg. at 39,874, 39,887, AR at 6, 19. Therefore, Counts IV and V of plaintiffs' Complaint should be dismissed or summary judgment granted to defendants.

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

As this Court has noted:

> The standard for granting a permanent injunction is much like the standard for a preliminary injunction, and the Court is required to consider four factors: (1) success on the merits; (2) whether the movant will suffer irreparable injury absent an injunction; (3) the balance of hardships between the parties; and (4) whether the public interest supports granting the requested injunction. . . . Unlike a preliminary injunction, actual success on the merits is a prerequisite to obtain permanent injunctive relief.

DynaLantic Corp. v. U.S. Dep't of Defense, 885 F. Supp. 2d 237, 249 (D.D.C. 2012) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008)). As explained above, plaintiffs cannot succeed on the merits of their claims, and thus are not entitled to an injunction for that reason alone. But even if plaintiffs could succeed on the merits, they would still not be entitled to an injunction because they cannot carry their burden on the other three factors.

"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 injunction analysis merge together, and plaintiffs cannot show irreparable injury without also showing success on the merits, which they cannot do. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012).

As to the final two injunction factors—the balance of equities and the public interest—"there is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281,

296 (6th Cir. 1998). 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 Priests for Life's 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."). Some of Priests for Life's employees may not share the organization's religious beliefs. Those employees should not be deprived of the benefits of payments provided by a third party that is not their employer for the full range of FDA-approved contraceptive services, as prescribed by a health care provider, on the basis of their employer's religious objection to those services. Many women do not use contraceptive services because they are not covered by their health plan or require costly copayments, coinsurance, or deductibles. IOM REP. at 19-20, 109, AR at 317-18, 407; 77 Fed. Reg. at 8727, AR at 214; 78 Fed. Reg. at 39,887, AR at 19. As a result, in many cases, both women and developing fetuses suffer negative health consequences. *See* IOM REP. at 20, 102-04, AR at 318, 400-02; 77 Fed. Reg. at 8728, AR at 215. And women are put at a competitive disadvantage due to their lost productivity and the disproportionate financial burden they bear in regard to preventive health services. 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009); *see also* IOM REP. at 20, AR at 318.

Enjoining defendants from enforcing, as to Priests for Life, 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. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). Accordingly, even assuming plaintiffs could succeed on the merits (which they cannot 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, Priests for Lie 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 summary judgment, and grant defendants' motion to dismiss or, in the alternative, for summary judgment on all of plaintiffs' claims.

Respectfully submitted this 17th day of October, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 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/ Benjamin L. Berwick
BENJAMIN L. BERWICK