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

THE CATHOLIC BENEFITS ASSOCIATION LCA, *et al.*, Plaintiffs, v. KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, *et al.*, Defendants.	Case No. 5:14-cv-00240-L

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs seek to enjoin multiple sets of regulations that are intended to help 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—including, 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—while also accommodating religious exercise. Though plaintiffs attempt to frame this case in terms of a single "Mandate" to which they are all subject, plaintiffs inappropriately conflate multiple sets of regulations and ignore, when it suits their purposes, the legal import of their differing circumstances.

Some plaintiffs—the Archdioceses of Oklahoma City and Baltimore—are exempt from any regulation having to do with contraceptive coverage. Some plaintiffs—the Catholic Insurance Company and the Catholic Benefits Association—seek to vindicate claims of their insureds and members, respectively, but lack the requisite standing to do so. One plaintiff—Good Will Publishers—is a for-profit corporation subject to a state law that independently requires coverage of contraception, and so lacks standing to challenge the regulations applicable to for-profit employers. The remaining plaintiffs are non-profit religious organizations eligible for regulatory accommodations that relieve them of responsibility to contract, arrange, or pay for contraceptive coverage, while also ensuring that women who participate in the group health plans of such organizations are not denied access to contraceptive coverage without cost-sharing.

To be eligible for the regulatory accommodations, eligible organizations merely need to certify that they meet the eligibility criteria, *i.e.*, that they are non-profit organizations that hold themselves out as religious and have a religious objection to providing coverage for some or all contraceptives. Once an organization certifies that it meets these criteria, it need not contract, arrange, or pay for contraceptive coverage or services. If the organization has third-party insurance, the third-party insurer takes on the responsibility to provide contraceptive coverage to the organization's employees and covered dependents. If the group health plan of the organization is self-insured, its third-party administrator (TPA) has responsibility to arrange for contraceptive coverage for the organization's employees and covered dependents. In neither case does the objecting employer bear the cost (if any) of providing contraceptive coverage; nor does it administer, contract, or arrange for such coverage.

The eligible organization plaintiffs contend that the mere act of opting out—of certifying that they are eligible for an accommodation—is a substantial burden on their religious exercise imposed in violation of the Religious Freedom Restoration Act (RFRA) because, once they make the certification, their employees will be able to obtain contraceptive coverage through other parties. This extraordinary contention suggests that they not only seek to avoid contracting, arranging, or paying for contraceptive coverage themselves, but also seek to prevent the women they employ from obtaining such coverage, even if through other parties.

But these plaintiffs cannot establish a substantial burden on their religious exercise—as they must—because the regulations do not require them to change their

behavior in any significant way. They are not required to contract, arrange, or pay for contraceptive coverage. To the contrary, they are free to continue to refuse to do so, to voice their disapproval of contraception, and to encourage their employees to refrain from using contraceptive services. They are required only to inform their issuers/TPAs that they object to providing contraceptive coverage, which they have done or would have to do voluntarily even absent these regulations in order to ensure that they are not responsible for contracting, arranging, or paying for such coverage. As a number of courts, including the Seventh Circuit, have held, the regulations accordingly do not impose a "substantial burden" sufficient to invalidate the regulations under RFRA. *Univ. of Notre Dame v. Sebelius* (*Notre Dame II*), 743 F.3d 547, 554-59 (7th Cir. 2014), *aff'g Univ. of Notre Dame v. Sebelius* (*Notre Dame I*), __ F. Supp. 2d __, 2013 WL 6804773 (N.D. Ind. 2013); *see Priests for Life v. HHS*, __ F. Supp. 2d __, 2013 WL 6672400, at *5-10 (D.D.C. 2013), *injunction pending appeal granted*, No. 13-5368 (D.C. Cir. Dec. 31, 2013); *Mich. Catholic Conf. v. Sebelius*, No. 1:13-CV-1247, 2013 WL 6838707, at *4-8 (W.D. Mich. Dec. 27, 2013), *injunction pending appeal granted*, No. 13-2723 (6th Cir. Dec. 31, 2013); *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-01303, 2013 WL 6834375, at *4-5 (M.D. Tenn. Dec. 26, 2013), *injunction pending appeal granted*, No. 13-6640 (6th Cir. Dec. 31, 2013).

Plaintiffs' Establishment Clause claim is equally meritless. Indeed, every court to consider a similar Establishment Clause challenge to the regulations has rejected the claim, and those courts' analyses apply here. Finally, plaintiffs cannot satisfy the

remaining requirements for obtaining a preliminary injunction. For these reasons, and those explained below, plaintiffs' motion for a preliminary injunction should be denied.

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.").[1] Section 1001 of the ACA—which includes the preventive services coverage provision relevant here—seeks to cure this problem by making preventive care accessible and affordable for many more Americans. Specifically, the provision requires all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, "[for] women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]." 42 U.S.C. § 300gg-13(a)(4).[2]

[1] http://books.nap.edu/openbook.php?record_id=13181 (last visited Apr. 2, 2014).

[2] This provision applies to a whole range of preventive services, including immunizations, cholesterol screening, blood pressure screening, and many others. *See* U.S. Preventive Services Task Force A and B Recommendations, http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm (last visited Apr. 2, 2014).

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. After conducting an extensive science-based review, IOM recommended that HRSA guidelines include, among other things and as relevant here, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id*. at 10-12. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices ("IUDs"). *See id.* at 105. 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. *Id*. at 102-03.

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").[3] 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-

[3] http://www.hrsa.gov/womensguidelines/ (last visited Apr. 2, 2014).

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). The government committed to undertake a new rulemaking during the safe harbor period to adopt new regulations to further accommodate non-grandfathered non-profit religious organizations' religious objections to covering contraceptive services. *Id*. at 8728. The 2013 final rules represent the culmination of that process. *See* 78 Fed. Reg. 39,869 (July 2, 2013); *see also* 77 Fed. Reg. 16,501 (Mar. 21, 2012) (Advance Notice of Proposed Rulemaking (ANPRM)); 78 Fed. Reg. 8456 (Feb. 6, 2013) (Notice of Proposed Rulemaking (NPRM)).

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. The regulations provide women who work for non-profit religious organizations with access to contraceptive coverage without cost sharing, thereby advancing the government's compelling interests in safeguarding public health and ensuring that women have equal access to health care. 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, or arrange for that coverage.

Under the 2013 final rules, an exempt "religious employer" is defined as "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 2013 final rules also establish accommodations with respect to the contraceptive coverage requirement for group health plans established or maintained by "eligible organizations." 78 Fed. Reg. at 39,875-80. 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.

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. To be relieved of 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. Its participants and beneficiaries, however, will still benefit from separate payments for contraceptive services without cost sharing or other charge. *Id*. at 39,874. In the case of an organization with an insured group health plan the organization's health insurance issuer, upon receipt of the self-certification, must provide separate payments to

plan participants and beneficiaries for contraceptive services without cost sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or its plan. *Id*. at 39,875-77. In the case of an organization with a self-insured group health plan the organization's TPA, upon receipt of the self-certification, will provide or arrange separate payments for contraceptive services for participants and beneficiaries in the plan without cost-sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or its plan. *See id*. at 39,879-80. Any costs incurred by the TPA will be reimbursed through an adjustment to Federally-facilitated Exchange (FFE) user fees. *See id*. at 39,880.

STANDARD OF REVIEW

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id*. at 20.

ARGUMENT

I. GOOD WILL PUBLISHERS, INC., THE CATHOLIC BENEFITS ASSOCIATION, AND THE CATHOLIC INSURANCE COMPANY ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION BECAUSE THEY LACK STANDING

Three plaintiffs lack standing to raise their claims, and the Court should therefore deny them preliminary injunctive relief at the outset. *See Bronson v. Swensen*, 500 F.3d

1099, 1106 (10th Cir. 2007) ("Each plaintiff must have standing to seek each form of relief in each claim."). "[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, 560-61 (1992) (citation omitted).

A law may be said to injure a plaintiff only if it constitutes "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 and citations omitted). "By particularized, [the Court means] that the injury must affect the plaintiff in a personal and individual way." *Id.* at 560 n.1. 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.* at 560 (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." *Id.* at 561 (citation omitted); *see Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) ("[T]he 'case or controversy' limitation of [Article III] still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."); *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 755 (4th Cir. 2013) ("The traceability and redressability prongs become problematic when third persons not party to the litigation must act in order for an injury to arise or be cured.").

Both before and after the advent of the regulations it challenges, Good Will Publishers' plan covered contraceptives. *See* Compl. ¶¶ 74-79. It only recently "discover[ed]" this fact, *id.* ¶ 78, but as Good Will Publishers acknowledges, the plan provided, and continues to provide, such coverage *because* North Carolina law requires its group health insurance coverage to do so. *See id.* ¶ 73 (citing N.C. Gen. Stat. § 58-3-178(a)). The requirement that insured health plans in North Carolina include coverage for contraceptive services has thus existed and continues to exist as a matter of state law—a state law Good Will Publishers has neither challenged in court nor attempted to avoid by, for example, self-insuring. The fact that Good Will Publishers currently has a health plan that covers contraception thus is not caused by the federal law challenged here. *Simon*, 426 U.S. at 41-42. Similarly, even if Good Will Publishers received the injunction it seeks against the defendants and the operation of the federal regulations it challenges, its coverage as currently constituted would still, under North Carolina law, be obligated to include the services to which Good Will Publishers now objects. Its claimed injury therefore cannot be redressed by a favorable ruling in this lawsuit. *See, e.g.*, *White v. United States*, No. 2:08-cv-118, 2009 WL 173509, at *5 (S.D. Ohio Jan. 26, 2009) ("Issuance of a judgment in favor of Plaintiffs is not likely to redress the asserted injuries that they have allegedly sustained. The federal prohibitions would simply fall away, leaving the state-by-state [laws in place]."); *Harp Adver. Ill., Inc. v. Vill. of Chi. Ridge, Ill.*, 9 F.3d 1290, 1291-92 (7th Cir. 1993) (dismissing challenge to village zoning and sign codes because a separate ordinance that plaintiff failed to challenge also prohibited plaintiff from erecting the sign at issue, making the case "irrelevant").

In an attempt to overcome this hurdle, Good Will Publishers alleges that it is "eligible" to sponsor a self-insured health plan that would avoid the North Carolina law, and that it therefore "seeks a judicial determination" that the federal regulations are invalid. Compl. ¶ 79. But Good Will Publishers does not now sponsor a self-insured health plan, and it does not allege that the regulations at issue here have prevented it from doing so.[4] In fact, it does not even allege that it actually plans to or will actually sponsor a self-insured health plan at any point in the future—just that it theoretically "would be able to." *Id.* This sort of speculative redressability is insufficient to confer standing. *Lujan*, 504 U.S. at 561. Even still, Good Will Publishers puts the cart before the horse when it asks this Court to issue a ruling as to whether, in the event that the corporation someday successfully takes steps to avoid the North Carolina law, the federal regulations to which its health plan would then be subject would be invalid. This is simply a request for an advisory opinion as to whether some hypothetical future set of facts would give rise to a successful claim, but "[f]ederal courts may not . . . give opinions advising what the law would be upon a hypothetical state of facts." *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (quotations and citation omitted).

The Catholic Insurance Company ("the Company") likewise lacks standing, but for a different reason. It claims to seek relief "for its present and future insureds," Pls.'

[4] Similarly, Good Will Publishers' suggestion that its membership in the Association "makes it eligible to sponsor a self-insured health plan," Compl. ¶ 79, is both misleading—since employers need not be members of any particular association in order to sponsor self-insured health plans, contract with a TPA, or purchase stop-loss insurance—and telling—since it reveals that Good Will Publishers understands that the regulations it challenges do not prevent its sponsorship of a self-insured health plan.

Opening Br. in Supp. of Mot. for Prelim. Inj., ECF No. 5 (Pls.' Br.), at 9, but this nod toward some form of third-party or associational standing is improper.[5] Third-party standing is generally "not looked favorably upon," and is only appropriate where "the party asserting the right has a close relationship with the person who possesses the right" and where "there is a hindrance to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (quotations and citations omitted). Setting aside whether the relationship between stop-loss insurer and insured can be sufficiently "close" to confer third-party standing, particularly in a matter unrelated to the stop-loss insurance contract between the two, there can be no question here that there is nothing preventing organizations that use the Company as a stop-loss insurer from protecting their own interests. In fact, some of them are plaintiffs here, and many employers have brought their own suits challenging the same regulations.

[5] The Company also lacks standing in its own right. The regulations apply to "group health plan[s], or . . . health insurance issuer[s] offering group or individual health insurance coverage," 45 C.F.R. § 147.130(a)(1), and the Company is, as relevant here, neither. *See* 42 U.S.C. § 300gg-91(a), (b) (defining "group health plan[s]" and "health insurance coverage" as providing "medical care"). The Company does not allege that it sponsors group health plans for the employees of the insureds at issue or offers group health insurance coverage, nor does it raise any sort of claim having to do with offering its own employees a group health plan. And in its capacity as a stop-loss insurer for self-insured health plans, it will not be called upon to do anything under the regulations at issue here. As discussed above, eligible organizations with self-insured health plans submit their self-certifications to their TPAs, and the Company does not allege that it is a TPA. *See* Compl. ¶ 104. Because the regulations do not require anything at all of the Company, they do not "affect the [Company] in a personal and individual way," and the Company cannot claim to be injured by them. *Lujan*, 504 U.S. at 560 n.1; *see Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013) ("Article III standing is not to be placed in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests." (quotations and citation omitted)). For the same reasons, Catholic Benefits Association ("the Association"), discussed below, lacks standing in its own right. And even if either entity had standing, its scope would be only as to itself.

Nor does the Company have associational standing, which is afforded to "voluntary membership organization[s]" like "typical trade associations" that seek to protect interests "germane to the organization's purpose" where "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342, 343 (1977). The Company is not a "membership organization," *id.* at 342, but rather an ordinary business with the purpose of "provid[ing] . . . stop loss insurance," Compl. ¶ 101.

Finally, the Company's standing fails for an additional reason, which also applies to the Catholic Benefits Association ("the Association") and leaves it without standing as well. While the Association may be the type of entity that may generally avail itself of associational standing, "the claim asserted [and] the relief requested require[] the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. Both the Company and the Association seek preliminary injunctive relief, based in substantial part under RFRA. But the availability of a cause of action under RFRA turns on a plaintiff's ability to show that the exercise of a sincerely held religious belief is substantially burdened, and on the government's ability to show a compelling interest served by the least restrictive means. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1125-26 (10th Cir. 2013) (en banc). These criteria may vary from claimant to claimant, which makes it necessary for each claimant to seek its own relief.[6] *See Harris v. McRae*, 448 U.S. 297, 321 (1980) (rejecting associational standing claim and noting that, "[s]ince it is

[6] After all, over 80 suits have been brought to challenge the preventive services coverage regulations, as each employer has apparently recognized that it must demonstrate its own entitlement to relief.

necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion, the claim asserted here is one that ordinarily requires individual participation." (quotation and citation omitted)); *Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Social & Rehab. Servs.*, 958 F.2d 1018, 1022-23 (10th Cir. 1992) (possible distinctions between members' abilities to state claims preclude associational standing). Moreover, the availability of preliminary injunctive relief on any claim turns on questions of irreparable harm, the balance of equities, and the public interest, *Winter*, 555 U.S. at 22; *see infra* at 24-25, all of which may very well vary from employer to employer and circumstance to circumstance.[7]

It is of no moment that, for its own purposes, the Association deems an employer as "Catholic" if its ownership and governing board are both comprised of more than 51% Catholics. *See* Compl. ¶ 87. The Association is free to construct whatever membership test it would like, but neither the government nor the courts are thereby relieved from examining the effect of the operation of the regulations as to each employer's religious exercise, *Harris*, 448 U.S. at 321, or bound to find that each and every employer is similarly subject to an unjustifiable substantial burden on its religious exercise. *See Legatus v. Sebelius*, 901 F. Supp. 2d 980, 990 n.3 (E.D. Mich. 2012) (rejecting associational standing claim in another case challenging the preventive services coverage regulations). For example, the Association and the Company do not appear to distinguish

[7] Indeed, plaintiffs seek preliminary injunctive relief as to "present *and future* members" of the Association and "present *and future* insureds" of the Company. Pls.' Mot. for Prelim. Inj., ECF No. 4, at 3 (emphasis added). It is simply impossible to determine whether hypothetical future members or insureds—corporations that are certainly not yet identifiable and that may not even exist yet—are entitled to preliminary injunctive relief.

in their membership between for-profit and non-profit employers, but different regulations apply to each type of employer, and courts have distinguished between the two when evaluating RFRA claims like those advanced here. *Compare Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013) (holding that application of regulations applicable to two for-profit employers was likely to violate RFRA), *with Notre Dame II*, 743 F.3d 547 (distinguishing *Korte* and holding that application of regulations applicable to non-profit employer was not likely to violate RFRA). This is just one of many factors for which each claimant must show its own entitlement to relief, which defeats the Association's and the Company's claims to associational standing.

II. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THEIR RELIGIOUS FREEDOM RESTORATION ACT CLAIM[8]

Under RFRA, 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). "A substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior

[8] If the Court concludes that Good Will Publishers has standing, defendants recognize for purposes of this motion that a majority of the en banc Tenth Circuit decided that the for-profit companies in *Hobby Lobby* were likely to succeed on their RFRA claim as to the regulations applicable to for-profit employers, 723 F.3d 1114, and that this Court is bound by that decision. Defendants note that the Supreme Court granted defendants' petition for a writ of certiorari in that case and recently heard oral argument. *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 678 (2013) (oral argument held March 25, 2014). In light of the Tenth Circuit's *Hobby Lobby* decision, this section of defendants' brief addresses only the RFRA claims made by the plaintiffs subject to the regulations applicable to non-profit religious organizations.

and to violate his beliefs.'" *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (citing *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981)). "An inconsequential or *de minimis* burden on religious practice does not rise to this level, nor does a burden on activity unimportant to the adherent's religious scheme." *Kaemmerling*, 553 F.3d at 678; *see Garner v. Kennedy*, 713 F.3d 237, 241-42 (5th Cir. 2013) ("[T]he plaintiff must show that the challenged action truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs.").

Plaintiffs cannot show—as they must—that the challenged regulations substantially burden their religious exercise because the regulations do not require exempt or eligible organizations to modify their behavior in any meaningful way. In essence, plaintiffs challenge regulations that require them to do next to nothing, except what they would have to do even in the absence of the regulations. The Archdioceses are exempt from the contraceptive coverage requirement. *See Diocese of Nashville*, 2013 WL 6834375, at *5 ("As for the Plaintiffs that are entirely exempt from contraceptive coverage, The Diocese and The Congregation, the regulations do not place any burden, much less a substantial one, on the exercise of their religious beliefs."); *Roman Catholic Archdiocese of New York v. Sebelius*, __ F. Supp. 2d __, 2013 WL 6579764, at *15 (E.D.N.Y. 2013) (expressly rejecting the alleged burden stemming from having to "expel" non-exempt employers from the plan). And the remaining employer plaintiffs, as eligible organizations, are not required to contract, arrange, or pay for such coverage.[9]

[9] Plaintiffs very briefly refer to an alleged substantial burden on the Association and the Company, Pls.' Br. at 14, but plaintiffs themselves state that these entities only seek relief

To the contrary, the non-diocese plaintiffs are free to continue to refuse to do so, to voice their disapproval of contraception, and to encourage their employees to refrain from using contraceptive services. The non-diocese plaintiffs need only fulfill the self-certification requirement and provide the completed self-certification to their issuers/TPAs. They need not provide payments for contraceptive services to their employees. Instead, third parties—their issuers/TPAs—provide payments for contraceptive services at no cost to plaintiffs. In short, with respect to contraceptive coverage, the non-diocese plaintiffs need not do anything more than they did prior to the promulgation of the challenged regulations—that is, to inform their issuers/TPAs that they object to providing contraceptive coverage in order to ensure that they are not responsible for contracting, arranging, or paying for such coverage.

As a number of courts have explained, these regulations thus merely "require[] [plaintiff] to do what it has always done—sponsor a plan for its employees, contract with [an issuer], and notify the [issuer] that it objects to providing contraceptive coverage. Thus, [plaintiff is] not require[d] to 'modify [its] behavior.'" *Mich. Catholic Conf.*, 2013 WL 6838707, at *7 (quoting *Thomas*, 450 U.S. at 718); *see Notre Dame I*, 2013 WL 6804773, at *12; *Priests for Life*, 2013 WL 6672400, at *8. Because 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]

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on behalf of others, not on behalf of themselves, *see id.* at 9. In any event, any such claims would fail on the merits for the same reasons discussed in this section.

engages," *Kaemmerling*, 553 F.3d at 679, the Court's inquiry should end here. *Notre Dame II*, 743 F.3d at 559.

Plaintiffs do not even attempt to make an argument as to why the regulations impose a substantial burden on eligible organizations. Instead, they simply cite two cases in this district in which judges have found a substantial burden. Pls.' Br. at 13 (citing *S. Nazarene Univ. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 6804265 (W.D. Okla. 2013), and *Reaching Souls Int'l v. Sebelius*, __ F. Supp. 2d __, 2013 WL 6804259 (W.D. Okla. 2013)). Defendants respectfully submit that those rulings, presently on appeal to the Tenth Circuit, Nos. 14-6026, 14-6028 (10th Cir.), are mistaken.

The implication of plaintiffs' suggestion, and of the cases on which they rely, is that RFRA not only affords them the right to be free from contracting, arranging, or paying for contraceptive coverage for their employees—which, under these regulations, they are—but that it also gives them the right to prevent *anyone else* from providing such coverage to their employees, who might not subscribe to plaintiffs' religious beliefs. This theory—"virtually unprecedented," *Notre Dame II*, 743 F.3d at 557—would mean, for example, that even the government would not realistically be able to provide contraceptive coverage to plaintiffs' employees, because such coverage would occur as the result of plaintiffs' objection to providing such coverage themselves. But RFRA is a shield, not a sword, *see O'Brien v. HHS*, 894 F. Supp. 2d 1149, 1158-60 (E.D. Mo. 2012), and accordingly it does not prevent the government from providing alternative means of achieving important statutory objectives once it has provided a religious accommodation. *Notre Dame II*, 743 F.3d at 555-58. Rejecting a claim like plaintiffs', the

Seventh Circuit offered the example of a Quaker excused from military service but who argued that "drafting another person in his place would make him responsible for the military activities of his replacement, and [thus] substantially burden his own sincere religious beliefs." *Id.* at 556. The court described as a "fantastic suggestion" the notion that the government's exempting the Quaker from military service would "'trigger' the drafting of a replacement who was not a conscientious objector, [such that RFRA] would require a draft exemption for both the Quaker and his non-Quaker replacement." *Id.*; *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*, where 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 reasoned 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.* The same is true here, where the provision of contraceptive services is "entirely [an] activit[y] of [a third party], in which [plaintiff] plays no role." *Id.* Here too, "[a]lthough the [third party]'s activities . . . may

offend [plaintiff's] religious beliefs, they cannot be said to hamper [its] religious exercise." *Id.*; *see Notre Dame II*, 2014 WL 687134, at *5.

The Tenth Circuit's decision in *Hobby Lobby* does not require a contrary result. There, the court observed that, in determining whether an alleged burden is substantial, the 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." 723 F.3d at 1137. But, because the for-profit corporation plaintiffs in that case were not eligible for the accommodations (and thus were required to contract, arrange, and pay for contraceptive coverage), the court did not address whether an accommodation that requires a plaintiff to do nothing beyond satisfying a purely administrative self-certification requirement imposes a substantial burden on religious exercise. Here, because the challenged regulations require that plaintiffs take the *de minimis* step that they would have to take even in the absence of the regulations, the regulations do not impose a substantial burden on plaintiffs' religious exercise.

The challenged regulations also do not impose a substantial burden on plaintiffs' religious exercise because any burden is indirect and too attenuated to be substantial. The ultimate decision of whether to use contraception "rests not with [the employers], but with [the] employees" in consultation with their health care providers. *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 414-15 (E.D. Pa. 2013). And even if the challenged regulations were deemed to impose a substantial burden on plaintiffs' religious exercise, the regulations satisfy strict scrutiny because they are the least restrictive means of serving compelling governmental interests in public health and

gender equality. Defendants recognize that a majority of the en banc Tenth Circuit rejected these arguments in *Hobby Lobby*, and that this Court is bound by that decision. As noted above, *supra* note 8, the Supreme Court recently heard oral argument to review that decision. Defendants raise the arguments here to preserve them for appeal.

III. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THEIR ESTABLISHMENT CLAUSE CLAIM

"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. 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. *Id.* 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 "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 (describing *Gillette*); *see also Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (rejecting an Establishment Clause challenge to RLUIPA because it does 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*, nothing in any of the preventive services coverage regulations grants any denominational preference or otherwise discriminate among religions.[10] It is of no moment that the religious employer exemption and accommodations for eligible organizations apply to some employers but not others. As the Seventh Circuit has said, the Establishment Clause "does not require the government to equalize the burdens (or the benefits) that laws of general applicability impose on religious institutions." *Notre Dame II*, 2014 WL 687134, at *13. Nor does it "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*

[10] Plaintiffs fall wide of the mark when they observe that Anabaptists and members of healthcare sharing ministries are exempt from the minimum coverage provision. *See* Pls.' Br. at 19-20 (citing 26 U.S.C. § 5000A(d)(2)(A), (B)). Plaintiffs do not challenge that provision, which is entirely distinct from the regulations at issue here. The minimum coverage provision requires certain individuals who fail to maintain a minimum level of health insurance to pay a tax penalty. It provides no exemption from the preventive services coverage regulations, or to any employer from any requirement, as it only excludes certain *individuals* whose healthcare is otherwise provided for from the requirement to obtain health coverage. Plaintiffs also err when they note that TPAs are not obligated to provide contraceptive coverage. *See id.* at 23. The regulations require that a TPA that wishes to remain in a contractual relationship with an eligible employer that sponsors a self-insured non-church plan provide contraceptive coverage. The statement to which plaintiffs refer means only that a TPA is not required by law to enter into or remain in a given contractual relationship.

Indus. v. Sebelius, 914 F. Supp. 2d 943, 954 (S.D. Ind. 2012), *rev'd on other grounds*, *Korte*, 735 F.3d 654 (7th Cir. 2013). "This kind of distinction—not between denominations, but between religious organizations based on the nature of their activities—is not what *Larson* condemns." *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468-69 (N.Y. 2006).[11]

The regulations "do[] not refer to any particular denomination," *Grote*, 914 F. Supp. 2d at 954, and the exemption and accommodations are available on an equal basis to organizations affiliated with any and all religions. The regulations thus do not violate the Establishment Clause—as every court to have considered the issue has found.[12]

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[11] Plaintiffs stretch *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), well beyond its facts. *Weaver* was limited to "laws that facially regulate religious issues," *id*. at 1257, and, particularly, those that do so in a way that denies certain religious institutions public benefits that are afforded to all other institutions, whether secular or religious. The court in *Weaver* said nothing about the constitutionality of exemptions from generally applicable laws that are designed to accommodate religion, not to discriminate against religion. A requirement that any religious exemption that the government creates must be extended to all organizations—no matter their structure or purpose—would severely hamper the government's ability to accommodate religion. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987); *Diocese of Albany*, 859 N.E.2d at 464 ("To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather than promote, freedom of religion."). Moreover, the way in which the law at issue in *Weaver* was administered required the government to make intrusive inquiries into a school's religious beliefs and practices, *see* 534 F.3d at 1261-62, whereas the regulations here do no such thing.

[12] *See Notre Dame II*, 2014 WL 687134, at *13, *aff'g Notre Dame I*, 2013 WL 6804773, at *18-20; *Priests for Life*, 2013 WL 6672400, at *14; *Roman Catholic Archbishop of Wash. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 6729515, at *39-43 (D.D.C. 2013); *Catholic Diocese of Nashville*, 2013 WL 6834375, at *8-10; *Mich. Catholic Conf.*, 2013 WL 6838707, at *11; *see also, 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); *Liberty Univ. v. Lew*, 733 F.3d 72,

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

Plaintiffs have not established that they are likely to suffer irreparable harm in the absence of preliminary relief because, as explained above, they have not shown a likelihood of success on the merits of their RFRA or Establishment Clause claims. *See Hobby Lobby*, 723 F.3d at 1146 (explaining that, in the RFRA and First Amendment context, the merits and irreparable injury prongs merge). As to 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 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 plaintiffs' employees (and their families) the benefits of the preventive services coverage regulations. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) ("[C]ourts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."). Many women do not use contraceptive services because they are not covered by their health plan or require costly copayments, coinsurance, or deductibles.

100-02 (4th Cir. 2013) (upholding another religious exemption contained in the ACA against an Establishment Clause challenge because the exemption "makes no explicit and deliberate distinctions between sects" (quotations and citation omitted)).

IOM REP. at 19-20, 109; 77 Fed. Reg. at 8727; 78 Fed. Reg. at 39,887. As a result, in many cases, both women and developing fetuses suffer negative health consequences. *See* IOM REP. at 20, 102-04; 77 Fed. Reg. at 8728. 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.

Enjoining defendants from enforcing, as to plaintiffs, the preventive services coverage regulations—the purpose of which is to eliminate these burdens, 75 Fed. Reg. at 41,733; *see also* 77 Fed. Reg. at 8728—would thus inflict a very real harm on the public and on a readily identifiable group of individuals. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) (vacating preliminary injunction and noting that "[t]here is a general public interest in ensuring that all citizens have timely access to lawfully prescribed medications"). Plaintiffs' health plans cover thousands of people. Compl. ¶¶ 24, 45, 54. Even assuming plaintiffs were likely to succeed on the merits (which they are not, as explained above), any potential harm to plaintiffs would be outweighed by the significant harm an injunction would cause these employees and their families.[13]

CONCLUSION

The Court should deny plaintiffs' motion for preliminary injunction.

[13] As to Good Will Publishers, the equities tilt even more strongly against preliminary injunctive relief, since its employees have had health plans that cover contraceptive services, both in compliance with the regulations and before the regulations even existed. Moreover, their delay in bringing this suit—now over two years since the regulations applicable to them were issued and since they apparently complied—militates against preliminary injunctive relief. *Indep. Bankers Ass'n v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980) ("[E]quity aids the vigilant, not those who slumber on their rights[.]").

Respectfully submitted this 2nd day of April, 2014,

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2014, 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/ Michael C. Pollack_____
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