IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TYNDALE HOUSE PUBLISHERS, INC.; MARK D. TAYLOR,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:12-cv-1635-RBW**
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs Tyndale House Publishers, Inc. ("Tyndale"), and Mark D. Taylor ask this Court to preliminarily enjoin regulations that are intended to help ensure that women have access to health coverage, without cost-sharing, for certain preventive services that medical experts have deemed necessary for women's health and well-being. The preventive services coverage regulations that plaintiffs challenge require all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain recommended preventive services without cost-sharing (such as a copayment, coinsurance, or a deductible).[1] As relevant here, except as to group health plans of certain non-profit religious employers (and group health insurance coverage sold in connection with those plans), the preventive services that must be covered include 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.

The plaintiffs in this case are Tyndale, a for-profit Delaware corporation that publishes Christian books, and Mr. Taylor, the President and CEO of Tyndale. Plaintiffs claim that their sincerely held religious beliefs prohibit them from providing health coverage for certain contraceptive services. Defendants do not question the sincerity of those beliefs, but plaintiffs' challenge rests largely on the legal theory that a for-profit corporation established to publish and sell religious books can claim to exercise religion and thereby avoid the reach of laws designed to regulate commercial activity and protect the rights of employees. The Court should not accept this proposition. The Supreme Court has recognized that, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *United States v. Lee*, 455 U.S. 252, 261 (1982). Nor can an owner or officer of such a company eliminate the legal separation provided by the corporate

[1] A grandfathered plan is one that was in existence on March 23, 2010, and that has not undergone any of a defined set of changes. *See, e.g.*, 45 C.F.R. § 147.140.

form to impose his personal religious beliefs on the corporate entity's employees. To hold otherwise would permit for-profit companies and their shareholders and officers to become laws unto themselves, claiming countless exemptions from an untold number of general commercial laws designed to improve the health and well-being of individual employees based on an infinite variety of alleged religious beliefs. Such a system would not only be unworkable, it would also cripple the government's ability to solve national problems through laws of general application. This Court therefore should reject plaintiffs' effort to bring about an unprecedented expansion of constitutional and statutory free exercise rights.

For this reason and others, plaintiffs' motion for preliminary injunction should be denied because plaintiffs are not likely to succeed on the merits of their claims. Plaintiffs' Religious Freedom Restoration Act (RFRA) claims are without merit. Plaintiffs cannot show, as they must, that the preventive services coverage regulations substantially burden their religious exercise. Tyndale is a for-profit employer that cannot "exercise religion" under RFRA and the Free Exercise Clause. The allegations that the regulations burden the religious exercise of Tyndale's organizational owners and Mr. Taylor, an officer of the company, fare no better. Tyndale has no standing to raise RFRA or Free Exercise claims on behalf of its parent organizations. Furthermore, the regulations that purportedly impose such a burden apply only to group health plans and health insurance issuers, and plaintiffs only challenge the regulations as applied to Tyndale's group health plan. Nor can Mr. Taylor advance these claims. It is well established that a corporation and its shareholders and officers are wholly separate entities, and the Court should not permit Mr. Taylor and Tyndale's organizational owners to eliminate that legal separation to impose their personal religious beliefs on the corporate entity's group health plan or its employees. Neither Mr. Taylor, a corporate officer of Tyndale, nor the organizational owners of Tyndale, is required to provide health coverage; only the corporation is subject to the challenged regulations. Mr. Taylor and Tyndale's shareholders cannot use the corporate form alternatively as a shield and a sword, depending on what suits them in any given circumstance.

Furthermore, even if Tyndale could exercise religion within the meaning of RFRA, the

preventive services coverage regulations still would not impose a substantial burden on plaintiffs' exercise of religion because any burden caused by the regulations is simply too attenuated to qualify as a substantial burden. Indeed, the first court to address the merits of a challenge to the preventive services coverage regulations dismissed the plaintiffs' RFRA claim for this reason. *See O'Brien v. Sebelius*, No. 4:12-cv-476, 2012 WL 4481208, at *5-*7 (E.D. Mo. Sept. 28, 2012) (appeal pending). It will remain the independent choice of Tyndale's employees (and their health care providers) whether to use their employer-provided health care coverage to procure particular health care services – including the contraceptive services to which plaintiffs object – in much the same way that it is currently their choice whether to use their employer-paid salaries to procure those services, subject to the employees' own moral and other preferences, rather than those of their employer. And Tyndale remains free to advocate particular choices to its workforce. Finally, even if the preventive services coverage regulations were deemed to substantially burden any plaintiff's religious exercise, the regulations would not violate RFRA because they are narrowly tailored to serve two compelling governmental interests: improving the health of women and children, and equalizing the provision of preventive care for women and men so that women who choose to do so can be part of the workforce on an equal playing field with men.

Plaintiffs' First Amendment claims are equally meritless. The Free Exercise Clause does not prohibit a law that is neutral and generally applicable even if the law prescribes conduct that an individual's religion proscribes. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). The preventive services coverage regulations fall within this rubric because they do not target, or selectively burden, religiously motivated conduct. The regulations apply to all non-exempt, non-grandfathered plans, not just those of employers with religious affiliations. Nor do the regulations violate the Establishment Clause by preferring some religious denominations over others. Furthermore, the regulations do not violate plaintiffs' free speech or free association rights. The regulations compel conduct, not speech. They do not require plaintiffs to say anything; nor do they prohibit plaintiffs from expressing to company employees

or the public their views in opposition to the use of contraceptive services. Indeed, the highest courts of both New York and California have upheld state laws similar to the preventive services coverage regulations against First Amendment challenges like those asserted here.

Nor can plaintiffs succeed on their Fifth Amendment due process or Administrative Procedure Act ("APA") claims. Plaintiffs fail to identify any vagueness in the statute or the challenged regulations and, indeed, acknowledge that they understand how the regulations apply to Tyndale. Moreover, in promulgating the challenged regulations, defendants complied with the relevant procedural rulemaking requirements and carefully considered – and continue to consider – the impact of the regulations on all employers, including for-profit employers like Tyndale.

Finally, even if plaintiffs could show a likelihood of success on the merits, the Court should not grant plaintiffs' request for a preliminary injunction because, in light of a delay of more than a year between the enactment of the challenged regulations and the initiation of this suit, plaintiffs cannot establish irreparable harm. The purported urgency of plaintiffs' current request for emergency injunctive relief is belied by the tardiness of that request. Plaintiffs should not be rewarded for creating their own alleged emergency. Furthermore, the balance of equities tips toward the government. Enjoining application of the regulations as to plaintiffs would prevent the government from achieving Congress's goals of improving the health of women and children and equalizing the playing field for women and men. It would also harm the public, given the large number of employees at Tyndale – as well as any covered spouses and other dependents – who could suffer the negative health and other consequences that the regulations are intended to prevent.

BACKGROUND

I. Statutory Background

Before the enactment of 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 in large part 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."). Section 1001 of the ACA – which includes the preventive services coverage provision that is relevant here – seeks to cure this problem by making preventive care affordable and accessible 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 in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]." 42 U.S.C. § 300gg-13(a)(4).

The government issued interim final regulations implementing the preventive services coverage provision on July 19, 2010. 75 Fed. Reg. 41,726. Those regulations provide, among other things, that a group health plan or health insurance issuer offering non-grandfathered health coverage must provide coverage for newly recommended preventive services, without cost-sharing, for plan years that begin on or after the date that is one year after the date on which the new recommendation is issued. 26 C.F.R. § 54.9815-2713T(b)(1); 29 C.F.R. § 2590.715-2713(b)(1); 45 C.F.R. § 147.130(b)(1).

Because there were no existing HRSA guidelines relating to preventive care and screening for women, HHS tasked the Institute of Medicine (IOM)[2] with developing recommendations to implement the requirement to provide preventive services for women. IOM REP. at 2. After an extensive science-based review, IOM recommended that HRSA guidelines include, 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). FDA, Birth Control Guide, *available at* http://www.fda.gov/forconsumers/byaudience/forwomen/

[2] IOM was established in 1970 by the National Academy of Sciences and is funded by Congress. IOM REP. at iv. It secures the services of eminent members of appropriate professions to examine policy matters pertaining to the health of the public and provides expert advice to the federal government. *Id.*

ucm118465.htm (last visited Oct. 22, 2012). IOM determined that coverage, without cost-sharing, for these services is necessary to increase access, and thereby reduce unintended pregnancies (and the negative health outcomes that disproportionately accompany unintended pregnancies) and promote healthy birth spacing. IOM REP. at 102-03; *see infra* at 21-22.

On August 1, 2011, HRSA adopted IOM's recommendations, subject to an exemption relating to certain religious employers authorized by an amendment to the interim final regulations. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), available at http://www.hrsa.gov/womensguidelines/ (last visited Oct. 22, 2012). The amendment to the interim final regulations, issued on the same day, authorized HRSA to exempt group health plans established or maintained by certain religious employers (and associated group health insurance coverage) from any requirement to cover contraceptive services under HRSA's guidelines. 76 Fed. Reg. 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A).[3] The religious employer exemption was modeled after the religious accommodation used in multiple states that had already required health insurance issuers to provide coverage for contraception.[4] 76 Fed. Reg. at 46,623.

In February 2012, the government adopted in final regulations the definition of "religious employer" contained in the amended interim final regulations while also establishing a temporary enforcement safe harbor for non-grandfathered group health plans sponsored by

[3] To qualify, an employer must 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.
> (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.

45 C.F.R. § 147.130(a)(1)(iv)(B).

[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 (Oct. 1, 2012), *available at* http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf (last visited Oct. 22, 2012).

certain non-profit organizations with religious objections to contraceptive coverage (and any associated group health insurance coverage). 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012). During the safe harbor period, the government intends to amend the preventive services coverage regulations to further accommodate non-exempt, non-grandfathered religious organizations' religious objections to covering contraceptive services. *Id.* at 8728. The government began the process of further amending the regulations on March 21, 2012, when it published an Advance Notice of Proposed Rulemaking (ANPRM) in the Federal Register. 77 Fed. Reg. 16,501.

II. Current Proceedings

Plaintiffs claim that the contraceptive coverage requirement violates RFRA, the First and Fifth Amendments to the United States Constitution, and the Administrative Procedure Act. On October 8, 2012 – 14 months after the regulations were published in interim final form and eight months after they were published as final regulations – plaintiffs filed suit and moved for a preliminary injunction, asserting that they would suffer irreparable harm if the preventive services coverage regulations were not enjoined as to them. *See* ECF No. 6.

ARGUMENT

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. Plaintiffs cannot satisfy any of these requirements.[5]

[5] Plaintiffs rely on *Newland v. Sebelius*, --- F. Supp. 2d ---, 2012 WL 3069154 (D. Colo. July 27, 2012) (appeal pending), to support their arguments. *See, e.g.*, Pls.' Mem. at 1, 7, 17. But the *Newland* court did not, as plaintiffs – represented by the same counsel as the plaintiffs in *Newland* – incorrectly claim, "rule[] that the Mandate threatens a substantial burden on the religious beliefs of a for-profit company run by religious believers," Pls.' Mem. at 17. *See Newland*, 2012 WL 3069154, at *6. In fact, the court did not decide whether a for-profit company can exercise religion, or whether the regulations impose a substantial burden on the exercise of religion, but only recognized that these are "difficult questions of first impression." *Id.* Furthermore, the *Newland* court applied a relaxed preliminary injunction standard, under which the court did not require the plaintiffs to show a likelihood of success on the merits. *See id.* at *3. But in this Circuit, plaintiffs must show a likelihood of success on the merits in order to obtain a preliminary injunction. *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 304 (D.C. Cir. 2006).

I. PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS

A. Plaintiffs' Religious Freedom Restoration Act claim is without merit.

1. Plaintiffs have not sufficiently alleged that the preventive services coverage regulations substantially burden their religious exercise.

Congress enacted the Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb-1 *et seq.*) in response to *Employment Division v. Smith*, 494 U.S. 872 (1990). RFRA was intended to reinstate the pre-*Smith* compelling interest test for evaluating legislation that substantially burdens the free exercise of religion. 42 U.S.C. § 2000bb-1(b). Under RFRA, the federal government generally may not "substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability.'" *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424 (2006) (quoting 42 U.S.C. § 2000bb-1(a)). But the government may substantially burden the exercise of religion if it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

For several reasons, plaintiffs cannot show that the challenged regulations substantially burden any exercise of religion, and thus cannot succeed on their RFRA claim. First, Tyndale is not an individual or a "religious organization," and thus cannot "exercise religion," under RFRA. Second, because the challenged regulations apply only to Tyndale, and not to its owners or officers, the religious exercise of Tyndale's owners and officers is not substantially burdened. And third, as the District Court for the Eastern District of Missouri recently decided, any burden imposed by the regulations is indirect and thus cannot be substantial. *See O'Brien*, 2012 WL 4481208.

a. *There is no substantial burden on Tyndale because the for-profit corporation does not exercise religion within the meaning of RFRA.*

Plaintiffs' principal claim is that Tyndale can "exercise . . . religion" within the meaning

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As for the court's compelling interest and least restrictive means analysis, the government respectfully maintains that *Newland* was incorrectly decided.

of RFRA. 42 U.S.C. § 2000bb-1(b). But the Supreme Court has made clear that, although the First Amendment freedoms of speech and association are "right[s] enjoyed by religious and secular groups alike," the Free Exercise Clause "gives special solicitude to the rights of *religious* organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (emphasis added). The cases are replete with statements like this. *See, e.g.*, *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (the Court's precedent "radiates . . . a spirit of freedom for *religious* organizations, an independence from secular control or manipulation") (emphasis added); *Hosanna-Tabor*, 132 S. Ct. at 702 ("Both Religion Clauses bar the government from interfering with the decision of a *religious* group to fire one of its ministers.") (emphasis added); *id.* at 706 (Free Exercise Clause "protects a *religious* group's right to shape its own faith and mission") (emphasis added); *Werft v. Desert Sw. Annual Conference of U. Methodist Church*, 377 F.3d 1099, 1102 (9th Cir. 2004) ("The Free Exercise Clause protects the power of *religious* organizations to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." (citations and quotation marks omitted) (emphasis added)). Because RFRA incorporates Free Exercise jurisprudence, the same logic applies. *See Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003) ("Congress in enacting RFRA only sought to provide process and standards for the protection of religious exercise. It did not purport to extend the definition of that term, and indeed defined the term 'exercise of religion' only as meaning 'the exercise of religion under the First Amendment to the Constitution.'" (quoting 42 U.S.C. § 2000bb-2(4))). In short, only a *religious* organization can "exercise religion" under RFRA.

Thus, the question the Court must decide in this case is whether Tyndale is a *religious* organization for the purposes of RFRA and the Free Exercise Clause. Defendants maintain that it is not. Contrary to plaintiffs' assertions, defendants do not take the position "that one cannot exercise religion while engaging in business," *see* Pls.' Mem. at 10, nor "that anything connected with commerce excludes religion," *see id.* at 12. But as far as defendants are aware, no court has ever held that a for-profit corporation is a religious organization for purposes of federal law. For

this reason, for-profit companies cannot permissibly discriminate on the basis of religion in hiring or firing their employees or otherwise establishing the terms and conditions of their employment under federal law. Title VII of the Civil Rights Act of 1964 generally prohibits religious discrimination in the workplace. *See* 42 U.S.C. § 2000e-2(a). But that bar does not apply to "a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [a] corporation . . . of its activities." *Id.* § 2000e(1)(a). Tyndale does not qualify as a "religious corporation" under Title VII: it is for-profit; plaintiffs do not allege that it is affiliated with a formally religious entity, nor that a formally religious entity participates in its management; and plaintiffs also do not claim that Tyndale's "membership" – in this case its employees – is made up only of individuals who share its religious beliefs. *See LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217 (3d Cir. 2007). In fact, the Ninth Circuit has explicitly held that a for-profit entity can never qualify for the Title VII exemption. *See Spencer v. World Vision, Inc.*, 633 F.3d 723, 734, 748 (9th Cir. 2011). And in a different context, the D.C. Circuit also reached the conclusion that a for-profit entity cannot be a religious organization. *See Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002) (holding that an organization can only be religious, and thus exempt from NLRB jurisdiction, if it is organized as a non-profit).

It would be extraordinary to conclude that Tyndale is not a "religious corporation" under Title VII (and it is not) and thus cannot discriminate on the basis of religion in hiring or firing, or otherwise establishing the terms and conditions of employment, 42 U.S.C. § 2000e-1(a), but nonetheless "exercise[s] . . . religion" within the meaning of RFRA, *id.* § 2000bb-1(b). To so hold would be to permit a for-profit company to impose its owner's religious beliefs on its employees in a way that denies those employees the protection of general laws designed to protect their health and well-being (including Title VII, thereby overriding the congressionally prescribed scope of the Title VII religious exemption, an exemption that has withstood scrutiny by the Supreme Court). A host of laws and regulations would be subject to attack on the ground that particular requirements did not conform to the corporate owner's personal religious views.

Moreover, any secular company in this country would have precisely the same right as a religious organization to, for example, require that its employees "observe the [company owner's] standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco." *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330 n.4 (1987). These consequences show why the Free Exercise Clause, RFRA, and Title VII distinguish between secular and religious organizations, with only the latter receiving special protection.

The cases relied on by plaintiffs are not to the contrary, as none of them held that a for-profit corporation may exercise religion. For example, *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and *United States v. Lee*, 455 U.S. 252, 257 (1982), all involved *individual* plaintiffs. Sherbert was an employee who was discharged for refusing to work on Saturdays; Yoder was a member of the Old Order Amish religion who objected to a compulsory school attendance law, and Lee was also a member of the Old Order Amish who objected to paying social security tax for his employees. None of the plaintiffs was a for-profit corporation. Nor are plaintiffs helped by *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), or *EEOC v. Townley Eng'g and Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988). Plaintiffs' statement that both cases "recognized that a for-profit and even 'secular' corporation could assert free exercise claims," Pls.' Mem. at 10, is fundamentally incorrect. Both cases expressly declined to decide whether "a for-profit corporation can assert its own rights under the Free Exercise Clause." *Stormans*, 586 F.3d at 1119; *see also Townley*, 859 F.2d at 619, 620. Instead, they held that the particular plaintiff corporations had standing to raise the rights of their owners. *Stormans*, 586 F.3d at 1119-22; *Townley*, 859 F.2d at 619-20 & n.15.[6] None of the other cases cited by plaintiffs fares any better. In fact, plaintiffs do not cite a single case that held that a for-profit corporation can exercise religion under RFRA and the Free Exercise Clause.[7]

[6] As explained in more detail later in this section, neither *Stormans* nor *Townley* has anything to say about whether a burden on a corporation is also a burden on its owners or officers. *See infra* at 16-17.

[7] The court in *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 800 F. Supp. 2d 405 (E.D.N.Y. 2011), held that the challenged law "does not restrict any religious practice" and therefore had no reason to reach the question

It is significant that Tyndale elected to organize itself as a for-profit entity and to enter the commercial marketplace. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261. Having chosen the for-profit path, the company may not impose its owner's religious beliefs on its employees (many of whom may not share the owner's beliefs). *See id.* ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."). In this respect, "[v]oluntary commercial activity does not receive the same status accorded to directly religious activity." *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) (interpreting the Free Exercise Clause of the Alaska Constitution). Any burden is therefore caused by the company's "choice to enter into a commercial activity." *Id. Cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring) (observing in the First Amendment expressive association context that "[o]nce [an organization] enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its

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whether a for-profit organization can exercise religion. *Id.* at 416. Moreover, nothing in the opinion discussed the secular or religious characteristics of the plaintiffs. *McClure v. Sports and Health Club*, 370 N.W. 2d 844 (Minn. 1985), expressly declined to decide whether the corporation could assert a right to free exercise of religion; the court assumed for purposes of the case that the owners and the corporation were "one and the same" and thus considered only the free exercise rights of the owners. *Id.* at 850-51 & n.12. What relevant language there is in *McClure* supports defendants, not plaintiffs. *See id.* at 853 ("Sports and Health, however, is not a religious corporation – it is a Minnesota business corporation engaged in business for profit. By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs . . . . [W]hen appellants entered into the economic arena and began trafficking in the market place, they have subjected themselves to the standards the legislature has prescribed not only for the benefit of prospective and existing employees, but also for the benefit of the citizens of the state as a whole in an effort to eliminate pernicious discrimination."); *see also Maruani v. AER Servs., Inc.*, No. 06-176, 2006 WL 2666302, at * 6 (D. Minn. Sept. 18, 2006) ("AER is a secular employer under any standard. It is a for profit business, not owned or operated by any church . . . . Accordingly, AER, as a secular employer is not entitled to First Amendment protections for religious institutions"). *Jasniowski v. Rushing*, 678 N.E.2d 743 (Ill. App. Dist. 1, 1997), relied on the standing analysis in *Townley* to allow the plaintiff corporation to assert the Free Exercise rights of it owner. *See id.* at 749. The court in *Jasniowski* also emphasized that its decision was based on the "limited context" where the owner is the "president, sole officer, and sole shareholder" of the corporation, and thus "its alter ego." *Id.* The court in *Morr-Fitz, Inc. v. Blagojevich*, No. 2005-CH-000495, 2011 WL 1338081 (Ill. Cir. Ct. 7th, Apr. 5, 2011), had no need to, and did not, address the question of whether a for-profit corporation can exercise religion, as the owners of the plaintiff corporations were also parties. *See id.* Finally, there is no indication that the religiously-affiliated hospital in *Roberts v. Bradfield*, 12 App. D.C. 453 (D.C. Cir. 1898), was a for-profit corporation. Furthermore, *Roberts* was decided more than a century ago, and therefore pre-dates the cases cited by defendants confirming that only religious organizations can exercise religion.

affairs to the marketplace of ideas"). An employer like Tyndale therefore stands in a fundamentally different position from a church or a religiously-affiliated non-profit organization. *Cf. Amos*, 483 U.S. at 343-45 (Brennan, J., concurring in the judgment).

b. *The preventive services coverage regulations do not substantially burden the religious exercise of Tyndale's owners because the regulations apply only to Tyndale, a separate and distinct legal entity.*

Plaintiffs also claim to be asserting the Free Exercise and RFRA claims of its owners, the Tyndale House Foundation and three separate trusts. *See* Pls.' Mem. at 13-14. As an initial matter, Tyndale lacks standing to assert a free-exercise claim on behalf of its parent entities. Inexplicably, these entities are not parties to this action. It is well settled that, as a general rule, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)); *see also Tileston v. Ullman*, 318 U.S. 44, 46 (1943). In order to overcome this rule, a plaintiff must show a "close relationship" with the person or entity that possesses the right and that there is a "hindrance" to the possessor's ability to protect his own interests. *Kowalski*, 543 U.S. at 129-30 (citing *Powers v. Ohio,* 499 U.S. 400, 411 (1991)). In the context of corporate entities, the mere existence of a parent-subsidiary relationship is, by itself, insufficient to confer standing for one to bring suit on behalf of the other. *See Schenley Distillers Corp. v. United States*, 326 U.S. 432, 435 (1946); *EMI Ltd. v. Bennett*, 738 F.2d 994, 997 (9th Cir. 1984). As plaintiffs have failed to show that Tyndale's parent entities would in any way be hindered from asserting their own First Amendment or RFRA rights, plaintiffs have no standing to assert claims on their behalf.[8]

[8] Though *Kowalski* acknowledges that First Amendment concerns can justify a lessening of prudential standing limitations, no such exception is applicable here. In support of its proposition, the *Kowalski* court cites *Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956-57 (1984). However, far from a universal grant of third party standing in First Amendment cases, *Munson* stands for the limited notion that the risk of *chilling protected speech* through threats of *criminal prosecution* outweighs the normal "hindrance" requirement for such standing. *Id.* at 956-57. This is because, "[e]ven where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser." *Id.* Indeed, the narrow and fact-specific scope of this exception is confirmed by the *Munson* Court's reliance on *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973), which also held that a party could challenge the constitutionality of a criminal restriction on speech even if his speech would not be permissible under a

But even if Tyndale's owners were parties to this case, the preventive services coverage regulations do not substantially burden their religious exercise. Defendants do not question the sincerity of the religious beliefs of Tyndale's owners and Mr. Taylor. But by their terms, the regulations apply only to group health plans and health insurance issuers, not the owners of entities providing group health coverage. *See* 42 U.S.C. § 300gg-91(a)(1); 26 C.F.R. § 54.9815-2713T; 29 C.F.R. § 2590.715-2713; 45 C.F.R. § 147.130. The Tyndale owners do not challenge any obligations imposed on them. Yet they nonetheless claim that the regulations substantially burden *their* religious exercise because the regulations may require the group health plan sponsored by their for-profit *company* to provide health insurance that includes contraceptive coverage. But a plaintiff cannot establish a substantial burden 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. "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Indeed, "[i]n our modern regulatory state, virtually all legislation (including neutral laws of general applicability) imposes an incidental burden at some level by placing indirect costs on an individual's activity. Recognizing this . . . [t]he federal government . . . ha[s] identified a substantiality threshold as the tipping point for requiring heightened justifications for governmental action." *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 262 (3d Cir. 2008) (Scirica, C.J., concurring). Here, any burden on the owners' religious exercise results from obligations that the regulations impose on a legally separate, for-profit corporation's group health plan. This type of indirect burden is not cognizable under RFRA.[9] Indeed, cases that find a substantial burden uniformly involve a direct

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constitutional statute because of the chilling effect such laws have. This exception is inapplicable to the case at hand because no threat of criminal penalty exists to deter the parties with proper standing from exercising their religious rights or bringing suit. Thus, no overriding societal interest justifies waiver of the close relationship or hindrance requirements of third party standing.

[9] The attenuation is in fact twice removed. A group health plan is a legally separate entity from the company that sponsors it. 29 U.S.C. § 1132(d). And, as explained below, Tyndale is a legally separate entity from its owners.

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); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993). Not so here, where the preventive services coverage regulations apply to the group health plan sponsored by Tyndale, not to Tyndale's owners.

Plaintiffs' theory boils down to the claim that what is done to the company (or, really, the group health plan sponsored by the company) is also done to its owners. But, as a legal matter, that is simply not so. The owners have voluntarily chosen to enter into commerce and elected to do so by establishing a for-profit corporation that is a creature of statute and a "separate and distinct legal entity" from its shareholders, officers, and directors. *Cargill, Inc. v. JWH Special Circumstance LLC*, 959 A.2d 1096, 1109 (Del. Ch. 2008); *see also, e.g., Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003) ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities."); *In re EToys, Inc.*, 234 Fed. App'x 24, 25 (3d Cir. 2007). Indeed, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). As a Delaware domestic corporation with a "perpetual" term of existence, Tyndale has broad powers – it may, for example, conduct business, sue and be sued, and appoint or employ agents. *See generally* 8 Del. C. §§ 101 *et seq.* The company's officers have a duty to act "in the best interests of the corporation," *see, e.g.*, *Ad Hoc Comm. of Equity Holders of Tectonic Network, Inc. v. Wolford*, 554 F. Supp. 2d 538, 558 (D. Del. 2008),[10] and they in turn are generally not liable for the corporation's actions, *see, e.g.*, 8 Del. C. § 102(b)(7). In short, "[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." *Cedric Kushner Promotions, Ltd.*, 533 U.S. at 163; *see also BASF Corp. v. POSM II Props. P'ship, L.P.*, No. 3608-VCS, 2009 WL 522721, at *8 n.50 (Del. Ch. Mar. 3, 2009) ("Delaware

[10] Similarly, an employer-sponsored group health plan must be administered "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1).

public policy does not lightly disregard the separate legal existence of corporations. . . . The reason for that is that the use of corporations is seen as wealth-creating for society as it allows investors to cabin their risk and therefore encourages the investment of capital in new enterprises." (internal citations omitted)). Tyndale's owners should not be permitted to eliminate that legal separation only when it suits them, i.e., only so they can impose their religious beliefs on the corporation's group health plan and its employees.

Plaintiffs' contrary view – that the owners of a corporation can assert a RFRA claim on the corporation's behalf, *see* Pls.' Mem. at 13-14 – would expand RFRA's scope in an extraordinary way. It is of course true that all corporations act through human agency.[11] But that cannot mean that any legal obligation imposed on a corporation is also the obligation of the owner or that the owner's and the corporation's rights and responsibilities are coextensive; if that were the rule, any of the millions of shareholders of publicly traded companies could assert RFRA claims on behalf of those companies. Moreover, if the owner's religious beliefs were automatically imputed to the company, any secular company with a religious owner or shareholder would be permitted to discriminate against the company's employees on the basis of religion in establishing the terms and conditions of employment, notwithstanding the limited religious exemption that Congress established under Title VII. The owner of a secular company could impose his own religious beliefs on his employees in a manner that deprives those employees of the legal rights they would otherwise have. This result would constitute a wholesale evasion of the rule that a company must be a "religious organization" to assert free exercise rights, *Hosanna-Tabor*, 132 S. Ct. at 706, or a "religious corporation" to permissibly discriminate on the basis of religion in hiring or firing its employees or otherwise establishing the terms and conditions of their employment, 42 U.S.C. § 2000e-1(a).

Stormans and *Townley* do not suggest otherwise. Both cases held – probably incorrectly – that the plaintiff corporations had standing to raise the rights of their owners. But neither case

[11] In the instant case, the owners of Tyndale are other entities, further attenuating the link between any individual and the corporation.

had anything to say about whether a burden on a corporation could also be a *substantial* burden on its owners. While *Stormans* discussed whether the challenged rules were neutral and generally applicable, *see* 586 F.3d at 1130-37, it did not address the substantial burden prong at all. Similarly, nothing in *Townley* suggests that a burden on a corporation is also a burden on its owners. Although the court allowed the company to assert the rights of its owners, *see* 859 F.2d at 619-20 & n.15, it did not find that Title VII imposed a substantial burden on the owners' religious exercise. Rather, *Townley* acknowledged that the challenged statute "to some extent would adversely affect [plaintiffs'] religious practices," and then proceeded to uphold Title VII on compelling interest grounds. *Id.* at 620. In short, neither case supports the proposition that the preventive services coverage regulations impose a substantial burden on Tyndale's owners.[12]

c. *Alternatively, any burden imposed by the challenged regulations is too indirect to constitute a substantial burden.*

Although the preventive services coverage regulations do not require Tyndale or Tyndale's owners to provide contraceptive services directly, plaintiffs' complaint appears to be that, through the company's group health plan and the benefits it provides to employees, plaintiffs will facilitate conduct (the use of certain contraceptives) that they find objectionable. But this complaint has no limits. A company provides numerous benefits, including a salary, to its employees and by doing so in some sense facilitates whatever use its employees make of those benefits. But the owner has no right to control the choices of his company's employees, who may not share his religious beliefs, when making use of their benefits. Those employees have a legitimate interest in access to the preventive services coverage made available under the challenged regulations.

[12] The other plaintiff in this case, Mr. Taylor, is an officer and director of Tyndale, as well as an officer and director of the Foundation that owns the majority of Tyndale, and a trustee of the trusts that own the remainder. He is *not* an owner of Tyndale in his own right. Curiously, plaintiffs advance no argument as to whether a burden on a corporation can impose a substantial burden on an officer or director of the corporation. But all of the arguments above as to owners apply with equal (if not greater) force to officers and directors. If any corporate officer, director, or shareholder could bring a RFRA claim asserting his or her own rights to religious freedom based on a burden on a corporation, RFRA would cease to have any limits.

Indeed, the first court to decide the merits of a challenge to the preventive services coverage regulations under RFRA concluded as much. *See O'Brien*, 2012 WL 4481208, at *5-*7. The plaintiffs in *O'Brien* were a for-profit company and its owner, who is Catholic. *Id*. at *1. Assuming, but not deciding, that the company in *O'Brien* could exercise religion, the court determined that any burden on that exercise (as well as the owner's exercise of religion) is too attenuated to state a claim for relief. The court explained that "the plain meaning of 'substantial,'" as used in RFRA, "suggests that the burden on religious exercise must be more than insignificant or remote." *Id*. at *5. And cases presenting the test that RFRA was intended to restore – *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) – confirm this "common-sense conclusion." *O'Brien*, 2012 WL 4481208, at *5. The plaintiff in *Sherbert*, the court explained, "was forced to 'choose between following the precepts of her religion [by resting, and not working, on her Sabbath] and forfeiting [unemployment] benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other.'" *Id*. (quoting *Sherbert*, 374 U.S. at 404). Similarly, in *Yoder*, the state compulsory-attendance law "affirmatively compel[led] [plaintiffs], under threat of criminal sanction to perform acts undeniably at odds with the fundamental tenets of their religious beliefs." *Id*. (quoting *Yoder*, 406 U.S. at 218).

In contrast to the direct and substantial burdens imposed in those cases, the court in *O'Brien* determined that the preventives services coverage regulations result in only an indirect and *de minimis* impact on the plaintiffs. *Id*. at *6-*7.

> [T]he challenged regulations do not demand that plaintiffs alter their behavior in a manner that will directly and inevitably prevent plaintiffs from acting in accordance with their religious beliefs. [Plaintiff] is not prevented from keeping the Sabbath, from providing a religious upbringing for his children, or from participating in a religious ritual such as communion. Instead, plaintiffs remain free to exercise their religion, by not using contraceptives and by discouraging employees from using contraceptives. The burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [the company's] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiffs' religion. The Court rejects the proposition that

> requiring indirect financial support of a practice, from which plaintiff himself abstains according to his religious principles, constitutes a substantial burden on plaintiff's religious exercise.

Id. at *6. The court noted that the regulations have no more of an impact on the plaintiffs' religious beliefs than the company's payment of salaries to its employees, which those employees can also use to purchase contraceptives. *Id*. at *7. Indeed, the court observed, "if the financial support of which plaintiffs complain was in fact substantially burdensome, secular companies owned by individuals objecting on religious grounds to all modern medical care could no longer be required to provide health care to employees." *Id*. at *6.

The court also noted that adopting the plaintiffs' substantial burden argument would turn RFRA, which was meant as a shield, into a sword. *Id*. "[RFRA] is not a means to force one's religious practices upon others. RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *Id*.[13]

Plaintiffs' attempts to distinguish *Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011), *aff'd*, *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *see* Pls.' Mem. at 19-20, are unavailing. In fact, those decisions further confirm that there is no substantial burden here. There, the plaintiffs brought a RFRA challenge to the minimum coverage provision of the ACA, which, starting in 2014, will require most Americans to obtain qualifying health coverage or pay a tax penalty. The plaintiffs alleged that they "believe[] in trusting in God to protect [them] from illness or injury" and that being required to purchase health care coverage violated that belief. *Mead*, 766 F. Supp. 2d at 42. In concluding that the minimum coverage provision does not substantially burden the plaintiffs' religious practice, the court reasoned, among other things, that "Plaintiffs routinely contribute to other forms of insurance, such as Medicare, Social Security, and unemployment taxes, which present the same conflict with their belief that God will provide

[13] The fact that Tyndale's group health plan is self-insured, *see* Pls.' Mem. at 17-18, does not meaningfully distinguish this case from *O'Brien*. It is still the case that "[t]he burden of which plaintiffs complain" rests on "a series of independent decisions by health care providers and patients covered by [Tyndale's plan]." *O'Brien*, 2012 WL 4481208, at *6. Furthermore, a group health plan is a separate legal entity from the sponsoring employer even if the plan is self-insured. *See* 29 U.S.C. § 1132(d).

for their medical and financial needs." *Id.*[14]; *see also O'Brien*, 2012 WL 4481208, at *7. The same is true in this case. Plaintiffs presumably "routinely contribute to other" schemes that present the same conflict with their religious beliefs alleged here. A portion of plaintiffs' taxes, for example, are used for Medicaid, a federal-state program that routinely pays for contraceptive services for the needy. *See* Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. II, 125 Stat. 786, 1075 (2012); 42 U.S.C. § 1396a(a)(10); *id.* § 1396d(a)(4)(C); *see also* Kaiser Family Found., State Medicaid Coverage of Family Planning Services, at 7, 9 (Nov. 2009), *available at* http://www.kff.org/womenshealth/upload/8015.pdf (last visited October 22, 2012) (identifying contraceptive services covered under Illinois's Medicaid State Plan). If there was no substantial burden in *Seven-Sky*, there is no substantial burden here.

Because the preventive services regulations "are several degrees removed from imposing a substantial burden on [Tyndale], and one further degree removed from imposing a substantial burden on [Tyndale's owners]," *O'Brien*, 2012 WL 4481208, at *7, the Court should dismiss plaintiffs' RFRA claim even assuming a for-profit company like Tyndale can exercise religion.

2. Even if there were a substantial burden, the preventive services coverage 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 their religious exercise, they would not prevail because the preventive services coverage regulations are justified by two compelling governmental interests, and are the least restrictive means to achieve those interests. As an initial matter, "the Government clearly has a compelling interest in safeguarding the public health by regulating the health care and insurance markets." *Mead*, 766 F. Supp. 2d at 43; *see also Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir. 1998); *Dickerson v. Stuart*, 877 F. Supp. 1556, 1560 (M.D. Fla. 1995) (citing *Planned*

[14] The court of appeals adopted the district court's substantial burden analysis. *See Seven-Sky*, 661 F.3d at 5 n.4.

Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992)). There can be no question that this compelling interest in the promotion of public health is furthered by the regulations at issue here.

As explained in the interim final regulations, the primary predicted benefit of the 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. at 41,733; *see also* 77 Fed. Reg. at 8728. Indeed, "[b]y expanding coverage and eliminating cost sharing for recommended preventive services, these interim final regulations could be expected to increase access to and utilization of these services, which are not used at optimal levels today." 75 Fed. Reg. at 41,733. Increased access to contraceptive services is a key part of these predicted health outcomes, as a lack of contraceptive use has proven to have negative health consequences for both women and a developing fetus. 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. Contraceptive coverage also helps to avoid "the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." *Id.* at 103. In fact, "pregnancy may be contraindicated for women with serious medical conditions such as pulmonary hypertension . . . and cyanotic heart disease, and for women with the Marfan Syndrome." *Id.* at 103-04.

Closely tied to this interest is a related, but separate, compelling interest that is furthered by the preventive services coverage regulations. As the Supreme Court explained in *Roberts v. United States Jaycees*, 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." 468 U.S. at 626. Thus, "[a]ssuring women equal access to . . . goods, privileges, and advantages . . . clearly furthers compelling state interests." *Id.* By including in the ACA gender-specific preventive health services for women, Congress made clear that the goals and benefits of effective preventive health care apply with equal force to women, who might otherwise be excluded from such

benefits if their unique health care burdens and responsibilities 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." *See* 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009); *see also* 155 Cong. Rec. S12265-02, S12269 (daily ed. Dec. 3, 2009); IOM REP. at 19. These costs result in women often forgoing preventive care. *See, e.g.*, 155 Cong. Rec. S12265-02, S12274. Accordingly, this disproportionate burden on women creates "financial barriers . . . that prevent women from achieving health and well-being for themselves and their families." IOM REP. at 20. Thus, Congress's goal was to equalize the provision of health care for women and men in the area of preventive care, including the provision of family planning services for women. *See, e.g.*, 155 Cong. Rec. S12265-02, S12271; *see also* 77 Fed. Reg. at 8728. Congress's attempt to equalize the provision of preventive health care services furthers a compelling governmental interest. *Cf. Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67, 92-93 (Cal. 2004).

In arguing that the government's interests are not in fact compelling, plaintiffs rely on the specific characteristics of Tyndale's work force and health plan. *See* Pls.' Mem. at 29-31. Under plaintiffs' theory, the government would have to analyze the impact of and need for the regulations as to each and every employer and employee in America. But this level of specificity would lead to an unworkable standard and would render this regulatory scheme – and potentially any regulatory scheme that is challenged due to religious objections – completely unworkable. *See Lee*, 455 U.S. at 259-60. In practice, courts have not required the government to analyze the impact of a regulation on the single entity seeking an exemption, but have expanded the inquiry 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).[15]

Plaintiffs also miss the point when they attempt to minimize the magnitude of the government's interests by arguing that contraception is widely available and even subsidized for certain individuals at lower income levels. *See* Pls.' Mem. at 29. Although a majority of employers do offer coverage of FDA-approved contraceptives, *see* IOM REP. at 109, many women forgo recommended preventive services, including contraceptive services, because of cost-sharing imposed by their health plans, *see id.* at 19-20, 109.[16] The challenged regulations

[15] *O Centro* is not to the contrary. To be sure, the Court rejected "slippery-slope" arguments for refusing to accommodate a particular claimant. *See O Centro*, 546 U.S. at 435-36. But it construed the scope of the requested exemption as encompassing all members of the plaintiff religious sect. *See id.* at 433. Similarly, the exemption in *Yoder*, 406 U.S. 205, encompassed *all* Amish children; and the exemption in *Sherbert*, 374 U.S. 398, encompassed *all* individuals who had a religious objection to working on Saturdays. *See O Centro*, 546 U.S. at 431 (discussing *Yoder* and *Sherbert*). The Court's warning in *O Centro* against "slippery-slope" arguments was a rejection of arguments by analogy – that is, speculation that providing an exemption to one group will lead to exemptions for other non-similarly situated groups. It was not an invitation to ignore the reality that an exemption for a particular claimant might necessarily lead to an exemption for an entire category of similarly situated entities. And according to plaintiffs, any for-profit corporation – even an indisputably secular company that manufactures heating, ventilation, and air conditioning products, as in *Newland* – is entitled to restrict its employees' statutory and regulatory protections to those that coincide with the owner's religious views.

[16] In general, plaintiffs do not dispute that equalizing the provision of preventive care so as to level the playing field between women and men is a compelling governmental interest or that it is furthered by the preventive services coverage regulations. Nor do plaintiffs dispute that improving the health of women and newborn children is a compelling governmental interest. Plaintiffs question only whether the regulations will actually further the government's public health goals, and they flyspeck the IOM Report to suggest that the regulations will not. *See* Pls.' Mem. at 29-31. But the IOM Report and its recommendations are the work of independent experts in the field of public health. After undertaking an extensive science-based review of the available evidence, IOM determined that coverage, without cost-sharing, for the full range of FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity is necessary for women's health and well-being. *See supra* at 21-22. The HRSA Guidelines adopting the IOM's expert, scientific recommendations are entitled to deference. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *see also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376-77 (1989) (emphasizing that deference is particularly appropriate when an interpretation implicates scientific and technical judgments within the scope of agency expertise). Plaintiffs' flyspecking does not overcome that deference.

advance the compelling interests of promoting the health of women and newborn children and furthering gender equality by eliminating that cost-sharing. 77 Fed. Reg. at 8728. Furthermore, the interests in promoting the health of women and newborn children and furthering gender equality are compelling when applied *specifically* to Tyndale and other companies that object to the regulations on religious grounds. Taking into account the "particular claimant whose sincere exercise of religion is [purportedly] being substantially burdened," *O Centro* 546 U.S. at 430-31, an exemption of plaintiffs and other similar employers from the obligation of their health plans to cover all recommended contraceptive services would remove their employees (and their employees' families) from the very protections that were intended to further the compelling interests recognized by Congress. *See, e.g.*, *Graham*, 822 F.2d at 853 ("Where, as here, the purpose of granting the benefit is squarely at odds with the creation of an exception, we think the government is entitled to point out that the creation of an exception does violence to the rationale on which the benefit is dispensed in the first instance."). This harm would befall female employees (and covered spouses and dependents) who do not necessarily share their employer's religious beliefs. Plaintiffs' desire for Tyndale not to provide a health plan that permits such individuals to exercise their own choice as to contraceptive use must yield to the government's compelling interests in avoiding the adverse and unfair consequences that would be suffered by such individuals as a result of the company's decision. *See Lee*, 455 U.S. at 261 (noting that a religious exemption is improper where it "operates to impose the employer's religious faith on the employees").

Plaintiffs' primary argument is that the interests underlying the regulations cannot be considered compelling when "191 million people" are not protected by the regulations. Pls.' Mem. at 22. But, contrary to plaintiffs' assertions, this is not a case where underinclusive enforcement of a law suggests that the government's "supposedly vital interest" is not really compelling. *Lukumi*, 508 U.S. at 546-47 (internal quotations and citations omitted). Many of the "exemptions" referred to by plaintiffs are not exemptions from the preventive services coverage regulations at all, but are instead provisions of the ACA that exclude individuals and entities

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

The first "exemption" cited by plaintiffs – the grandfathering of certain health plans with respect to certain provisions of the ACA – is not limited to the preventive services coverage regulations. *See* 42 U.S.C. § 18011; 45 C.F.R. § 147.140. In fact, the effect of grandfathering is not a permanent "exemption," but rather, over the long term, a transition in the marketplace with respect to several provisions of the ACA, including the preventive services coverage provision. The grandfathering provision reflects Congress's attempts to balance competing interests – specifically, the interest in spreading the benefits of the ACA, including those under the preventive services coverage provision, and the interest in easing the transition into the new regulatory regime established by the ACA by minimizing any potential for disruption to existing coverage – in the context of a complex statutory scheme. *See* 75 Fed. Reg. 34,538, 34,540, 34,546 (June 17, 2010).

The incremental transition of the marketplace into the ACA administrative scheme does not call into question the compelling interests furthered by the preventive services coverage regulations. Even with grandfathering, it is projected that more group health plans will transition

to the requirements under the regulations as time goes on. The government estimates that, as a practical matter, a majority of group health plans will lose their grandfather status by 2013. *See id.* at 34,552. Thus, any purported damage to the compelling interests underlying the regulations will be quickly mitigated, which is in stark contrast to the *permanent* exemption from the regulations sought by plaintiffs.[17] 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 they offer no support for such an untenable proposition. To the contrary, this approach is a perfectly reasonable balancing of competing interests. *See Winddancer*, 435 F. Supp. 2d at 695-98.

Second, 26 U.S.C. § 4980H(c)(2) does *not* exempt small employers from the preventive services coverage regulations. *See* 42 U.S.C. § 300gg-13(a); 76 Fed. Reg. at 46,622 n.1. Instead, it excludes employers with fewer than 50 full-time equivalent employees from the employer responsibility provision. That provision subjects employers with more than 50 full-time employees to assessable payments, beginning in 2014, if they do not provide health coverage to their full-time employees and certain other conditions are met. *See* 26 U.S.C. § 4980H(c)(2). This has nothing to do with preventive services coverage. In fact, small employers that choose to offer non-grandfathered health coverage to their employees must provide coverage for recommended preventive services – including contraceptive services – without cost-sharing. And there is reason to believe that many small employers will continue to offer health coverage, because the ACA, among other things, provides tax incentives for small businesses to encourage the purchase of health insurance for their employees. *See id*. § 45R.[18]

[17] The same is true of the temporary enforcement safe harbor for certain non-profit organizations with religious objections to contraceptive coverage.

[18] Even if there were some connection between the preventive services coverage provision and the employer responsibility provision, excluding small employers from the employer responsibility provision does not undermine the government's compelling interests in helping to ensure that employees have access to recommended preventive services. Employees of small employers that do not provide health coverage will be able to obtain health coverage through health insurance exchanges (in some cases, with federal financial assistance). *See* 42 U.S.C. § 18021; *id.* § 18031(d)(2)(B)(i). Because the preventive services coverage requirement applies to the health plans being offered through the exchanges, the coverage individuals buy there will necessarily cover recommended contraceptive

Third, 26 U.S.C. § 5000A(d)(2)(A) exempts from the minimum coverage provision of the ACA those "member[s] of a recognized religious sect or division thereof" who, on the basis of their religion, are opposed to the concept of health insurance. *See also id.* § 1402(g). The minimum coverage provision will require certain individuals who fail to maintain a minimum level of health insurance to pay a tax penalty beginning in 2014. Again, this provision is entirely unrelated to the preventive services coverage regulations. Nor could it provide any exemption from the preventive services coverage regulations, as it only excludes certain individuals from the requirement to obtain health coverage and says nothing about the requirement that non-exempt, non-grandfathered group health plans provide preventive services coverage to their participants. It is also clearly an attempt by Congress to accommodate religion and, unlike the exemption sought by plaintiffs, is sufficiently narrow so as not to undermine the larger administrative scheme. *See Lee*, 455 U.S. at 260-61 (discussing 26 U.S.C. § 1402(g), which is incorporated by reference into 26 U.S.C. § 5000A(d)(2)(A) and is thus identical in scope to the exemption at issue here). Furthermore, exempting this particular "readily identifiable," *see id.* at 261, class of individuals from the minimum coverage provision is unlikely to appreciably undermine the compelling interests motivating the preventive services coverage regulations. By definition, a woman who is "conscientiously opposed to acceptance of the benefits of any private or public insurance which . . . makes payments toward the cost of, or provides services for, medical care," 26 U.S.C. § 1402(g)(1), would not utilize health coverage – including contraceptive coverage – even if it were offered.

Finally, the only true exemption from the preventive services coverage regulations cited by plaintiffs is the exemption for "religious employer[s]," 45 C.F.R. § 147.130(a)(1)(iv). But there is a rational distinction between the narrow exception currently in existence and plaintiffs' requested expansion. As revealed by the plain text of the regulations, a "religious employer" is narrowly defined to be an employer that, *inter alia*, has the "inculcation of religious values" as

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services. *Id.* § 300gg-13(a). In other words, in general, the employees of small employers will receive contraceptive coverage either through their employers or through the exchanges.

its purpose and "primarily employs persons who share the religious tenets of the organization." *Id.* Thus, the exception does not undermine the government's compelling interests. It anticipates that the impact on employees of exempted organizations will be minimal, given that any religious objections of the exempted organizations are presumably shared by most, if not all, of the individuals actually making the choice as to whether to use contraceptive services – largely employees of houses of worship. *See* 77 Fed. Reg. at 8728. The same is not true for Tyndale and other for-profit entities, which cannot discriminate based upon anyone's religious beliefs when hiring, and may employ many individuals who do not share their employer's religious beliefs. If the Court were to extend RFRA to any employer whose owners or shareholders object on religious grounds to the operation of the regulations, it is difficult to see how the regulations could continue to function or be enforced in a rational manner. *See O Centro*, 546 U.S. at 435 ("[T]he Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodation would seriously compromise its ability to administer the program.").

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

The preventive services coverage regulations, moreover, are the least restrictive means of furthering the underlying interests. When determining whether a particular regulatory scheme is "least restrictive," the inquiry is whether the individual or organization with religious objections, and those similarly situated, can be exempted from the scheme – or whether the scheme can otherwise be modified – without undermining the government's compelling interest. *See S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1206 (6th Cir. 1990) (describing the least restrictive means test as "the extent to which accommodation of the defendant would impede the state's objectives"); *see also, e.g.*, *United States v. Wilgus*, 638 F.3d 1274, 1289-95 (10th Cir. 2011); *New Life Baptist Church Acad. v. Town of E. Longmeadow*, 885 F.2d 940, 946 (1st Cir. 1989) (Breyer, J.). The government is not required "to do the impossible

– refute each and every conceivable alternative regulation scheme." *Wilgus*, 638 F.3d at 1289. Instead, the government need only "refute the alternative schemes offered by the challenger." *Id.*

Instead of explaining how Tyndale and similarly situated secular companies could be exempted from the preventive services coverage regulations without significant damage to the government's compelling interests in public health and gender equality, plaintiffs conjure up several new regulatory schemes – most of which would require the government to pay for contraceptive coverage – that they claim would be less restrictive. *See* Pls.' Mem. at 32-33. Rather than suggesting modifications to the current employer-based system that Congress enacted, *see generally* H.R. Rep. No. 111-443, pt. II, at 984-86 (2010) (explaining why Congress chose to build on the employer-based system), plaintiffs would have the whole system turned upside-down to accommodate their religious beliefs at enormous administrative and financial cost to the government. But just because plaintiffs can devise an entirely new legislative and administrative scheme that would purportedly address their concerns does not make that scheme a feasible less restrictive means.

In effect, plaintiffs want the government "to subsidize private religious practices," *Catholic Charities of Sacramento*, 85 P.3d at 94, by expending significant resources to adopt an entirely new legislative or administrative scheme. But a proposed alternative scheme is not an adequate alternative – and thus not a viable less restrictive means to achieve the compelling interest – if it is not "feasible" or "plausible." *See S. Ridge Baptist Church*, 911 F.2d at 1208 (noting that, for a less restrictive means to be constitutionally required, it must be "feasible"); *New Life Baptist*, 885 F.2d at 947; *Graham*, 822 F.2d at 852. In determining whether a proposed alternative scheme is feasible, courts often consider the burdens and disadvantages that would be imposed on other important interests, including the additional administrative and fiscal costs of the proffered 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. Plaintiffs' alternatives would impose considerable new costs and other burdens on the government and would otherwise be impractical. *See, e.g.*, *Lafley*, 656

F.3d at 942; *Gooden v. Crain*, 353 F. App'x 885, 888 (5th Cir. 2009); *Adams v. Comm'r of Internal Revenue*, 170 F.3d 173, 180 n.8 (3d Cir. 1999).[19]

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

For these reasons, plaintiffs' RFRA challenge should be rejected.

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

B. Plaintiffs' First Amendment claims are meritless.

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

Plaintiffs' Free Exercise claim fails at the outset because, as explained above, *see supra* at 8-13, for-profit employers like Tyndale do not engage in any exercise of religion protected by the First Amendment. Nevertheless, even if they did, the preventive services coverage regulations are neutral laws of general applicability and therefore do not violate the Free Exercise Clause. *See O'Brien*, 2012 WL 4481208, at *7-9. To the extent the preventive services coverage regulations contain an exemption for certain religious employers, that exemption serves to accommodate religion, not to burden or disapprove of it.[20]

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. *Smith*, 494 U.S. at 879; *see also Lukumi*, 508 U.S. at 531-32; *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) ("[T]he general rule is that laws and regulations that incidentally burden religion do not violate the free exercise clause."). The Supreme Court has explained that "mak[ing] an individual's obligation to obey [a neutral law of general applicability] contingent upon the law's coincidence with his religious beliefs, except where the [government's] interest is compelling," would "permit[] him, by virtue of his beliefs, to become a law unto himself" in contravention of both "constitutional tradition and common sense." *Smith*, 494 U.S. at 885 (quotations omitted).

"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, or have as its purpose the disapproval "of a particular religion or of religion in general." *Id*. at 532-33,

[20] Plaintiffs contend this exemption is unlawful because it exempts some religious organizations but not others. Pls.' Mem. at 35-36. The First Amendment, however, does not prohibit the government from distinguishing among types of organizations – based on purpose, composition, or character – when it is attempting to accommodate religion. *See, e.g., Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 673 (1970) (upholding tax exemption for realty owned by associations organized exclusively for religious purposes and used exclusively for religious purposes); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468-69 (N.Y. 2006). It prohibits only laws that "officially prefer[]" "one religious denomination" over another. *Larson v. Valente*, 456 U.S. 228, 244 (1982) (emphasis added); *see also Gillette v. United States*, 401 U.S. 437, 450-51 (1971). The religious employer exemption contains no such denominational preference.

545. A law is generally applicable so long as it does not selectively impose burdens only on conduct motivated by religious belief. *Id*. at 533, 535-37.

The preventive services coverage regulations are neutral and generally applicable. First, the regulations are neutral because they do not target religiously motivated conduct. They do not, on their face, refer to any religion or religious practice,[21] and they do not evidence any "official purpose to disapprove of a particular religion or of religion in general." *Id*. at 532. The object of the regulations is to promote public health and gender equality by increasing access to and utilization of recommended preventive services, including those for women. *O'Brien*, 2012 WL 4481208, at *7. They reflect expert medical recommendations without regard to any religious motivations for or against such services. As shown by the IOM Report, this purpose has nothing to do with religion, as the IOM Report is entirely secular in nature. IOM REP. at 2-4, 7-8; *see also Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 275 (3d Cir. 2007) (concluding law was neutral where there was no evidence "it was developed with the aim of infringing on religious practices").

Likewise, the regulations are generally applicable because they do not pursue their purpose "only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545. The regulations apply to all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage and do not qualify for the religious employer exemption. *O'Brien*, 2012 WL 4481208, at *8. Thus, "it is just not true . . . that the burdens of the [regulations] fall on religious organizations 'but almost no others.'" *Am. Family Ass'n*, 365 F.3d at 1171 (quoting *Lukumi*, 508 U.S. at 536); *see United States v. Amer*, 110 F.3d 873, 879 (2d Cir. 1997) (concluding law that "punishe[d] conduct within its reach without regard to whether the conduct was religiously motivated" was generally applicable).

[21] The regulations refer to religion in the context of exempting certain religious employers from the requirement to cover contraceptive services. But this reference does not destroy the regulations' neutrality. *See O'Brien*, 2012 WL 4481208, at *8. Any burden on plaintiffs' religious beliefs – and there is none – would "arise[] not from the religious terminology used in the exemption, but from the generally applicable requirement to provide coverage for contraceptives." *Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67, 83 (Cal. 2004).

Plaintiffs contend that the regulations are not generally applicable because they contain certain categorical exceptions. *See* Pls' Mem. at 36. But the existence of "express exceptions for objectively defined categories of [entities]," like the ones plaintiffs reference, does not negate a law's general applicability. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004); *see also Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008); *Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 961 (9th Cir. 1991); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006) (refusing to "interpret *Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption"). None of the "exceptions" to the regulations cited by plaintiffs interferes with the regulations' general applicability. For example, the exception for grandfathered plans is available on equal terms to all employers, whether religious or secular, and the religious employer exemption serves to *accommodate* religion, not to disfavor it. The regulations apply with equal force to all remaining group health plans and health insurance issuers. The regulatory scheme is therefore not the result of "religious animus," is not "discriminatorily enforced against religious institutions," and does not "devalue[] religious reasons." *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 275 (3d Cir. 2007). Indeed, the nature of these exemptions distinguishes them from those in the cases on which plaintiffs rely. *See, e.g., Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (finding that a medical exemption to a police department's no-beard policy indicated that the department accepted secular motivations but *rejected* religious ones). By contrast, these categorical exceptions – solicitous of religious motivations or, at least, equally available to both religious and secular employers – are no different than the sorts of neutral and generally applicable laws that have been upheld against Free Exercise challenges. *See, e.g., United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 629 (7th Cir. 2000) (holding that federal tax laws were neutral and generally applicable because they were "not restricted to [the church] or even religion-related employers generally, and there [was] no indication that they were enacted for the purpose of burdening religious practices"); *Thornburgh*, 951 F.2d at 960-61 (concluding employer verification statute was not subject to

strict scrutiny even though it exempted certain employees because exemptions "exclude[d] entire, objectively-defined categories" and because they did not burden religious entities "*because of* their religious expression or motivation") (quoting *Intercommunity Ctr. for Justice & Peace v. INS*, 910 F.2d 42, 44 (2d Cir. 1990) (emphasis added)).

Plaintiffs also maintain that defendants have created a system of individualized exemptions. *See* Pls.' Mem. at 37. To warrant strict scrutiny, however, a system of individualized exemptions must be one that enables the government to make a subjective, case-by-case inquiry of the reasons for the relevant conduct, and the government must utilize that system to grant exemptions for secular reasons but not for religious reasons. *Smith*, 494 U.S. at 884. Plaintiffs point to no such system with respect to the preventive services coverage regulations, and there is none. While a law that requires "individualized governmental assessment of the reasons for the relevant conduct" is not generally applicable, *Lukumi*, 508 U.S. at 537, the existence of discretion to define categorical exceptions neither requires nor risks individualized assessments. The exceptions themselves are categorical and generally applicable.

Because the preventive services coverage regulations are neutral laws of general applicability, they do not run afoul of the Free Exercise Clause.[22]

2. The regulations do not violate the Establishment Clause.

Plaintiffs also claim that the preventive services coverage regulations violate the Establishment Clause because the religious employer exemption amounts to a denominational preference forbidden by *Larson v. Valente*, 456 U.S. 228, 244 (1982), and requires the government to unlawfully scrutinize an organization's religious tenets. *See* Pls.' Mem. at 38. Plaintiffs are wrong on both counts.

"The clearest command of the Establishment Clause is that one religious *denomination* cannot be officially preferred over another." *Larson*, 456 U.S. at 244 (emphasis added). A law that discriminates among religions by "aid[ing] one religion" or "prefer[ring] one religion over

[22] Even if the regulations were subject to strict scrutiny, plaintiffs' Free Exercise challenge would still fail. As explained above, *see supra* at 20-30, the regulations satisfy strict scrutiny.

another" is subject to strict scrutiny. *Id*. at 246; *see also Olsen*, 878 F.2d at 1461 (observing that "[a] statutory exemption authorized for one church alone, and for which no other church may qualify" creates a "denominational preference"). Thus, for example, the Supreme Court 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 preventive services coverage regulations do not grant any denominational preference or otherwise discriminate among religions. *O'Brien*, 2012 WL 4481208, at *9. They are therefore analogous to statutes upheld by the Supreme Court against Establishment Clause challenges. *See Gillette v. United States*, 401 U.S. 437, 450-51 (1971) (upholding statute that provided exemption from military service for persons who had conscientious objection to all wars, but not those who objected to only a particular war, because "no particular sectarian affiliation" was required to qualify for conscientious objector status and the statute therefore did not discriminate among religions); *see also Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (upholding Religious Land Use and Institutionalized Persons Act 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"). Plaintiffs' challenge is similarly without merit.[23]

It is of no moment that the religious employer exemption applies to some religious employers – for example, those that primarily inculcate religious values or hire co-religionists –

[23] Plaintiffs' reliance on *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990), is inapposite. The court in that case applied strict scrutiny to strike down a law that discriminated among religious denominations by favoring established denominations – i.e., "a bona fide religion, body, or sect" over less established religions. *Id.* at 1285, 1287. These regulations do no such thing. Similarly inapposite is *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), which addressed only laws that "facially regulate religious issues" and that serve to disadvantage religion. *Id.*at 1257-58. These regulations do neither.

but not others. *O'Brien*, 2012 WL 4481208, at *9-10. The relevant inquiry is whether the distinction drawn by the regulations between exempt and non-exempt entities is based on religious affiliation. *See Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 673 (1970) (holding that a law exempting from property taxes all realty owned by an association organized exclusively for religious purposes and used exclusively for carrying out such purposes did not violate the Establishment Clause because it did not "single[] out one particular church or religious group"); *Droz v. Comm'r of IRS*, 48 F.3d 1120, 1124 (9th Cir. 1995) (concluding that religious exemption from self-employment Social Security taxes did not violate the Establishment Clause even though "some individuals receive exemptions, and other individuals with identical beliefs do not"); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E. 2d 459, 468–69 (N.Y. 2006) ("[T]his kind of distinction – not between denominations, but between religious organizations based on the nature of their activities – is not what *Larson* condemns."). Here, the regulations' definition of "religious employer" does not refer to any particular denomination. The criteria for the exemption focus on the purpose and composition of the organization, not on its sectarian affiliation. The exemption is available on an equal basis to organizations affiliated with any and all religions. The regulations thus do not promote some religions over others and therefore do not implicate the Establishment Clause. *See Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1090-92 (8th Cir. 2000).[24]

Accordingly, plaintiffs' Establishment Clause claim fails.[25]

[24] Nor does the religious employer exemption foster excessive government entanglement with religion. Tyndale acknowledges that it does not qualify for the religious employer exemption. First Am. Compl. ¶ 102. In particular, Tyndale admits that it fails to satisfy even the fourth criterion for the religious employer exemption – the requirement that it be a nonprofit organization as described in section 6033 of the Internal Revenue Code. *Id.* ¶ 64; 45 C.F.R. § 147.130(a)(1)(iv)(B)(4). Plaintiffs therefore cannot credibly claim that this criterion requires *any* inquiry that would pose a potential entanglement issue. Accordingly, any entanglement that might result from the religious employer exemption would not exist with respect to these plaintiffs. Defendants do not question the sincerity of the religious beliefs of Tyndale's owners and Mr. Taylor as a factual matter; indeed, it is the government's desire to avoid any such inquiry into the bona fides of individuals' or organizations' religious beliefs that further supports the government's need to draw lines for the religious employer exemption according to specified, objective criteria.

[25] Even if the regulations discriminate among religions (and they do not), they are valid under the Establishment Clause because they satisfy strict scrutiny. *See supra* at 20-30; *Larson*, 456 U.S. at 251-52.

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

Plaintiffs' free speech claim fares 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 require plaintiffs – or any other person, employer, or entity – to say anything. Nor do the preventive services coverage regulations limit what plaintiffs may say. Indeed, plaintiffs may encourage Tyndale's employees not to use contraceptive services. The preventive services regulations regulate only conduct, not speech. *See FAIR*, 547 U.S. at 60-62 (concluding that statute that required law schools to provide military recruiters with equal access to campus and students regulated conduct, not speech).

Plaintiffs appear to concede that they are not required to speak. Rather, they claim only that because they must cover "education and counseling," they are made to pay for speech with which they disagree. Pls.' Mot. at 39. But plaintiffs' assertion that this counseling will be "in favor of abortifacients," *id.*, is their own invention. The conversations that may take place between a patient and her doctor or counselor cannot be known or screened in advance and may cover any number of approaches to women's health. And the very occurrence of such a conversation is due to a choice of the insured, not her employer. Accepting plaintiffs' 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. Far from supporting that position, the cases on which plaintiffs rely involve the compelled funding of a particular message, *e.g.*, *United States v. United Foods*, 533 U.S. 405, 411 (2001), not the funding of an employee's ability to seek out whatever message she sees fit. *O'Brien*, 2012 WL 4481208, at *12.

Similarly, the conduct required by the preventive services coverage regulations is not "inherently expressive," such that it is entitled to First Amendment protection. *Id*. at 66. An employer that provides a health plan that covers contraceptive services, along with numerous other medical items and services, because it is required by law to do so is not engaged in the sort

of conduct the Supreme Court has recognized as inherently expressive. *Compare id*. at 65-66 (making space for military recruiters on campus is not conduct that indicates colleges' support for, or sponsorship of, recruiters' message), *with Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 568-70 (1995) (openly gay, lesbian, and bisexual group marching in parade is expressive conduct), *and W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (not saluting American flag is expressive conduct). Because the preventive services coverage regulations do not compel any speech or expressive conduct, they do not violate the Free Speech Clause.

For these reasons, all of plaintiffs' First Amendment claims fail.[26]

C. Plaintiffs' Fifth Amendment Due Process claim is without merit.

Plaintiffs' claim that the preventive services coverage regulations violate the Fifth Amendment's Due Process Clause is misdirected and baseless. A law is not unconstitutionally vague unless it "fails to provide a person of ordinary intelligence fair notice of what is prohibited" or "is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). Courts relax these standards where, as here, the law in question imposes civil rather than criminal penalties and does not "interfere[] with the right of free speech or of association." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). "But 'perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'" *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010).

[26] Indeed, the highest courts of two states have rejected First Amendment claims like those raised by plaintiffs here in cases challenging similar provisions of state law. Under both California and New York law, group health insurance coverage that includes coverage for prescription drugs must also provide coverage for prescription contraceptives. *Diocese of Albany*, 859 N.E.2d at 461; *Catholic Charities of Sacramento*, 85 P.3d at 74 n.3. Both states' laws contain an exemption for religious employers' health insurance coverage that is similar to the exemption contained in the preventive services coverage regulations. *Diocese of Albany*, 859 N.E.2d at 462; *Catholic Charities of Sacramento*, 85 P.3d at 74 n.3. The highest courts in both states held that the laws do not violate the Free Exercise Clause because they are neutral laws of general applicability. *Diocese of Albany*, 859 N.E.2d at 468-69; *Catholic Charities of Sacramento*, 85 P.3d at 81-87. The courts rejected the Establishment Clause challenge because the exemptions for religious employers' health insurance coverage do not discriminate among religious denominations or sects. *Diocese of Albany*, 859 N.E.2d at 468-69; *Catholic Charities of Sacramento*, 85 P.3d at 83-87. And they upheld the laws under the Free Speech Clause because "a law regulating health care benefits is not speech." *Catholic Charities of Sacramento*, 85 P.3d at 89; *see also Diocese of Albany*, 859 N.E.2d at 465.

Plaintiffs direct much of their Fifth Amendment argument at "the statute," 42 U.S.C. § 300gg-13, alleging that it is vague because it contains no standards to guide the development of regulatory policy. Pls.' Mem. at 40. But this litigation is primarily directed at the regulations promulgated under that statutory authority, Compl. ¶ 4 n.1, and nowhere do plaintiffs assert that those regulations are unconstitutionally vague or that they create a risk of "discriminatory enforcement." Pls.' Mot. at 39 (citing *Williams*, 553 U.S. at 304). Nor could plaintiffs so claim, given that they evidently have no difficulty concluding that the regulations "compel[] Tyndale to obtain and pay for insurance coverage of [what it finds to be] objectionable items in [its] October 1, 2012 plan." Compl. ¶ 8; *see* Pls.' Mot. at 6 ("Defendants have now mandated that Tyndale . . . insert[] coverage of [what it believes to be] abortifacients into its employee health plan."). In other words, the regulations are not vague as applied to plaintiffs (and indeed are not vague at all). *See U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973) ("Surely, there seemed to be little question in the minds of the plaintiffs who brought this lawsuit as to the meaning of the law, or as to whether or not the conduct in which they desire to engage was or was not prohibited by the Act."); *Parker v. Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). As in *Humanitarian Law Project*, "the dispositive point" is that the regulations' terms "are clear in their application to plaintiffs' proposed conduct, which means that plaintiffs' vagueness challenge must fail." 130 S. Ct. at 2720.

As for the statute, plaintiffs suggest that a due process violation exists simply because the statute delegates to administrative agencies the responsibility to promulgate implementing regulations. But accepting this argument would defeat a multitude of statutory schemes and must fail. *See Mistretta v. United States*, 488 U.S. 361, 372 (1989) (recognizing that "Congress simply cannot do its job absent an ability to delegate power under broad general directives," and upholding "Congress' ability to delegate power under broad standards"). Plaintiffs offer no precedent to the contrary. Nor could they offer any such precedent, given that the Supreme Court has routinely upheld even statutes simply "authorizing regulation in the 'public interest.'"

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) (citing cases).[27] Far from delegating "basic policy matters" to "policemen, judges, and juries," *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972), Section 300gg-13 represents a routine and entirely permissible decision by Congress to delegate implementation and enforcement to agencies with relevant expertise. The statute expressly contemplates the development of further regulation through agency rulemaking, and, because entities will look to those regulations to guide their conduct, there is no risk of discriminatory enforcement so long as those regulations are themselves not unconstitutionally vague, and they are not. Indeed, that is what Tyndale has done: having read the implementing regulations together with the statute, Tyndale knows precisely what is required of it. It can therefore make no argument that it remains unsure of its legal obligations.

D. Plaintiffs' Administrative Procedure Act claims are without merit.

Plaintiffs' claim that defendants failed to follow the procedures required by the APA in issuing the preventive services coverage regulations, Pls.' Mem. at 41-42, is baseless. The APA's rulemaking provisions generally require that agencies provide notice of a proposed rule, invite and consider public comments, and adopt a final rule that includes a statement of basis and purpose. *See* 5 U.S.C. § 553(b), (c). Defendants complied with these requirements.

On August 1, 2011, Defendants issued an amendment to the interim final regulations authorizing HRSA to exempt group health plans sponsored by certain religious employers (and associated group health insurance coverage) from any requirement to cover contraceptive services under HRSA's guidelines. 76 Fed. Reg. 46,621. That amendment was issued pursuant to express statutory authority granting defendants discretion to promulgate regulations relating to

[27] Ultimately, plaintiffs' objection to the "unlimited discretion" allegedly vested by Congress in defendants, Pls.' Mem. at 40, does not raise a vagueness question at all. Rather, it is a claim that Congress has improperly delegated authority to defendants. But it is beyond cavil that Congress may confer decisionmaking authority upon an agency so long as it provides, as it did here, a guiding "intelligible principle." *Whitman*, 531 U.S. at 472, 475-76 (finding "intelligible principle" where Congress authorized regulations "requisite to protect the public health"). Courts have "almost never felt qualified to second-guess Congress" in this regard, *id*. at 474-75, and "[o]nly the most extravagant delegations of authority, those providing no standards to constrain administrative discretion, have been condemned by the Supreme Court as unconstitutional," *Humphrey v. Baker*, 848 F.2d 211, 217 (D.C. Cir. 1988).

health coverage on an interim final basis.[28] *Id*. at 46,624. Defendants requested comments for a period of 60 days on the amendment to the regulations and specifically on the definition of "religious employer" contained in the exemption authorized by the amendment. *Id*. at 46,621. After receiving and carefully considering thousands of comments, defendants adopted the definition of "religious employer" contained in the amended interim final regulations, and created a temporary enforcement safe harbor period during which time defendants would consider additional amendments to the regulations to further accommodate religious organizations' religious objections to providing contraception coverage. 77 Fed. Reg. at 8,726-27.

Because defendants provided notice and an opportunity to comment on the amendment to the interim final regulations, they satisfied the APA's procedural requirements. Plaintiffs' assertion that defendants were "close-minded" about the regulations and that, but for that alleged close-mindedness, the regulations "would still not be finalized," Pls. Mem. at 42, is pure speculation. Similarly, their assertion that comments were "ignore[d]," *id.* at 41, is groundless. The mere fact that the regulations were not altered in the manner plaintiffs seek does not undermine the thoughtfulness of defendants' consideration.[29]

Plaintiffs also contend that the preventive services regulations violate the APA because they conflict with federal law and constitutional rights under 5 U.S.C. § 706(2)(A), (B). Pls.' Mem. at 42. For the reasons discussed above, the regulations do not violate RFRA, the First Amendment, or the Fifth Amendment. Finally, plaintiffs do not specifically claim in their

[28] Defendants also made a determination, in the alternative, that issuance of the regulations in interim final form was in the public interest, and, thus, defendants had "good cause" to dispense with the APA's notice-and-comment requirements. 76 Fed. Reg. at 46,624.

[29] The fact that regulations may not satisfy the preferences of each and every commenter is not evidence that comments were unlawfully ignored. Moreover, defendants *did* respond to such comments by creating the "temporary enforcement safe harbor," concurrent with which defendants intend to amend the preventive services coverage regulations to further accommodate non-exempt, non-grandfathered religious organizations' religious objections to covering contraceptive services. 77 Fed. Reg. at 8,727. And defendants have begun the amendment process by issuing an ANPRM, which expressly notes that defendants will consider whether "for-profit religious employers with [religious] objections" should be provided an accommodation. 77 Fed. Reg. at 16,504. Thus, it can hardly be argued that defendants have failed to consider the implications of the preventive services coverage regulations for for-profit employers. *O'Brien*, 2012 WL 4481208, at *14.

motion that the regulations are arbitrary or capricious, in violation of 5 U.S.C. § 706(2)(A), or even suggest how they might be. And, as the above discussion of defendants' policymaking path reveals, the regulations are neither arbitrary nor capricious. *See Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (indicating that, under the arbitrary and capricious standard, agency action must be upheld, so long as "the agency's path may reasonably be discerned"); *DKT Mem'l Fund, Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 281 (D.C. Cir. 1989) ("The APA has never been construed to grant to this or any other court the power to review the wisdom of policy decisions of the President.").

For these reasons, plaintiffs' APA claims should be rejected.

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

The challenged regulations (and the HRSA Guidelines) were issued on August 1, 2011. Yet plaintiffs waited fourteen months – until October 8, 2012 – to seek preliminary injunctive relief. Such a substantial and unexplained delay seriously undermines plaintiffs' claim of irreparable harm. *See Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (denying preliminary injunctive relief and noting that a delay of forty-four days after final regulations were issued was "inexcusable"); *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 43-44 (D.D.C. 2000) (noting that an over two-month delay "further militates against a finding of irreparable harm"); *see also Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) ("[T]he failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury.") (internal quotation marks and citation omitted); *Quince Orchard Valley Citizens' Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) ("Equity demands that those who would challenge the legal sufficiency of administrative decisions . . . do so with haste and dispatch."); *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276-77 (2d Cir. 1985) (indicating that a ten-week delay in seeking an injunction against a trademark infringement "undercuts the sense of urgency" and suggests that no irreparable injury was threatened); *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d

1374, 1377 (9th Cir. 1985) ("[L]ong delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."); *Gidatex, S.R.L. v. Campaniello Imps., Ltd.*, 13 F. Supp. 2d 417, 419 (S.D.N.Y. 1998) ("[C]ourts typically decline to grant preliminary injunctions in the face of unexplained delays of more than two months."). This delay alone is sufficient for the Court to conclude that plaintiffs have not met their burden to establish irreparable harm.

Moreover, preliminary injunctive relief would harm the government and the public. "[T]here is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008). Enjoining the regulations as to a for-profit corporation would undermine the government's ability to achieve Congress's goals of improving the health of women and children and equalizing the coverage of preventive services for women and men so that women who choose to do so can be a part of the workforce on an equal playing field with men. It would also be contrary to the public interest to deny the employees of Tyndale (and their families) of their choice of whether to avail themselves of the benefits of the preventive services coverage regulations. *See Weinberger v. Romero-Barcelo*, 456 U.S. 306, 312-13 (1982) ("[C]ourts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."). Tyndale's employees may not share their employer's religious beliefs. Those employees (and their families) should not be denied the benefits of receiving a health plan through their employer that covers all recommended contraceptive services. Enjoining the government from enforcing the preventive services coverage regulations, the purpose of which is to improve the health of women and children and promote gender equality by equalizing coverage of preventive services for women, 75 Fed. Reg. at 41,733; *see also* 77 Fed. Reg. at 8728, as to plaintiffs would thus harm the public. Tyndale has 260 full-time employees, Compl. ¶ 71, and the scope of coverage of its health plan also affects those employees' covered spouses and dependents. Any potential harm to plaintiffs resulting from their desire for Tyndale not to provide contraceptive coverage is thus outweighed by the significant harm an injunction would cause to the public.

CONCLUSION

This Court should deny plaintiffs' motion for preliminary injunction.

Respectfully submitted this 22nd day of October, 2012,

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

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