IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

ETERNAL WORD TELEVISION NETWORK, INC., and STATE OF ALABAMA Plaintiffs, v. KATHLEEN SEBELIUS, *et al.*, Defendants.	Case No. 1:13-cv-521

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

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INTRODUCTION

Plaintiff Eternal Word Television Network, Inc. (EWTN) asks this Court to permanently enjoin regulations that are intended to accommodate religious exercise while helping to ensure that women have access to health coverage, without cost-sharing, for preventive services that medical experts deem necessary for women's health and well-being. Subject to an exemption for houses of worship and their integrated auxiliaries, and accommodations for certain other non-profit religious organizations, as discussed below, the regulations require certain group health plans and health insurance issuers to provide coverage, without cost-sharing (such as a copayment, coinsurance, or a deductible), for, among other things, all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider.

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

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

Remarkably, EWTN now declares that these accommodations themselves violate its rights under RFRA and the First Amendment. EWTN contends that the mere act of certifying that it is eligible for an accommodation is a substantial burden on its religious exercise because, once it makes the certification, its employees will be able to obtain contraceptive coverage through other parties. This extraordinary contention suggests that EWTN not only seeks to avoid paying for, administering, or providing contraceptive coverage itself, but also seeks to prevent its employees from obtaining such coverage, even if through other parties.

At bottom, EWTN's position seems to be that any asserted burden, no matter how *de minimis*, amounts to a substantial burden under RFRA. That is not the law. Congress amended the initial version of RFRA to add the word "substantially," and thus made clear that "any burden" would not suffice. Although these regulations require virtually nothing of EWTN, EWTN claims that the regulations run afoul of its sincerely held religious beliefs prohibiting it from providing or facilitating health coverage for certain contraceptive services, and that the challenged regulations violate RFRA, the First and Fifth Amendments, and the Administrative

Procedure Act (APA). All of EWTN's claims fail, and should be dismissed in their entirety; alternatively, the Court should enter judgment in favor of the government.

With respect to EWTN's RFRA claim, EWTN cannot establish a substantial burden on its religious exercise—as it must—because the regulations do not require EWTN to change its behavior in any significant way. EWTN is not required to contract, arrange, pay, or refer for contraceptive coverage. To the contrary, EWTN is free to continue to refuse to do so, to voice its disapproval of contraception, and to encourage its employees to refrain from using contraceptive services. EWTN is required only to inform its TPAs that it objects to providing contraceptive coverage, which it has done or would have to do voluntarily even absent these regulations in order to ensure that that it is not responsible for contracting, arranging, paying, or referring for such coverage. EWTN can hardly claim that it is a violation of RFRA to require it to do almost exactly what it would do in the ordinary course. *See Priests for Life v. HHS*, __ F. Supp. 2d __, 2013 WL 6672400, at *5-10 (D.D.C. Dec. 19, 2013) (addressing these regulations), *injunction pending appeal granted*, No. 13-5368 (D.C. Cir. Dec. 31, 2013); *Univ. of Notre Dame v. Sebelius*, __ F. Supp. 2d __, 2013 WL 6804773, at *7-14 (N.D. Ind. Dec. 20, 2013) (same), *injunction pending appeal denied*, No. 13-3853 (7th Cir. Dec. 30, 2013); *Mich. Catholic Conf. v. Sebelius*, No. 1:13-CV-1247, 2013 WL 6838707, at *4-8 (W.D. Mich. Dec. 27, 2013) (same), *injunction pending appeal granted*, No. 13-2723 (6th Cir. Dec. 31, 2013).

Furthermore, EWTN's challenge rests largely on the theory that even the extremely attenuated connection between it and the independent provision by TPAs of payments for contraceptive services to which EWTN objects on religious grounds—but for which EWTN pays nothing—amounts to a substantial burden on its religious exercise. This cannot be. *See Catholic Diocese of Nashville v. Sebelius*, No. 3:13-01303, 2013 WL 6834375, at *4-5 (M.D. Tenn. Dec. 26, 2013),

injunction pending appeal granted, No. 13-6640 (6th Cir. Dec. 31, 2013). Regardless of how EWTN frames its religious beliefs, courts must independently consider whether a given law imposes a substantial burden on those beliefs. *See, e.g.*, *Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012), *aff'd*, 730 F.3d 618 (6th Cir. 2013). The regulations impose, at most, only a *de minimis* burden on EWTN's religious exercise—one too slight and attenuated to be "substantial" under RFRA, and little different from EWTN's payment of salaries to its employees, which those employees can use to purchase contraceptive services if they so choose.

Moreover, even if the challenged regulations were deemed to impose a substantial burden on EWTN'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 newborn children, and equalizing the provision of preventive care for women and men so that women can participate in the workforce, and society more generally, on an equal playing field with men.

EWTN's First Amendment claims are equally meritless. Indeed, nearly every court to consider similar First Amendment challenges to the prior version of the regulations rejected the claims, and their analysis applies here. Nor do the regulations violate the Due Process Clause. EWTN also cannot succeed on its APA claims because the regulations are in accordance with the APA and federal law.

Finally, the Court should reject the State of Alabama's request for declaratory relief. Because the State of Alabama's claim for declaratory relief is entirely derivative of EWTN's various arguments, and because the challenged regulations are lawful, the State's claim must also fail.

For these reasons, and those explained below, defendants' motion to dismiss or, in the alternative, for summary judgment should be granted, and plaintiffs'

motions for summary judgment should be denied.[1]

BACKGROUND

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

Because there were no existing HRSA guidelines relating to preventive care and screening for women, the Department of Health and Human Services (HHS) requested that the Institute of Medicine (IOM) develop recommendations to implement the requirement to provide coverage, without cost-sharing, of preventive services for women. IOM REP. at 2, AR at 300.[2] After conducting an extensive science-based review, IOM recommended that HRSA guidelines include,

[1] Because the background and arguments related to both EWTN's partial motion for summary judgment and the State of Alabama's motion for summary judgment are closely related, defendants address plaintiffs' arguments in this single memorandum.

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

among other things, well-woman visits; breastfeeding support; domestic violence screening; and, as relevant here, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id.* at 10-12, AR at 308-10. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices ("IUDs"). *See id.* at 105, AR at 403. IOM determined that coverage, without cost-sharing, for these services is necessary to increase access to such services, and thereby reduce unintended pregnancies (and the negative health outcomes that disproportionately accompany unintended pregnancies) and promote healthy birth spacing. *See id.* at 102-03, AR at 400-01.[3]

On August 1, 2011, HRSA adopted guidelines consistent with IOM's recommendations, subject to an exemption relating to certain religious employers authorized by regulations issued that same day (the "2011 amended interim final regulations"). *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), AR at 283-84.[4] Group health plans established or maintained by these religious employers (and associated group

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

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

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

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

health insurance coverage) are exempt from any requirement to cover contraceptive services consistent with HRSA's guidelines. *See id.*

In February 2012, the government adopted in final regulations the definition of "religious employer" contained in the 2011 amended interim final regulations while also creating a temporary enforcement safe harbor for non-grandfathered group health plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage (and any associated group health insurance coverage). *See* 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012), AR at 213-14. The government committed to undertake a new rulemaking during the safe harbor period to adopt new regulations to further accommodate non-grandfathered non-profit religious organizations' religious objections to covering contraceptive services. *Id.* at 8728, AR at 215. The regulations challenged here (the "2013 final rules") represent the culmination of that process. *See* 78 Fed. Reg. 39,869 (July 2, 2013), AR at 1-31; *see also* 77 Fed. Reg. 16,501 (Mar. 21, 2012) (Advance Notice of Proposed Rulemaking (ANPRM)), AR at 186-93; 78 Fed. Reg. 8456 (Feb. 6, 2013) (Notice of Proposed Rulemaking (NPRM)), AR at 165-85.

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

The 2013 final rules simplify and clarify the religious employer exemption by eliminating the first three criteria and clarifying the fourth criterion. *See supra*

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

The 2013 final rules also establish accommodations with respect to the contraceptive coverage requirement for group health plans established or maintained by "eligible organizations" (and group health insurance coverage provided in connection with such plans). *Id.* at 39,875-80, AR at 7-12; 45 C.F.R. § 147.131(b). An "eligible organization" is an organization that satisfies the following criteria:

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

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

Under the 2013 final rules, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious

objections. 78 Fed. Reg. at 39,874, AR at 6. To be relieved of any such obligations, the 2013 final rules require only that an eligible organization complete a self-certification form stating that it is an eligible organization and provide a copy of that self-certification to its issuer or TPA. *Id.* at 39,878-79, AR at 10-11. Its participants and beneficiaries, however, will still benefit from separate payments for contraceptive services without cost sharing or other charge. *Id.* at 39,874, AR at 6. In the case of an organization with a self-insured group health plan—such as EWTN—the organization's TPA, upon receipt of the self-certification, must provide or arrange separate payments for contraceptive services for participants and beneficiaries in the plan without cost-sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or its plan. *See id.* at 39,879-80, AR at 11-12. Any costs incurred by the TPA will be reimbursed through an adjustment to Federally-facilitated Exchange (FFE) user fees. *See id.* at 39,880, AR at 12.

The 2013 final rules generally apply to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014, *see id.* at 39,872, AR at 4, except that the amendments to the religious employer exemption apply to group health plans and group health insurance issuers for plan years beginning on or after August 1, 2013, *see id.* at 39,871, AR at 3.

STANDARD OF REVIEW

Defendants move to dismiss the Complaint in its entirety for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Under this Rule, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Defendants also move to dismiss one count, *see infra* at Section I.F.3,

under Federal Rule of Civil Procedure 12(b)(1) in part for lack of subject matter jurisdiction. The party invoking federal jurisdiction bears the burden of establishing its existence. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 104 (1998).

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

ARGUMENT

I. EWTN'S CLAIMS LACK MERIT

A. EWTN's Religious Freedom Restoration Act Claim Is Without Merit

1. The regulations do not substantially burden EWTN's exercise of religion

Under RFRA, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb-1 *et seq.*), the federal government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. 2000bb-1. Importantly, "only *substantial* burdens on the exercise of religion trigger the compelling interest requirement." *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001) (emphasis added). "A substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (citing *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981)); *see Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 997 (7th Cir. 2006) (noting same in the context of the Religious Land Use and Institutionalized Persons Act

(RLUIPA)). "An inconsequential or *de minimis* burden on religious practice does not rise to this level, nor does a burden on activity unimportant to the adherent's religious scheme." *Kaemmerling*, 553 F.3d at 678.

For two reasons, EWTN cannot show that the challenged regulations substantially burden its religious exercise. First, because the regulations require virtually nothing of EWTN, and certainly do not require it to modify its behavior in any meaningful way, the regulations do not impose any more than a *de minimis* burden on EWTN—let alone a substantial one. *See Priests for Life*, 2013 WL 6672400, at *5-10; *Notre Dame*, 2013 WL 6804773, at *7-14; *Mich. Catholic Conf.*, 2013 WL 6838707, at *4-8. Second, even if this Court were to find that the regulations impose some burden on EWTN's religious exercise, any such burden would be far too attenuated to be substantial. *See Diocese of Nashville*, 2013 WL 6834375, at *4-5.

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

To put this case in its simplest terms, EWTN challenges regulations that require it to do next to nothing, except what it would have to do even in the absence of the regulations. EWTN, as an eligible organization, is not required to contract, arrange, pay, or refer for contraceptive coverage. To the contrary, it is free to continue to refuse to do so, to voice its disapproval of contraception, and to encourage its employees to refrain from using contraceptive services. EWTN need only fulfill the self-certification requirement and provide the completed self-certification to its TPA. It need not provide payments for contraceptive services to its employees. Instead, a third party—EWTN's TPA—provides payments for contraceptive services, at no cost to EWTN. In short, with respect to contraceptive coverage, EWTN need not do anything more than it did prior to the promulgation of the challenged regulations—that is, to inform its TPA that it objects to providing

contraceptive coverage in order to ensure that it are not responsible for contracting, arranging, paying, or referring for such coverage. Thus, the regulations do not require EWTN "to modify [its] religious behavior in any way." *Kaemmerling*, 553 F.3d at 679. The Court's inquiry should end here. A law cannot be a substantial burden on religious exercise when "it involves no action or forbearance on [EWTN's] part, nor . . . otherwise interfere[s] with any religious act in which [EWTN] engages." *Kaemmerling*, 553 F.3d at 679; *see also Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003) (holding, in the context of RLUIPA, that "a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable").

Because the regulations place no burden *at all* on EWTN, it plainly places no cognizable burden on its religious exercise. EWTN's contrary argument rests on an unprecedented and sweeping theory of what it means for religious exercise to be burdened. Not only does EWTN want to be free from contracting, arranging, paying, or referring for contraceptive services for its employees—which, under these regulations, it is—but EWTN would also prevent *anyone else* from providing such coverage to its employees, who might not subscribe to EWTN's religious beliefs. That this is the *de facto* impact of EWTN's stated objections is made clear by its assertion that RFRA is violated whenever EWTN is the "trigger"—or but-for case—of a third party's provision to EWTN's employees of services to which EWTN objects. Compl. ¶¶ 96, 112. This theory would mean, for example, that even the government would not realistically be able to provide contraceptive coverage to EWTN's employees, because such coverage would be "trigger[ed]," *id.*, by its objection to providing such coverage itself. But RFRA is a shield, not a sword, *see O'Brien v. HHS*, 894 F. Supp. 2d 1149, 1158-60 (E.D. Mo. 2012), and accordingly it does not prevent the government from providing alternative means

of achieving important statutory objectives once it has provided a religious accommodation. *Mich. Catholic Conf.*, 2013 WL 6838707, at *8; *Notre Dame*, 2013 WL 6804773, at *8; *cf. Bowen v. Roy*, 476 U.S. 693, 699 (1986) ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.").

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

Perhaps understanding the tenuous ground on which its RFRA claim rests, given that the regulations do not require them to contract, arrange, pay, or refer for contraceptive services, EWTN attempts to circumvent this problem by framing the allegation in its complaint as part of a novel theory that the regulations require it to somehow "facilitate" access to contraception coverage, and that it is this facilitation that violates EWTN's religious beliefs. *See, e.g.*, Compl. ¶ 140. But

under the challenged regulations EWTN need *only* to self-certify that it objects to providing coverage for contraceptive services and that it otherwise meets the criteria for an eligible organization, and to share that self-certification with its TPA. In other words, EWTN is required to inform its TPA that it objects to providing contraceptive coverage, which it has done or would have to do voluntarily anyway even absent these regulations in order to ensure that it is not responsible for contracting, arranging, paying, or referring for contraceptive coverage. The sole difference is that EWTN must inform its TPA that its objection is for religious reasons—a statement which it has already made in this litigation and elsewhere. This does not amount to a substantial burden under RFRA. *Mich. Catholic Conf.*, 2013 WL 6838707, at *7; *Notre Dame*, 2013 WL 6804773, at *12; *Priests for Life*, 2013 WL 6672400, at *8.

Furthermore, any burden imposed by the purely administrative self-certification requirement is, at most, *de minimis*, and thus cannot be "substantial" under RFRA. The substantial burden hurdle is a high one. *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007); *see also Kaemmerling*, 553 F.3d at 678 ("An inconsequential or *de minimis* burden on religious practice does not rise to this level [of a substantial burden]."); *Washington v. Klem*, 497 F.3d 272, 279-81 (3d Cir. 2007); *McEachin v. McGuinnis*, 357 F.3d 197, 203 n.6 (2d Cir. 2004); *Civil Liberties for Urban Believers*, 342 F.3d at 761. Indeed, if this is not a *de minimis* burden, it is hard to see what would be.

The mere fact that a plaintiff may claim that the self-certification requirement imposes a substantial burden on its religious exercise does not make it so. *See Priests for Life*, 2013 WL 6672400, at *8 n.5 ("[T]he Court is not persuaded . . . that a plaintiff can meet his burden of establishing that the accommodation creates a 'substantial burden' upon his exercise of religion simply

because he claims it to be so."); *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 413 (E.D. Pa. 2013) (same), *aff'd*, 724 F.3d 377 (3d Cir. 2013). Under RFRA, EWTN is entitled to its sincere religious beliefs, but it is not entitled to decide what does and does not impose a substantial burden on such beliefs. Although "[c]ourts are not arbiters of scriptural interpretation," *Thomas*, 450 U.S. at 716, "RFRA still requires the court to determine whether the burden a law imposes on a plaintiff's stated religious belief is 'substantial.'" *Conestoga*, 917 F. Supp. 2d at 413. This inquiry asks whether the challenged regulations actually require a plaintiff to modify its behavior in a significant—or more than *de minimis*—way. *See Living Water Church of God*, 258 F. App'x at 734-36 (reviewing cases); *see also, e.g.*, *Vision Church*, 468 F.3d at 997; *Garner v. Kennedy*, 713 F.3d 237, 241-42 (5th Cir. 2013); *Church of Scientology of Ga., Inc. v. City of Sandy Springs, Ga.*, 843 F. Supp. 2d 1328, 1353-54 (N.D. Ga. 2012).

If courts played virtually no role in determining whether an alleged burden is "substantial"—if, as long as a plaintiff's religious belief is sincere, the inquiry would be complete—a plaintiff would be allowed to evade RFRA's threshold by simply asserting that the burden on its religious exercise is "substantial," thereby paradoxically reading the term "substantial" out of RFRA. *Autocam*, 2012 WL 6845677, at *6 ("The Court does not doubt the sincerity of Plaintiff Kennedy's decision to draw the line he does, but the Court still has a duty to assess whether the claimed burden—no matter how sincerely felt—really amounts to a substantial burden on a person's exercise of religion."); *Diocese of Nashville*, 2013 WL 6834375, at *5 n.7 ("Although the Court accepts the Plaintiffs' determination that self-certification is at odds with their sincerely-held religious beliefs, the determination of whether those beliefs are 'substantially burdened' by self-certification is an objective one that RFRA requires the courts to make."); *Mich. Catholic Conf.*, 2013 WL 6838707, at *5-6 (same). "If every plaintiff were

permitted to unilaterally determine that a law burdened their religious beliefs, and courts were required to assume that such burden was substantial, simply because the plaintiff claimed that it was the case, then the standard expressed by Congress under the RFRA would convert to an 'any burden' standard." *Conestoga*, 917 F. Supp. 2d at 413-14; *see also Autocam*, 2012 WL 6845677, at *7; *Mersino Mgmt. Co. v. Sebelius*, No. 13-cv-11296, 2013 WL 3546702, at *16 (E.D. Mich. July 11, 2013).[5] The result would be to subject every act of Congress to strict scrutiny every time any plaintiff could articulate a sincerely held religious objection to compliance with that law. The "most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), would thus be transformed into a norm against which Congress must always legislate.

For the reasons stated above, the regulations do not impose a substantial burden on EWTN's religious exercise, and EWTN's RFRA claims (Count I of the Complaint) should be dismissed or summary judgment granted to defendants.

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

Although the regulations do not require EWTN to contract, arrange, pay, or refer for contraceptive coverage, EWTN's complaint appears to be that the regulations require it to indirectly facilitate conduct on the part of its employees that it finds objectionable. But this complaint has no limits. An employer 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. EWTN not

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

only seeks to be free from the requirement to contract, arrange, pay, or refer for contraceptive coverage itself—which it is under the regulations—but also seeks to prevent anyone else from providing such coverage to its employees. But an employer has no right to control the choices of its employees, who may not share its religious beliefs, when making use of their benefits.

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

As these courts concluded, the preventive services coverage regulations result in only an indirect impact on for-profit companies, which must provide contraceptive coverage themselves. Any burden on EWTN and similar eligible organizations that qualify for the accommodations is even more attenuated. Not only is EWTN separated from the use of contraception by "a series of events" that must occur before the use of contraceptive services to which EWTN object would "come into play," *Conestoga*, 917 F. Supp. 2d at 414-15, but they are also further insulated by the fact that a third party—EWTN's TPA—and *not* EWTN, will actually contract, arrange, pay, and refer for such services, and thus EWTN is in no

way subsidizing—even indirectly—the use of preventive services that they find objectionable. *See Diocese of Nashville*, 2013 WL 6834375, at *5 & n.8; *Mich. Catholic Conf.*, 2013 WL 6838707, at *7.

Under EWTN's theory, its religious exercise is substantially burdened when one of its employees and her health care provider make an independent determination that the use of certain contraceptive services is appropriate, and when such services are paid for exclusively by EWTN's TPA—with none of the cost being passed on to EWTN—and no administration of the payments by EWTN, solely because EWTN self-certified that it has religious objections to providing contraceptive coverage and so informed its TPA. But a burden simply cannot be "substantial" under RFRA when it is attenuated. Cases that find a substantial burden uniformly involve a direct burden on the plaintiff rather than a burden imposed on another entity. *See, e.g.*, *Potter v. Dist. of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009). A plaintiff cannot establish a substantial burden on his religious exercise by invoking this type of trickle-down theory; to constitute a substantial burden within the meaning of RFRA, the burden must be imposed on the plaintiff himself. *See Conestoga*, 917 F. Supp. 2d at 411, 413; *Autocam*, 2012 WL 6845677, at *7. Here, of course, there is no such direct burden. In fact, given that any payment for contraceptive services is made by EWTN's TPA, the regulations have even less impact on EWTN's religious exercise than its payment of salaries to its employees, which those employees can use to purchase contraceptives. *See O'Brien*, 894 F. Supp. 2d at 1160; *Conestoga*, 917 F. Supp. 2d at 414..

EWTN remains free to refuse to contract, arrange, pay, or refer for contraceptive coverage; to voice its disapproval of contraception; and to encourage its employees to refrain from using contraceptive services. The regulations therefore affect EWTN's religious practice, if at all, in a highly attenuated way. In short, because the preventive services coverage regulations "are several degrees

removed from imposing a substantial burden on [EWTN]," *O'Brien*, 894 F. Supp. 2d at 1160, the Court should dismiss EWTN's RFRA claim, or grant summary judgment to defendants, even if it finds—contrary to the government's argument—that the challenged regulations impose some burden on EWTN's religious exercise.

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

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

Even if EWTN were able to demonstrate a substantial burden on its religious exercise, it would not prevail because the challenged regulations are justified by two compelling governmental interests, and are the least restrictive means to achieve those interests. First, the promotion of public health is unquestionably a compelling governmental interest. *See, e.g.*, *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011); *Dickerson v. Stuart*, 877 F. Supp. 1556, 1559 (M.D. Fla. 1995). And the challenged regulations further this compelling interest by "expanding access to and utilization of recommended preventive services for women." 78 Fed. Reg. at 39,887, AR at 19.

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

shows that cost sharing can be a significant barrier to access to contraception." (citation omitted)), AR at 5.

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

Closely tied to this interest is a related, but separate, compelling interest that is furthered by the regulations: assuring that women have equal access to health care services. 78 Fed. Reg. at 39,872, 39,887, AR at 4, 19. As the Supreme Court explained in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), there is a fundamental "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically

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

Although the challenged regulations further these two compelling governmental interests, while simultaneously accommodating the religious objections of eligible organizations, EWTN argues that the interests underlying the regulations cannot be considered compelling when the employees of exempt religious employers and organizations with grandfathered plans are not protected by the regulations at the moment. Compl. ¶¶ 164-67. But this is not a case where underinclusive enforcement of a law suggests that the government's "supposedly

vital interest" is not really compelling. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993). The grandfathering of certain health plans with respect to certain ACA provisions is not specifically limited to the preventive services coverage regulations and is not an exemption from the preventive services coverage regulations at all. *See* 42 U.S.C. § 18011; 45 C.F.R. § 147.140. In fact, the effect of grandfathering is not really a permanent "exemption," but rather, over the long term, a transition in the marketplace with respect to several ACA provisions, including the preventive services coverage provision. *See* 78 Fed. Reg. at 39,887 n.49, AR at 19.

Furthermore, the grandfathering provision reflects Congress's attempts to balance competing interests—specifically, the interest in spreading the benefits of the ACA, including those provided by the preventive services coverage provision, and the interest in maintaining existing coverage and easing the transition into the new regulatory regime established by the ACA—in the context of a complex statutory scheme. *See* 75 Fed. Reg. 34,538, 34,546 (June 17, 2010). It is permissible for the government to balance the compelling interests underlying the challenged regulations against other significant interests supporting the complex administrative scheme created by the ACA. *See United States v. Winddancer*, 435 F. Supp. 2d 687, 695-98 (M.D. Tenn. 2006) (recognizing that regulations must "strike a delicate balance" between competing interests).

And, unlike the permanent exemption EWTN seeks for employers that object to the regulations on religious grounds, the grandfathering provision's incremental transition does not undermine the government's interests in a significant way. *See Lukumi*, 508 U.S. at 547; *S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1208-09 (6th Cir. 1990); *see also* 78 Fed. Reg. at 39,887, AR at 19. Even under the grandfathering provision, it is projected that more group health plans will transition to the requirements under the regulations as

time goes on. Defendants have estimated that a majority of group health plans will have lost their grandfather status by the end 2013. *See id.* at 34,552. Thus, any purported adverse effect on the compelling interests underlying the regulations will be quickly mitigated, which is in stark contrast to the *permanent* exemption plaintiff seeks. EWTN 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 offers no support for such a proposition.

The only true exemption from the preventive services coverage regulations is the exemption for the group health plans of religious employers. 45 C.F.R. § 147.131(a).[6] But there is a rational distinction between this narrow exception and the expansion EWTN seeks. Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers, including organizations eligible for the accommodations, to employ people of the same faith who share the same objection, and who would therefore be

[6] EWTN's argument regarding two other purported "exemptions" is unavailing. *See* Compl. ¶ 164. First, while 26 U.S.C. § 5000A(d)(2) exempts from the minimum coverage provision of the ACA "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 and members of health care sharing ministries, this provision is entirely unrelated to the preventive services coverage regulations. *See also id.* § 1402(g)(1). The minimum coverage provision provides no exemption from the regulations EWTN challenges, as it only excludes certain *individuals* from the requirement to obtain health coverage and says nothing about the requirement that non-grandfathered group health plans provide recommended preventive services coverage without cost sharing. It is also clearly an attempt by Congress to *accommodate* religion and, unlike the broad exemption EWTN seeks, is sufficiently narrow so as not to undermine the larger administrative scheme. *See Lee*, 455 U.S. at 260-61. Exempting these discrete and "readily identifiable," *id.* at 260-61, classes 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), or is a member of a health care sharing ministry described in 26 U.S.C. § 5000A(d)(2)(B)(ii) would not utilize health coverage—including contraceptive coverage—even if it were offered.

Second, 26 U.S.C. § 4980H9(c)(2) does *not*, as EWTN asserts, exempt small employers from the challenged regulations. Small businesses that elect to offer non-grandfathered health coverage to their employees are required to provide coverage for recommended preventive health services without cost sharing. *See* 42 U.S.C. § 300gg-13. And, small employers have business incentives to offer health coverage to their employees; an otherwise eligible small employer would lose eligibility for certain tax benefits if it did not do so. *See* 26 U.S.C. § 45R.

less likely than other people to use contraceptive services even if such services were covered under their plan. *See* 78 Fed. Reg. at 39,874, 39,887, AR at 6, 19. In any event, it would be perverse to hold that the government's provision of a limited religious exemption eliminates its compelling interest in the regulation, thus effectively extending the same exemption to anyone else who wants it under RFRA. Such a reading of RFRA would *discourage* the government from accommodating religion, the exact opposite of what Congress intended to accomplish in enacting RFRA.

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

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

EWTN alleges, "the government could provide access" to contraceptive services through "Title X," "direct government payments," or "tax deductions, refunds, or credits." Compl. ¶ 158-59. Yet EWTN fails to recognize that such alternatives would be incompatible with the fundamental statutory scheme set forth in the ACA, which EWTN does not challenge in this lawsuit. Congress did not adopt a single (government) payer system financed through taxes and instead opted

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

Furthermore, just because EWTN can devise an entirely new legislative and administrative scheme does not make that scheme a feasible less restrictive means, *see Wilgus*, 638 F.3d at 1289; *Adams v. Comm'r of Internal Revenue*, 170 F.3d 173, 180 n.8 (3d Cir. 1999), particularly where such alternative would come at enormous administrative and financial cost to the government. A proposed alternative scheme is not an adequate alternative—and thus not a viable less restrictive means to achieve a compelling interest—if it is not feasible. *See, e.g.*, *New Life Baptist Church Acad. v. Town of East Longmeadow*, 885 F.2d 940, 947 (1st Cir. 1989) (Breyer, J.). In determining whether a proposed alternative scheme is feasible, courts often consider the additional administrative and fiscal costs of the scheme. *See, e.g.*, *S. Ridge Baptist Church*, 911 F.2d at 1206; *Fegans v. Norris*, 537 F.3d 897, 905-06 (8th Cir. 2008); *United States v. Lafley*, 656 F.3d 936, 942 (9th Cir. 2011). Defendants considered EWTN alternatives and determined that it is not feasible because the agencies lacked statutory authority to implement it; it would impose considerable new costs and other burdens on the government; and it would otherwise be impractical. *See* 78 Fed. Reg. at 39,888, AR at 20; *see also, e.g.*, *Gooden v. Crain*, 353 F. App'x 885, 888 (5th Cir. 2009).

Nor would the proposed alternatives be equally effective in advancing the government's compelling interests. *See* 78 Fed. Reg. at 39,888, AR at 20; *see also,*

e.g., *Murphy v. State of Ark.*, 852 F.2d 1039, 1042-43 (8th Cir. 1988) (finding that means was least restrictive where no alternative means would achieve compelling interests). 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 regulations are attributable not only to the fact that recommended contraceptive services will be available to women with no cost-sharing, but also to the fact that these services will be available through the existing employer-based system of health coverage through which women face minimal logistical and administrative obstacles to receiving coverage of their care. EWTN's alternatives, by contrast, have none of these advantages. Nor does EWTN offer any suggestion as to how its proposed alternative could be integrated with the employer-based system or how women would obtain government-provided preventive services in practice. Thus, EWTN's proposals—in addition to raising myriad logistical difficulties and being unauthorized by statute and not funded by any appropriation—are less likely to achieve the compelling interests furthered by the regulations, and thus do not represent a reasonable less restrictive means. *Id.*

B. The Regulations Do Not Violate the Free Exercise Clause

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

or of religion in general. *Id*. at 545. A law is generally applicable so long as it does not selectively impose burdens only on conduct motivated by religious belief. *Id*.

Unlike such selective laws, the challenged regulations are neutral and generally applicable. Indeed, every court to have considered a free exercise challenge to these regulations has rejected it, concluding that the regulations are neutral and generally applicable. *See, e.g.*, *Priests for Life*, 2013 WL 6672400, at *10-12, *Notre Dame*, 2013 WL 6804773, at *14-18; *Roman Catholic Archbishop of Washington v. Sebelius*, __ F. Supp. 2d __, 2013 WL 6729515, at *27-31 (D.D.C. Dec. 20, 2013).[7] "The regulations were passed, not with the object of interfering with religious practices, but instead to improve women's access to health care and lessen the disparity between men's and women's healthcare costs." *O'Brien*, 894 F. Supp. 2d at 1161. The regulations reflect expert medical recommendations about the medical necessity of contraceptive services, without regard to any religious motivations for or against such services. *See, e.g.*, *Conestoga*, 917 F. Supp. 2d at 410; *Notre Dame*, 2013 WL 6804773, at *17.

The regulations, moreover, do not pursue their purpose "only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545; *see also United States v. Amer*, 110 F.3d 873, 879 (2d Cir. 1997). The regulations apply to all non-grandfathered health plans that do not qualify for the religious employer exemption or the accommodations for eligible organizations. Thus, "it is just not true . . . that the burdens of the [regulations] fall on religious organizations 'but almost no others.'" *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (quoting *Lukumi*, 508 U.S. at 536).

[7] Likewise, nearly every court to have considered a free exercise challenge to the prior version of the regulations rejected it. *See, e.g., MK Chambers Co. v. U.S. Dep't of Health & Human Servs.*, Civil Action No. 13–11379, 2013 WL 1340719, at *5 *Conestoga*, 917 F. Supp. 2d at 409-10; *Grote Indus. v. Sebelius*, 914 F. Supp. 2d 943, 952-53 (S.D. Ind. 2012), *rev'd on other grounds sub nom. Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013).

The existence of express categorical exceptions or accommodations for objectively defined categories of entities, like grandfathered plans, religious employers, and eligible organizations, "does not mean that [the regulations do] not apply generally." *Priests for Life*, 2013 WL 6672400, at *11; *see Notre Dame*, 2013 WL 6804773 (same); *Autocam*, 2012 WL 6845677, at *5 (same). "General applicability does not mean absolute universality." *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008); *accord Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004). "Instead, exemptions undermining 'general applicability' are those tending to suggest disfavor of religion." *O'Brien*, 894 F. Supp. 2d at 1162. The exception for grandfathered plans is available on equal terms to all employers, whether religious or secular. And the religious employer exemption and eligible organization accommodations serve to accommodate religion, not to disfavor it. *Id.*; *see also Conestoga*, 917 F. Supp. 2d at 410; *Grote*, 914 F. Supp. 2d at 953. Indeed, the religious employer exemption "presents a strong argument in favor of neutrality" by "demonstrating that the object of the law was not to infringe upon or restrict practices because of their religious motivation." *O'Brien*, 894 F. Supp. 2d at 1161 (quotations omitted). The regulations are not rendered unlawful merely because the religious employer exemption does not extend as far as EWTN wishes.

Finally, EWTN's unsupported assertions that the regulations were "designed" to "target religious organizations such as EWTN" and that defendants promulgated the regulations "in order to suppress the religious exercise of EWTN and others," Compl. ¶ 207-08, are mere rhetorical bluster. *See Notre Dame*, 2013 WL 6804773, at *16; *Mich. Catholic Conf.*, 2013 WL 6838707, at *9. There is no indication that the regulations are anything other than an effort to increase women's access to and utilization of recommended preventive services. *See O'Brien*, 894 F. Supp. 2d at 1161; *Conestoga*, 917 F. Supp. 2d at 410; *Grote*, 914 F. Supp. 2d at 952-53. And it cannot be disputed that defendants have made

extensive efforts—through the religious employer exemption and the eligible organization accommodations—to accommodate religion in ways that will not undermine the goal of ensuring that women have access to coverage for recommended preventive services without cost sharing.[8] For these reasons Counts II through IV fail.

C. The Regulations Do Not Violate the Establishment Clause, the Due Process Clause, or the Equal Protection Clause

"The clearest command of the Establishment Clause is that one religious *denomination* cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982) (emphasis added). A law that discriminates among religions by "aid[ing] one religion" or "prefer[ring] one religion over another" is subject to strict scrutiny. *Id*. at 246; *see also Olsen*, 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 has struck down on Establishment Clause grounds a state statute that was "drafted with the explicit intention" of requiring "particular religious denominations" to comply with registration and reporting requirements while excluding other religious denominations. *Larson*, 456 U.S. at 254. The Court, on the other hand, has upheld a statute that provided an exemption from military service for persons who had a conscientious objection to all wars, but not those who objected to only a particular war. *Gillette v. United States*, 401 U.S. 437 (1971). The Court explained that the statute did not discriminate among religions because "no particular sectarian affiliation" was required to qualify for conscientious objector status. *Id*. at 450-51. "[C]onscientious objector status was available on an equal basis to both the Quaker and the Roman Catholic." *Larson*,

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

456 U.S. at 247 n.23; *see also Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (upholding RLUIPA because it did not "confer[] . . . privileged status on any particular religious sect" or "single[] out [any] bona fide faith").

Like the statutes at issue in *Gillette* and *Cutter*, the challenged regulations do not grant any denominational preference or otherwise discriminate among religions. It is of no moment that the religious employer exemption and accommodations for eligible organizations apply to some employers but not others. "[T]he Establishment Clause does not prohibit the government from [differentiating between organizations based on their structure and purpose] when granting religious accommodations as long as the distinction[s] drawn by the regulations . . . [are] not based on religious affiliation." *Grote*, 914 F. Supp. 2d at 954; *accord O'Brien*, 894 F. Supp. 2d at 1163. (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").

The regulations' definitions of religious employer and eligible organization "do[] not refer to any particular denomination." *Grote*, 914 F. Supp. 2d at 954. The exemption and accommodations are available on an equal basis to organizations affiliated with any and all religions. The regulations, therefore, do not discriminate among religions in violation of the Establishment Clause. Indeed, every court to have considered an Establishment Clause challenge to both these regulations and to the prior version of the regulations—which also included a requirement that the organization be an organization as described in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended—has rejected it. *See Notre Dame*, 2013 WL 6804773, at *18-20; *Priests for Life*, 2013 WL 6672400, at *14; *Archbishop of Washington*, 2013 WL 6729515, at *39-43; *Diocese of Nashville*, 2013 WL 6834375, at *8-10; *Mich. Catholic Conf.*, 2013 WL 6838707, at *11.

"As the Supreme Court has frequently articulated, there is space between the religion clauses, in which there is 'room for play in the joints;' government may encourage the free exercise of religion by granting religious accommodations, even if not required by the Free Exercise Clause, without running afoul of the Establishment Clause." *O'Brien*, 894 F. Supp. 2d at 1163 (citations omitted). Accommodations of religion are possible because the type of legislative line-drawing to which EWTN objects is constitutionally permissible. *Id*.; *Conestoga*, 917 F. Supp. 2d at 417; *see, e.g.*, *Walz v. Tax Commission of New York*, 397 U.S. 664, 672-73 (1970) (upholding property tax exemption "to religious organizations for religious properties used solely for religious worship"); *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1984) (upholding Title VII's exemption for religious organizations).[9] For all of these reasons, EWTN's Establishment Clause claims—Counts V, VI, and VII of the Complaint—fail.

Like its Establishment Clause claims, EWTN's due process and equal protection claims are based on the theory that the regulations discriminate among religions. Because, as shown above, the regulations do not so discriminate, EWTN's due process and equal protection claims warrant only rational basis review. *See, e.g.*, *Johnson v. Robison*, 415 U.S. 361, 375 n. 14 (1974); *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 638 (7th Cir. 2007); *Wirzberger v. Galvin*, 412 F.3d 271, 282-83 & n.6 (1st Cir. 2005);*Cooper v. Tard*, 855 F.2d 125, 130 (3d Cir. 1988). The regulations and, in particular, the religious employer exemption, satisfy rational basis review for the reasons explained above and in the final rules. *See supra*; 78 Fed. Reg. at 39,874, 39,887, AR at 6, 19. Therefore, Counts VII and VIII of the Complaint also fail.

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

D. The Regulations Do Not Interfere With Internal Religious Governance

Plaintiff also alleges that, by requiring it to facilitate practices in violation of its religious beliefs, the regulations interfere with EWTN's "internal decisions" in violation of the Religion Clauses. See Compl. ¶¶ 222-28 (Count VI). But that is merely a restatement of EWTN's substantial burden theory, which fails for reasons explained already. *See supra*.

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

EWTN's free speech claims fare no better. The right to freedom of speech "prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 61 (2006). But the regulations do not "compel speech"—by EWTN or any other person, employer, or entity—in violation of the First Amendment. Nor do they limit what EWTN may say. EWTN remains free under the regulations to express whatever views it may have on the use of contraceptive services (or any other health care services) as well as its views about the regulations. Indeed, every court to review a Free Speech challenge like EWTN's as to both the challenged regulations and the prior contraceptive-coverage regulations has rejected it, in part, because the regulations deal with conduct. *See, e.g.*, *Priests for Life*, 2013 WL 6672400, at *12-14; *Briscoe v. Sebelius*, 927 F. Supp. 2d 1109 (D. Colo. 2013).

The regulations also do not require EWTN to subsidize any conduct that is "inherently expressive." *FAIR*, 547 U.S. at 66; *see also United States v. O'Brien*, 391 U.S. 367, 376 (1968) (recognizing that some forms of "symbolic speech" are protected by the First Amendment). As an initial matter, the regulations explicitly prohibit EWTN's TPA from imposing any cost sharing, premium, fee, or other charge on EWTN or its plan with respect to the separate payments for contraceptive services made by the TPA. *See* 78 Fed. Reg. at 39,880, AR at 12.

EWTN, therefore, is not funding or subsidizing anything pertaining to contraceptive coverage. Moreover, even if EWTN played some role in its TPA's provision of payments for contraceptive services (and it does not), making payments for health care services is not the sort of conduct the Supreme Court has recognized as inherently expressive. *See, e.g.*, *Autocam*, 2012 WL 6845677, at *8.

Furthermore, EWTN is wrong when it contends that the regulations require it to "facilitate access" to "counseling related to abortion." Compl. ¶ 254. The regulations simply require coverage of "education and counseling for women with reproductive capacity." HRSA Guidelines, AR at 130-31. The conversations that may take place between a patient and her doctor cannot be known or screened in advance and may cover any number of options. To the extent that EWTN intends to argue that the covered education and counseling is objectionable because some of the conversations between a doctor and one of EWTN's employees *might* be supportive of something to which they object, accepting this theory would mean that the First Amendment is violated by the mere possibility of an employer's disagreement with a potential subject of discussion between an employee and her doctor, and would extend to all such interactions, not just those that are the subject of the challenged regulations. The First Amendment does not require such a result. *See, e.g.*, *Conestoga*, 2013 WL 140110, at *17.

Finally, the regulations do not violate the right to expressive association. To be sure, "[t]he right to speak is often exercised most effectively by combining one's voice with the voices of others." *FAIR*, 547 U.S. at 68. "If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect." *Id*. But the challenged regulations do not interfere with EWTN's right of expressive association. The regulations do not interfere in any way with the composition of EWTN's workforce. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000);

Roberts, 468 U.S. at 623. Moreover, EWTN, as well as its employees, are free to associate to voice their disapproval of the use of contraception and the regulations. Even the statute at issue in *FAIR*, which required law schools to allow military recruiters on campus if other recruiters were allowed on campus, did not violate the law schools' right to expression association. 547 U.S. at 68-70. The regulations challenged here do not even implicate EWTN's free speech rights. *See Priests for Life*, 2013 WL 6672400, at *13.

F. EWTN's APA Claims Fail

1. The regulations were properly promulgated

EWTN asserts that defendants failed to comply with the APA's notice and comment procedures and the ACA's timing provisions. These allegations are 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.[10]

As to the challenged regulations, defendants issued the ANPRM on March 21, 2012, and solicited comments on it. Defendants then considered those comments and issued the NPRM on February 6, 2013, requesting comments on the proposals contained in it. Defendants received over 400,000 comments, and the preamble to the 2013 final rules contains a detailed discussion both of the comments defendants received and of defendants' responses to those comments. *See* 78 Fed. Reg. at 39,871-39,888, AR at 3-20. The mere fact that the regulations as ultimately issued may not satisfy the preferences of each and every commenter is certainly not evidence that those comments were not considered.

[10] To the extent EWTN attempts to raise any alleged insufficiencies or improprieties as to the prior, interim final rules, they are simply irrelevant. The regulations EWTN challenges here are an entirely different set of regulations. The relevant question is whether defendants complied with the APA as to *these* regulations, and as shown below, there is no question that they did.

As to the HRSA Guidelines, because there were no existing HRSA guidelines relating to preventive care and screening for women, HRSA sought the scientific and medical expertise of the IOM. This is not at all unusual, as entities like HRSA frequently contract with non-governmental entities, including the IOM, for this type of technical input. After considering the IOM's recommendations, HRSA independently made the decision to adopt guidelines based on those recommendations, subject to the religious employer exemption. Moreover, nothing in the APA, or any other statute, requires HRSA to have subjected IOM's recommendations to notice and comment procedures before adopting them in the guidelines. The APA's notice-and-comment requirements apply only to rulemaking, 5 U.S.C. § 553(b), and a "rule" is defined in relevant part, as being "designed to implement, interpret, or prescribe law or policy," *id.* § 551(4). The guidelines neither do nor are designed to do any such thing, and as such they do not constitute a "rule" within the meaning of the APA. The substantive obligations that are imposed on group health plans and health insurance issuers were imposed by Congress, in 42 U.S.C. § 300gg-13(a) and in corresponding provisions of ERISA and the Internal Revenue Code, which expressly and automatically imported the content of various guidelines (including the HRSA Guidelines), including new content after a specified period of time. Indeed, in the same provision, Congress also imported by reference recommendations of the United States Preventive Services Task Force and the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention. *Id.* The recommendations of these entities are not generally required to be subject to notice and comment, and there is no suggestion that Congress intended otherwise.

2. The regulations are neither arbitrary nor capricious

EWTN claim that the regulations are arbitrary and capricious is belied by the policymaking path discussed above, which illustrates that 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) (agency action must be upheld so long as "the agency's path may reasonably be discerned. The preamble to the rules also sets out that path in detail, *see* 78 Fed. Reg. at 39,871-88, and there is no question that it can be reasonably discerned. Similarly, EWTN's brazen allegation that defendants failed to consider the constitutional and statutory implications of the regulations is flatly contradicted by the record, which explicitly discusses that very issue. *See* 78 Fed. Reg. at 39,886-88.

3. EWTN lacks standing to raise its statutory authority claims

EWTN makes two allegations in which it claims that defendants lacked statutory authority to enact parts of the regulations that apply to health insurance issuers and TPAs. But EWTN's attempt to challenge the government's regulation of third parties, rather than of EWTN itself, runs afoul of the "general rule that a party 'must assert [its] own legal rights and interests, and cannot rest [its] claim to relief on the legal rights or interests of third parties.'" *Hinck v. United States*, 550 U.S. 501, 510 n.3 (2007) (quotation omitted)); *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975). EWTN's allegations raise the claims of issuers and TPAs. *See* Compl. ¶¶ 284-85. It is undisputed, however, that EWTN is not an issuer or a TPA, and EWTN fails to allege any reason why such entities are unable to assert their own claims if they so desire. Thus, EWTN lacks standing to raise these claims.

4. The regulations do not violate restrictions relating to abortion

EWTN contends the regulations violate the APA because they conflict with two federal statutes dealing with abortion: the Weldon Amendment to the Consolidated Appropriations Act of 2012, and section 1303(b) of the ACA. EWTN appears to reason that, because the regulations require group health plans to cover

emergency contraception, such as Plan B, they in effect require coverage of abortions in violation of federal law.

EWTN's ACA-related argument should be rejected at the outset because EWTN lacks prudential standing to assert it. The doctrine of prudential standing requires that a plaintiff's claim fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). But the necessary link between EWTN and section 1303(b)(1) of the ACA is missing here. *O'Brien*, 894 F. Supp. 2d at 1167-68 (holding that plaintiff lacked prudential standing to raise similar claims). Section 1303(b)(1) of the ACA provides that "nothing in this title . . . shall be construed to require a qualified health plan to provide coverage of [abortion services]," 42 U.S.C. § 18023(b)(1)(A)(i), but EWTN is neither a health insurance issuers nor a purchaser of a qualified health plan.[11] It therefore does not fall within the zone of interests to be protected by the statute in question.

Even if the Court were to reach the merits of these claims, EWTN's premise that the regulations require abortion coverage is fundamentally incorrect. The regulations do not require that any health plan cover abortion as a preventive service, or that it cover abortion at all, as that term is defined in federal law. Rather, the regulations require only that non-grandfathered, non-exempt and non-accommodated group health plans cover all FDA-approved "contraceptive methods, sterilization procedures, and patient education and counseling," as prescribed by a health care provider. *See* HRSA Guidelines, *supra*. And the government has made clear that the preventive services covered by the regulations

[11] A "qualified health plan," within the meaning of this provision, is a health plan that has been certified by the health insurance exchange "through which such plan is offered" and that is offered by a health insurance issuer. 42 U.S.C. § 18021(a)(1). EWTN's health insurance plans were not purchased on a health insurance exchange, and so none is a "qualified health plan."

do not include abortifacient drugs.[12] Although EWTN believes that Plan B, ella, and certain IUDs are abortifacient drugs or cause abortions, neither the government nor this Court is required to accept that characterization, which is inconsistent with the FDA's scientific assessment and with federal law. While EWTN's religious beliefs may define abortion more broadly, statutory interpretation requires that terms be construed as a matter of law and not in accordance with any particular individual's views or beliefs. *See Mich. Catholic Conf.*, 2013 WL 6838707, at *13.

In recommending what contraceptive services should be covered by health plans without cost-sharing, the IOM Report identified the contraceptives that have been approved by the FDA as safe and effective. *See* IOM REP. at 10, AR at 308. And the list of FDA-approved contraceptives includes emergency contraceptives such as Plan B. *See id.* at 105, AR at 403. The basis for the inclusion of such drugs among safe and effective means of contraception dates back to 1997, when the FDA first explained why Plan B and similar drugs act as contraceptives rather than abortifacients. *See* Prescription Drug Products; Certain Combined Oral Contraceptives for Use as Postcoital Emergency Contraception, 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997); 45 C.F.R. § 46.202(f). In light of this conclusion by the FDA, HHS informed Title X grantees, which are required to offer a range of acceptable and effective family planning methods—and may not offer abortion except under limited circumstances—that they "should consider the availability of emergency contraception the same as any other method which has been established as safe and effective." Office of Population Affairs, Memorandum (Apr. 23, 1997), http://www.hhs.gov/opa/pdfs/opa-97-02.pdf (last visited Jan. 9, 2014).

[12] HealthCare.gov, Affordable Care Act Rules on Expanding Access to Preventive Services for Women (August 1, 2011), *available at* http://www.hhs.gov/healthcare/facts/factsheets/2011/08/womensprevention08012011a.html (last visited Jan. 9, 2014); *see also* IOM REP. at 22 (recognizing abortion services as outside the scope of permissible recommendations), AR at 320.

Because they reflect a settled understanding of FDA-approved contraceptives that is in accordance with existing federal laws prohibiting federal funding for certain abortions, the regulations are consistent with over a decade of regulatory policy and practice and thus cannot be deemed contrary to any law dealing with abortion.[13]

II. EWTN HAS NOT ESTABLISHED THAT IT IS ENTITLED TO A PRELIMINARY INJUNCTION IN THE ALTERNATIVE

EWTN asks, in the alternative, for a preliminary injunction "[s]hould the Court not have sufficient time to rule of EWTN's summary judgment motion" before July1, 2014. EWTN's Mem. in Supp. of Mot. at 36-39, ECF No. 30. EWTN, however, is not entitled to such relief.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). EWTN has not shown that the challenged regulations violate their First Amendment or RFRA rights, so there has been no "loss of First Amendment freedoms" for any period of time, *id.* In this respect, the merits and irreparable injury prongs of the preliminary injunction analysis merge, and EWTN cannot show irreparable injury without also showing a likelihood of success on the merits, which it cannot do. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012).

As to the final two preliminary injunction factors—the balance of equities and the public interest—"there is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that

[13] Representative Weldon, the sponsor of the Weldon Amendment, himself did not consider the word "abortion" in the statute to include FDA-approved emergency contraceptives. *See* 148 Cong. Rec. H6566, H6580 (daily ed. Sept. 25, 2002) ("The provision of contraceptive services has never been defined as abortion in Federal statute, nor has emergency contraception, what has commonly been interpreted as the morning-after pill. . . . [U]nder the current FDA policy[,] that is considered contraception, and it is not affected at all by this statute."). His statement leaves little doubt that the Weldon Amendment was not intended to apply to emergency contraceptives. *See Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (statement of one of the legislation's sponsors deserves to be accorded substantial weight in interpreting a statute).

agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008). Enjoining the regulations as to EWTN would undermine the government's ability to achieve Congress's goals of improving the health of women and newborn children and equalizing the coverage of preventive services for women and men.

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

Enjoining defendants from enforcing, as to EWTN, the regulations—the purpose of which is to eliminate these burdens—would thus inflict a very real harm on the public and, in particular, a readily identifiable group –*i.e.*, EWTN's 350 employees and their covered dependents, Compl. ¶ 30. Accordingly, even assuming EWTN were likely to succeed on the merits (which it is not for the reasons explained above), any potential harm to EWTN resulting from its offense at a third party providing payment for contraceptive services at no cost to, and with no administration by, EWTN would be outweighed by the significant harm an injunction would cause these employees and their families.

III. THE STATE OF ALABAMA IS NOT ENTITLED TO DECLARATORY RELIEF

The State of Alabama additionally seeks a declaration that—despite the Supremacy Clause of the United States Constitution—the challenged regulations do not preempt provisions of Alabama law that permit "health insurance plans, employers, and employees" to "refuse to participate in health insurance systems and may refuse to provide coverage for contraceptives . . . sterilization procedures, and related education and counseling." Compl. ¶¶ 308-09 (citing Ala. Code § 27-45-5; Ala. Const. Amend. No. 864).

The State's argument is merely a restatement of those asserted by EWTN. *See* Comp. ¶ 307. Indeed, in its motion for summary judgment, the State provides no justification whatsoever for the declaration that it seeks, other than to assert that the regulations violate RFRA. *See* State of Alabama's Br. in Supp. of Mot. for Sum. J. at 5-6, ECF No. 28. The State's claim, therefore, is entirely derivative of the claims asserted by EWTN and should be rejected for the reasons explained above. Because the challenged regulations are lawful, the State's claim—Count VII—should be dismissed, or, alternatively, summary judgment should be entered in defendants' favor.

CONCLUSION

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

Respectfully submitted this 10th day of February, 2014,

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS