IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

PAUL JOSEPH WIELAND, and TERESA JANE WIELAND, Plaintiffs, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF LABOR; THOMAS E. PEREZ, in his official capacity as Secretary of the United States Department of Labor, Defendants.	Civil Action No. 4:12-cv-00476-CEJ

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs ask this Court to enjoin a provision of law that does not apply to them and does not require anything of them. The preventive services coverage provision that plaintiffs challenge requires all non-exempt group health plans and health insurance issuers offering non-grandfathered health coverage to provide coverage without cost-sharing for certain recommended preventive services, including, among other things, immunizations; cholesterol screening; mammography; depression screening; autism screening for children; tobacco use counseling and interventions; and 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. But plaintiffs are not a "group health plan" or a "health insurance issuer," and thus, they are not required by the provision they seek to enjoin to do anything. This flaw – and others – in plaintiffs' suit warrants dismissal of this case (or, at the very least, denial of plaintiffs' motion for temporary restraining order and preliminary injunction).

At the outset, this case should be dismissed for lack of jurisdiction because plaintiffs have not shown – as it is their burden to do – that their alleged injury is caused by the law they challenge or that it is likely to be redressed by the injunction they seek. Instead, plaintiffs' alleged injury is inextricably linked with the independent discretionary actions of Mr. Wieland's employer, the State of Missouri, and the employer's insurance provider, the Missouri Consolidated Health Care Plan (MCHCP) – third parties that are not before the Court. Plaintiffs have not shown that the challenged law was the cause of the State of Missouri's or MCHCP's decision not to offer to Mr. Wieland and other employees a health plan that excludes contraceptive coverage. Nor have plaintiffs shown that, even if they received the injunction they seek, these third parties would offer Mr. Wieland a health plan that excludes contraceptive coverage. Accordingly, plaintiffs lack standing, and the case should be dismissed.

Furthermore, even if plaintiffs had standing, all of their claims are without merit. With respect to plaintiffs' Religious Freedom Restoration Act claim, the preventive services coverage

provision does not impose any burden – much less a substantial one – on plaintiffs' religious exercise. As noted above, the provision does not impose any burden on plaintiffs because it does not even apply to them. Mr. Wieland is simply an employee of the entity to which the provision applies and that cannot be a substantial burden. Moreover, the fact that the premiums plaintiffs pay for their health plan are placed into a pool of funds that may ultimately be used by the plan's issuer to fund contraceptive services obtained by plaintiffs' daughters or other employees does not amount to a substantial burden. Indeed, another court in this District recently "reject[ed] 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." *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012). RFRA, the court explained, "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*.

Even if plaintiffs could demonstrate a substantial burden on their religious exercise, their RFRA claim still would fail because the preventive services coverage provision significantly advances the government's compelling interest in promoting public health and is the least restrictive means to achieve that interest. Congress enacted the provision to increase access to and utilization of recommended preventive services. The government undoubtedly has a compelling interest in having a workable insurance system that covers a wide range of preventive health services. Plaintiffs' proposed alternative, in which insurance issuers are required to permit individual plan participants and beneficiaries to opt out of paying for coverage for any particular service they object to on religious grounds, is administratively and financially infeasible. "[C]ontraceptive care is by no means the sole form of health care that implicates religious concerns." *Grote v. Sebelius*, 708 F.3d 850, 866 (7th Cir. 2013) (Rovner, J., dissenting). Some individuals object on religious grounds to vaccinations, drawing blood, preventive and remedial treatment for sexually-transmitted diseases, among many other services. *See id*. Permitting

individual plan participants and beneficiaries to pick and choose what preventive services they would like their premiums to cover based on their individual religious beliefs would be an impossible administrative undertaking. It would, moreover, all but lead to the end of group health coverage, which relies on common coverage for a set of insured individuals. This is why, in the similar context of taxes, courts have uniformly held that the collection of tax revenues for expenditures that offend the religious beliefs of individual taxpayers does not violate free exercise rights.

Plaintiffs' remaining claims also fail. First, 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 provision falls squarely within this rubric because it does not target, or selectively burden, religiously motivated conduct. It applies to all non-grandfathered health plans that do not qualify for the religious employer exemption or the accommodations for eligible organizations, not just those of employers with a religious affiliation. Second, the Wielands' moral disapproval of the law, and their related desire to teach their children that that which the law makes available is sinful, does not render the law an unconstitutional intrusion on the Wielands' rights to raise their daughters in the manner they choose. Nothing in the preventive services coverage provision prevents plaintiffs from teaching, believing, and fostering in their daughters the belief that contraception is wrong and sinful or from explaining to their daughters that the fact that the group health plan offered by Mr. Wieland's employer covers contraception should not be understood as an endorsement by them of the use of contraception. The law, therefore, does not unconstitutionally interfere with parental rights. Third, the preventive services coverage provision does not violate the Free Speech Clause because it does not require plaintiffs to say anything or limit what plaintiffs may say. Indeed, as noted above, it does not regulate plaintiffs at all. Finally, plaintiffs lack prudential standing to raise a claim under section 1303(b)(1) of the Patient Protection and Affordable Care Act because plaintiffs are not "health insurance issuers" and they have not purchased a "qualified health

plan." And, in any event, the preventive services coverage provision does not require qualified health plans to cover abortions as prohibited by section 1303(b)(1).

BACKGROUND

I. STATUTORY AND REGULATORY 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."), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited Sept. 9, 2013). The preventive services coverage provision that plaintiffs challenge here seeks to cure this problem by making recommended preventive care affordable and accessible for many more Americans. It requires all non-exempt group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for recommended preventive services without cost-sharing – that is, without requiring plan participants and beneficiaries to make co-payments or pay deductibles. 42 U.S.C. § 300gg-13. The provision applies to employment-based group health plans covered by ERISA as well as to health plans offered by health insurance issuers on the health benefit exchanges established by the ACA. *See* 29 U.S.C. § 1185d; 42 U.S.C. § 300gg-91(b). The provision does not require anything of individual plan participants or beneficiaries.

The preventive health services that must be covered include immunizations recommended by the Advisory Committee on Immunization Practices, 42 U.S.C. § 300gg-13(a)(2); items or services that have an "A" or "B" rating from the U.S. Preventive Services Task Force, *id*. § 300gg-13(a)(1); preventive care and screenings for infants, children and adolescents as provided in guidelines of the Health Resources and Services Administration ("HRSA"), a component of the Department of Health and Human Services, *id*. § 300gg-13(a)(3); and certain

additional preventive services for women as provided in HRSA guidelines, *id*. § 300gg-13(a)(4). Each category encompasses a package of preventive services that have been determined by independent medical experts in the relevant field to improve health outcomes. *See* 75 Fed. Reg. 41,726, 41,733 (July 19, 2010); IOM REP. at 2. Items or services receiving an A or B rating by the U.S. Preventive Services Task Force, for example, have been determined by an independent panel of private sector experts in primary care and prevention to be supported by fair or good evidence showing that they improve important health outcomes and that the benefits outweigh any harms. 75 Fed. Reg. at 41,733. And the HRSA guidelines for preventive services for women were developed based on recommendations by the Institute of Medicine after it conducted an extensive science-based review of the preventive services that are necessary for women's health and well-being.[1] IOM REP. at 2; HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Sept. 9, 2013).

The array of recommended preventive health services that must be covered under this provision include, *inter alia*, immunizations; cholesterol screening; blood pressure screening; mammography; cervical cancer screening; screening and counseling for sexually transmitted infections; domestic violence counseling; depression screening; obesity screening and counseling; diet counseling; hearing loss screening for newborns; autism screening for children; developmental screening for children; alcohol misuse counseling; tobacco use counseling and interventions; well-woman visits; breastfeeding support and supplies; and all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a provider.[2]

[1] 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*.

[2] For a complete list of services for which coverage is required, *see* http://www.hhs.gov/healthcare/facts/factsheets/2010/07/preventive-services-list.html.

By requiring coverage for recommended preventive services and eliminating cost-sharing requirements, Congress sought to increase access to and utilization of these services, which were not used at optimum levels. 75 Fed. Reg. at 41,728. Underutilization of preventive services was caused by three main factors. First, health insurance issuers did not have incentives to provide coverage for preventive services because the benefits may only be realized in the future when, due to high turnover in the health insurance market, an individual may no longer be enrolled in the plan. *Id*. at 41,731. Second, individuals were less likely to use preventive services due to the direct and immediate costs imposed by cost-sharing requirements. *Id*. Third, some of the benefits of preventive services accrue to society as a whole and thus individuals do not factor these benefits in when deciding whether to obtain preventive services. *Id*. Congress enacted the preventive services coverage provision to eliminate these market failures. *See id*. In particular, by requiring non-grandfathered health plans to provide coverage for recommended preventive services, Congress sought to overcome plans' lack of incentive to invest in these services. *See id*. And Congress eliminated cost-sharing requirements to remove a barrier that causes individuals not to obtain such services. *See id*.

The increased access to and utilization of recommended preventive services that Congress sought to achieve through the ACA is intended to benefit the health of individual Americans and society at large. *Id*. at 41,733-36. Individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of disease. *Id*. Healthier workers and children will be more productive with fewer sick days. *Id*. Increased utilization will reduce the incidence or severity of illness and thus result in lower health care costs. *Id*. And the cost of preventive services will be distributed more equitably across the broad insured population. *Id*.

II. CURRENT PROCEEDINGS

Plaintiffs, Paul Joseph Wieland and Teresa Jane Wieland, brought this action to challenge the preventive services coverage provision and implementing regulations. Plaintiffs allege that they receive health coverage for themselves and their three daughters through the Missouri

Consolidated Health Care Plan, which is provided as an earned benefit of Mr. Wieland's employment with the State of Missouri. According to plaintiffs, they pay a portion of their health care plan premiums while the State of Missouri contributes the remaining portion. Plaintiffs allege that their premiums "partially fund medical services provided to other employees covered under the same plan." Compl. ¶ 32.

Plaintiffs were notified in July 2013 that, beginning August 1, 2013, the health plan provided by Mr. Wieland's employer would include coverage for all FDA-approved contraceptive methods, sterilization procedures, and related patient education and counseling. Plaintiffs allege that their sincerely held religious beliefs prohibit them from providing, funding or participating in the provision of health coverage for such services. Compl. ¶ 35. Plaintiffs claim that, as purportedly applied to them, the preventive services coverage provision, and particularly the requirement that all non-grandfathered health plans cover contraceptive services, violates the Religious Freedom Restoration Act, the First and Fifth Amendments to the United States Constitution, and the Administrative Procedure Act. On August 20, 2013, plaintiffs moved for a temporary restraining order and preliminary injunction, seeking an order from the Court "prohibiting Defendants from requiring that the Plaintiffs' health benefit plan contain coverage for" the objected to services. Pls.' Mem. in Supp. of Mot. for Temp. Restraining Ord. & Prelim. Inj. ("Pls.' Mem.") at 34, ECF No. 4, Aug. 20, 2013.

STANDARD OF REVIEW

Defendants move to dismiss this case for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), respectively. The party invoking federal jurisdiction bears the burden of establishing its existence, and the Court must determine whether it has subject matter jurisdiction before addressing the merits of a claim. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 104 (1998); *Wilkinson v. United States*, 440 F.3d 970, 977 (8th Cir. 2006). Under Rule 12(b)(6), "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); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

This memorandum also responds to plaintiffs' motion for a temporary restraining order and preliminary injunction. 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. "The party requesting injunctive relief bears the 'complete burden' of proving that an injunction should be granted." *Henderson v. Biltbest Prods., Inc.*, No. 4:10CV01503 AGF, 2010 WL 5392828, at *3 (E.D. Mo. Dec. 22, 2010). The elements for obtaining a temporary restraining order are the same as those required for obtaining a preliminary injunction. *Irving v. Jones*, No. 1:09CV8 SNLJ, 2009 WL 910687, at *1 (E.D. Mo. Apr. 2, 2009).

ARGUMENT

I. THIS CASE SHOULD BE DISMISSED BECAUSE THE COURT LACKS SUBJECT MATTER JURISDICTION

Plaintiffs' motion for preliminary injunction, and their entire case, should be dismissed at the outset for lack of standing. Plaintiffs are individuals who receive health coverage through Mr. Wieland's employer, the State of Missouri, and their complaint stems from an objection to the nature of the coverage the employer provides in compliance with a federal requirement that acts upon the employer and its health insurance provider only. As plaintiffs themselves explain, the preventive services coverage provision is addressed to "group health plans" and "health insurance issuers." Compl. ¶¶ 41, 65, 66; *see* 42 U.S.C. § 300gg-13; 45 C.F.R. § 147.130(a)(1) ("[A] group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage for all of the following items and services.").

Plaintiffs are neither.[3] The only provision that plaintiffs challenge thus imposes no direct obligation or requirement on plaintiffs. The Supreme Court has recognized that establishing standing in the case of such an indirect injury is "substantially more difficult" than it is when a law directly makes a plaintiff "the object" of government action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (citation omitted). Plaintiffs fail to clear that hurdle here.

"[T]he irreducible constitutional minimum of standing" requires that a plaintiff (1) have suffered an injury in fact, (2) that is caused by the defendant's conduct, and (3) that is likely to be redressed by a favorable ruling. *Id.* at 560. The requirement of a causal connection between the defendant's conduct and the plaintiff's injury means that the injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (citation omitted). Further, for an injury to be redressable, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (citation omitted).

It is these latter two elements – causation and redressability – that make establishing standing difficult in a challenge to a law by which one is not personally regulated. As the Court explained in *Lujan*, "[w]hen . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction – and perhaps on the response of others as well." 504 U.S. at 562 (emphasis in original); *see Doe v. Va. Dep't of State Police*, 713 F.3d 745, 755 (4th Cir. 2013) ("The traceability and redressability prongs become problematic when third persons not party to the litigation must act in order for an injury to arise or be cured."). Here, plaintiffs' alleged injury is not caused by the law they challenge, and it is not likely to be redressed by the injunction they seek, because the injury is inextricably linked with

[3] Plaintiffs' allegation that they "provide" health insurance coverage for their daughters, Compl. ¶¶ 75-76, does not make them an issuer of a health insurance plan offering group or individual health insurance coverage. Plaintiffs are simply subscribers to a health plan.

the independent discretionary actions of third parties not before the Court: the Wielands' employer, the State of Missouri, and that employer's insurance provider, MCHCP.

First, the chain of causation between the preventive services coverage provision and plaintiffs' alleged injury is indirect and attenuated, *see Allen v. Wright*, 468 U.S. 737, 757-58 (1984), and plaintiffs' assertions do not satisfy their burden to "adduce facts showing that [the independent] choices [of a third party] have been or will be made in such manner as to produce causation and permit redressability of injury," *Lujan*, 504 U.S. at 562. The explanation from MCHCP that plaintiffs have placed in the record simply refers to a "federal court ruling" and a decision of the Board of Trustees, Ex. 2 to Pls.' Mem., ECF No. 4-2, but this vague reference alone is insufficient to establish causation. *See Renal Physicians Ass'n v. U.S. Dep't of Health & Human Servs.*, 489 F.3d 1267, 1277 (D.C. Cir. 2007) (finding insufficient an affidavit that "refers vaguely to a 'new federal law,'" and concluding that "we really have no way of knowing why" the third party took the action that harmed plaintiff).

Plaintiffs believe the court ruling that MCHCP referred to was Judge Fleissig's decision finding the state statute requiring insurance companies to offer health plans that do not cover contraception to be preempted by federal law. *Missouri Ins. Coal. v. Huff*, No. 4:12-cv-02354, 2013 WL 2250430, at *5 (E.D. Mo. May 22, 2013). But even if this were true, as plaintiffs recognize, *Huff* did not address a different state statute that provides that no employee shall be compelled to obtain, and no employer shall be compelled to provide, coverage for contraception. Pls.' Mem. at 1.n.1 (citing Mo. Rev. Stat. § 191.724). Moreover, the defendant in *Huff* – a state official who, along with other state officials and legislators, sits on the same MCHCP Board of Trustees that voted to eliminate the opt out option that plaintiffs desire[4] – declined to appeal the court's ruling. Without more evidence of these third parties' decision-making, plaintiffs cannot draw a line of causation from the challenged law to their own alleged injury that is not severed by the independent acts or omissions of the State of Missouri, MCHCP, or other independent

[4] MCHCP, Board of Trus tees, http://www.mchcp.org/aboutUs/board.asp (last visited Sept. 9, 2013).

actors. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) ("[T]he 'case or controversy' limitation of [Article III] still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."); *Allen*, 468 U.S. at 759 (1984) (noting that, in *Simon*, "[t]he causal connection depended on the decisions hospitals would make in response to withdrawal of tax-exempt status, and those decisions were sufficiently uncertain to break the chain of causation between the plaintiffs' injury and the challenged Government action"); *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004).

Much more problematic for plaintiffs is the fact that, even if they could establish causation, they cannot establish that their alleged injury is likely to be redressed by a favorable ruling. To start, plaintiffs do not challenge any law from which they could be relieved because the preventive services coverage provision does not apply to them. Plaintiffs have requested an injunction that would prohibit the defendants from "forc[ing] [plaintiffs] to provide, fund, or participate in the provision of contraceptives," Compl. at 21, ¶ e, but the preventive services coverage provision does not require any such thing. Rather, the provision requires plaintiffs' *employer* and the employer's *health insurance provider* to cover contraception in the employer's health plan. Indeed, even if the Court were to grant plaintiffs the injunction they seek, defendants would only be enjoined from imposing a penalty on the State of Missouri or MCHCP in the event either decided to permit plaintiffs to opt out of contraceptive coverage; but whether the State or MCHCP would ultimately permit plaintiffs to opt out is a choice entirely in their hands, and those entities are not before the Court.[5] In fact, thus far, neither the State nor MCHCP has evinced any interest in making such an exemption available. Neither the State nor MCHCP has challenged the preventive services coverage provision or the contraceptive coverage requirement. As noted above, the State has evidently declined to appeal a ruling that this federal requirement preempts a state law that required insurance companies to offer health plans that do

[5] It is not entirely clear that the Court could enjoin defendants from enforcing the preventive services coverage provision against entities that are not parties to this case.

not cover contraception. And MCHCP has chosen, as plaintiffs point out, not to offer plaintiffs an exemption under another provision in the Missouri code that deals with contraception coverage. Compl. ¶ 82.

In other words, even if plaintiffs received the injunction they seek against defendants, Mr. Wieland could find that he still works for an employer that covers contraception in its health plan. Whether plaintiffs' claims of injury would be redressed by a favorable decision in this case thus "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," which is fatal to plaintiffs' standing. *Lujan*, 504 U.S. at 562 (quoting *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (plurality opinion)); *see id.* at 569-70 ("[R]esolution by the District Court would not have remedied respondents' alleged injury anyway, because it would not have been binding upon the agencies. They were not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced."); *Nat'l Wrestling Coaches*, 366 F.3d at 936-37 ("The direct causes of appellants' asserted injuries . . . are the independent decisions of educational institutions . . . . Appellants offer nothing but speculation to substantiate their claim that a favorable decision from this court will redress their injuries by altering these schools' independent decisions.").

II. EVEN IF THE COURT HAD JURISDICTION, PLAINTIFFS FAIL TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED, AND THEY HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS

A. Plaintiffs' Religious Freedom Restoration Act Claim Fails

Congress enacted the Religious Freedom Restoration Act ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488 (1993) (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 "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. Plaintiffs RFRA claim

fails because the preventive services coverage provision does not substantially burden plaintiffs' exercise of religion and, in any event, it satisfies strict scrutiny.

1. Plaintiffs have not shown that the preventive services coverage provision substantially burdens their religious exercise

The preventive services coverage provision that plaintiffs challenge does not substantially burden their religious exercise because it does not apply to plaintiffs at all. The provision applies only to group health plans and health insurance issuers, and plaintiffs are neither. *See* 42 U.S.C. § 300gg-91(a)(1) (defining group health plan to include a plan established or maintained by an employer that provides medical care to employees); *id*. § 300gg-91(b) (defining a health insurance issuer that offers health insurance coverage as an insurance company, insurance service, or insurance organization that is licensed to engage in the business of insurance in a state and that issues a policy or contract to provide group or individual health insurance coverage). Thus, unlike the employer plaintiffs in the cases the Wielands cite, which are required to *provide coverage* for contraceptive services in any health plan they offer to their employees, the Wielands are not required to "provide . . . coverage" (Compl. ¶ 38; *accord* Pls.' Mem. at 4, 10, 14) for contraceptive services or any other preventive services to their daughters or to anyone else. Plaintiffs' RFRA challenge should be dismissed for this reason alone.[6]

The fact that the preventive services coverage provision may require Mr. Wieland's employer or his employer's insurance issuer to provide coverage for preventive services in any

[6] Motions panels of the Eighth Circuit have granted injunctions pending appeal to employers challenging the contraceptive coverage requirement under RFRA. *See O'Brien v. HHS*, No. 12-3357, Order (8th Cir. Nov. 28, 2012) (granting injunction pending appeal without explanation); *Annex Medical, Inc. v. Sebelius*, No. 13-1118, Order (8th Cir. Feb. 1, 2012) (granting injunction pending appeal based on *O'Brien*). Although the government believes these motions were wrongly decided, it has not opposed the entry of preliminary injunctions in subsequent cases brought by employers in the Eighth Circuit pending a decision by the merits panel in *O'Brien* or *Annex Medical*. *See, e.g.*, *Bick Holdings, Inc. v. Sebelius*, No. 4:13-cv-00462-AGF, ECF No. 18 (E.D. Mo. Mar. 28, 2013). Neither the motions panels' decisions in *O'Brien* or *Annex Medical* nor the government's position on the entry of preliminary injunctive relief as to employers is controlling in, persuasive in, or even relevant to this case. As noted above, the individual plaintiffs here are not in the same position as the employers in cases like *O'Brien* because plaintiffs are not required by the challenged law to provide coverage for contraceptive services or to do anything else for that matter. Further, as explained below, this case requires a different strict scrutiny analysis than the one apparently undertaken by the Eighth Circuit motions panels – one that the government easily satisfies.

health plan they offer – including any plan plaintiffs may decide to subscribe to – does not establish a substantial burden on plaintiffs' exercise of religion. A plaintiff cannot establish a substantial burden on his religious exercise by invoking this type of trickle-down-burden theory. Instead, cases that find a substantial burden – including those relied on by plaintiffs here – uniformly involve a direct burden *on the plaintiffs themselves* rather than a burden imposed on another entity. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (law prohibited plaintiff from sacrificing animals); *United States v. Lee*, 455 U.S. 252 (1982) (law required plaintiff to pay social security taxes); *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981) (law denied plaintiff unemployment benefits because of his religious exercise); *Sherbert v. Verner*, 374 U.S. 398 (1963) (same); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (law required plaintiffs to send their children to school); *United States v. Ali*, 682 F.3d 705 (8th Cir. 2012) (court order required claimant to stand when court convened and recessed). "In 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, the alleged burden on plaintiffs' religious exercise results from obligations that the preventive services coverage provision imposes on other entities (i.e., the State of Missouri and MCHCP) and thus it is not cognizable under RFRA.

Plaintiffs also argue that their religious exercise is substantially burdened because the premiums they pay for their health plan are placed into a pool of funds that may ultimately be used by the plan's issuer to fund contraceptive services obtained by their daughters or other employees. But this argument fails too, as another court in this District recently recognized. *See O'Brien*, 894 F. Supp. 2d 1149.[7] Although *O'Brien* involved a challenge by an employer to the

[7] The district court's decision in *O'Brien* is sound in its reasoning. And although a motions panel of the Eighth Circuit granted an injunction pending appeal in *O'Brien*, "[d]ecisions by motions panels are

contraceptive coverage requirement, and thus is not on point as to the Wielands' providing coverage argument for the reasons explained above, the court's reason for rejecting the *O'Brien* plaintiffs' RFRA claim is compelling as to the Wielands' funding argument. The court explained,

> the challenged regulations do not dem and that plaintiffs alter their behavior in a manner that will d irectly and in evitably 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 comm union. Instead, plaintiffs rem ain free to exercise their religion, by not us ing contraceptives and by dis couraging [other] employees [and their daughters] fr om 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 [Mr. W ieland's employer's] plan, subsidize *someone else's* participation in an activity that is condemned by pl aintiffs' religion. The Court rejects the proposition that requiring indirect financial support of a practice, from which plaintiff him self abstains according to his religious princip les, constitutes a substantial burden on plaintiff's religious exercise.

Id. at 1159. The court 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*. Indeed, plaintiffs "routinely contribute to other schemes" that "present the same conflict with their belief[s]" alleged here. *Mead v. Holder*, 766 F. Supp. 2d 16, 42 (D.D.C. 2011), *aff'd*, *Seven-Sky v. Holder*, 661 F.3d 1, 5 n.4 (D.C. Cir. 2011) (rejecting RFRA challenge to another ACA provision). A portion of plaintiffs' taxes, for example, are used for Medicaid and Medicare, programs that routinely pay for contraceptive services for the needy and disabled. *See* Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. II, 125 Stat. 786, 1075

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summary in character, made often on a scanty record, and not entitled to the weight of a decision made after plenary submission." *In re Rodriquez*, 258 F.3d 757, 759 (8th Cir. 2001) (quotation omitted). That is particularly so where, as in *O'Brien*, the motions panel gave no explanation for its decision, which was issued over a dissent. *See, e.g.*, *Gonzalez v. Arizona*, 485 F.3d 1041, 1046 (9th Cir. 2007) (noting Supreme Court vacated an injunction "because the motions panel gave no reasons for its action"). Indeed, the decision of a motions panel is not even binding on the merits panel in the same case. *See Council Tree Commc'ns, Inc. v. FCC*, 503 F.3d 284, 291-92 (3d Cir. 2007) (citing cases).

(2012); 42 U.S.C. § 1396a(a)(10); *id*. § 1396d(a)(4)(C); IOM REP. at 59; *see also* Kaiser Family Found., State Medicaid Coverage of Family Planning Services, at 7, 9, 11 (Nov. 2009), *available at* http://www.kff.org/womenshealth/upload/8015.pdf (last visited Sept. 9, 2013) (identifying contraceptive services covered under Missouri's Medicaid State Plan). Accordingly, any impact on plaintiffs' religious exercise is *de minimus* and too attenuated to constitute a substantial burden, even if it were viewed as a burden at all.

Plaintiffs suggest that the Court cannot look beyond their sincerely held assertion of a religiously based objection to the preventive services coverage provision to assess whether the law actually functions as a substantial burden on the exercise of religion. "But if accepted, this theory would mean that every government regulation could be subject to the compelling interest and narrowest possible means test of RFRA based simply on an asserted religious basis for objection." *Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, 2012 WL 6845677, at *7 (W.D. Mich. Dec. 24, 2012). "This would subject virtually every government action to a potential private veto based on a person's ability to articulate a sincerely held objection tied in some rational way to a particular religious belief." *Id*. 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. Although "'courts are not the arbiters of scriptural interpretation,'" *Thomas*, 450 U.S. at 718, "the RFRA still requires the court to determine whether the burden a law imposes on a plaintiff's stated religious beliefs is 'substantial.'" *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 413 (E.D. Pa. 2013), *aff'd on other grounds*, 2013 WL 3845365 (3d Cir. July 26, 2013). Otherwise, "the standard expressed by Congress under the RFRA would convert to an 'any burden' standard." *Id*. at 414. Congress, however, amended the initial version of RFRA to add the word "substantially," and thus made clear that "any burden" would not suffice. *See* 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy & text of Amendment No. 1082). Because the preventive services coverage provision does not apply to plaintiffs at all and imposes – at most – only a *de minimus* and attenuated burden on plaintiffs' religious exercise,

plaintiffs have not shown – as they are required to do – that the law imposes a substantial burden on their religious exercise.

2. Even if there were a substantial burden, the preventive services coverage provision serves compelling governmental interests and is the least restrictive means to achieve those interests

Even if plaintiffs were able to demonstrate a substantial burden on their religious exercise, they would not prevail on their RFRA claim because the preventive services coverage provision significantly advances the government's compelling interest in promoting public health and is the least restrictive means to achieve that interest. Having a workable insurance system that covers a wide range of preventive health services is undoubtedly a compelling governmental interest. *See, e.g.*, *Lee*, 455 U.S. at 258 (affirming government's compelling interest in social security system, which provides "a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees"); *Mead*, 766 F. Supp. 2d at 43 ("[T]he Government clearly has a compelling interest in safeguarding the public health by regulating the health care and insurance markets."); *see also* 75 Fed. Reg. at 41,731-36 (explaining that Congress sought to make recommended preventive services more accessible and affordable by requiring coverage of such services and eliminating cost-sharing requirements).[8]

In contrast to the system of mandatory coverage for recommended preventives services in all non-grandfathered health plans that Congress established, plaintiffs want a system where individual plan participants and beneficiaries can opt out of paying for coverage for any particular service they object to on religious grounds. Plaintiffs' proposal, however, misunderstands how health insurance works. Health insurance, by design, covers a wide array of services. No one is required to use a particular service that is covered by a comprehensive plan.

[8] "Mandated-benefit laws . . . that require an insurer to provide a certain kind of benefit to cover a specified illness or procedure whenever someone purchases a certain kind of insurance" are commonplace. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 728 (1985). By 1985, every State had imposed some coverage requirements on health insurance policies, *id*. at 729, and Congress has done so as well long before the enactment of the preventive services coverage provision, 29 U.S.C. §§ 1185-1185c.

Indeed, health insurance plans routinely cover services that a particular participant or beneficiary may not want or may never use. Most health plans, for example, cover prostate cancer screening even though women do not have a prostate. And most plans cover children's immunizations even though some plan participants do not have children or do not plan to immunize their children. Insurance markets could not function – either administratively or financially – if insurers had to tailor each health plan to the specific needs and desires of each individual plan participant and beneficiary.

Limiting "opt outs" only to objections based on religious beliefs would not eliminate this feasibility problem either. As Judge Rovner explained in another challenge to the contraceptive coverage requirement, "contraceptive care is by no means the sole form of health care that implicates religious concerns. To cite a few examples: artificial insemination and other reproductive technologies; genetic screening, counseling, and gene therapy; preventative and remedial treatment for sexually-transmitted diseases; sex reassignment; vaccination; organ transplantation from deceased donors; blood transfusions; stem cell therapies; [and] end-of-life care[.]" *Grote*, 708 F.3d at 866 (Rovner, J., dissenting). Many of the health care services that may implicate religious concerns are preventive services required by the preventive services coverage provision. Permitting individual plan participants and beneficiaries to pick and choose what preventive services they would like their premiums to cover based on their individual religious beliefs would be an impossible administrative undertaking. It would, moreover, all but lead to the end of group health coverage, which relies on common coverage for a set of insured individuals. *See Graham v. CIR*, 822 F.2d 844, 853 (9th Cir. 1987) (explaining that in applying the least restrictive means test courts are not limited to "analyz[ing] the problem solely in terms of exempting the few adherents whose religious views were alleged to conflict with the law," but rather, should consider the "myriad exemptions flowing from a wide variety of religious beliefs"); *see also United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001) (per curiam) ("Oliver has argued a one-man exemption should be made," but "[t]here are no safeguards to

prevent similarly situated individuals from asserting the same privilege and leading to uncontrolled eagle harvesting.").

The "opt out" system plaintiffs seek here is similar to the one courts have uniformly rejected in the tax context since the Supreme Court's decision in *United States v. Lee*, 455 U.S. 252 (1982). *See Jenkins v. CIR*, 483 F.3d 90, 92 (2d Cir. 2007) (recognizing that it is "well settled that the collection of tax revenues for expenditures that offend the religious beliefs of individual taxpayers does not violate the Free Exercise Clause of the First Amendment"). The plaintiff in *Lee* sought an exemption from paying social security taxes based on religious objection. The Court rejected the plaintiff's claim, explaining: "The design of the [social security] system requires support by mandatory contributions from covered employers and employees. This mandatory participation is indispensable to the fiscal vitality of the social security system. [W]idespread individual voluntary coverage under social security . . . would undermine the soundness of the social security program. Moreover, a comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer." *Lee*, 455 U.S. at 258 (internal quotations and citation omitted). More broadly, the Court acknowledged the difficulty of accommodating religious belief in the area of taxation – a difficulty that similarly exists in the context of mandatory health coverage. The Court noted that "we are a cosmopolitan nation made up of people of almost every conceivable religious preference." *Id*. at 259. "To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, but there is a point at which accommodation would radically restrict the operating latitude of the legislature." *Id*. (quotations and citations omitted). The same reasoning applies here.

Indeed, in *Goehring v. Brophy,* 94 F.3d 1294 (9th Cir. 1996), the Ninth Circuit relied on the rationale of the tax cases to reject a RFRA challenge to a mandatory health insurance requirement. *Id*. at 1298, *overruled on other grounds*, *City of Boerne v. Flores*, 521 U.S. 507 (1997). In *Goehring*, several students at the University of California alleged that their rights to

free exercise were violated by a mandatory health insurance fee collected by the University for a health insurance program that covered services to which the plaintiffs objected on religious grounds. "[G]uided by cases involving free exercise challenges to the government's use of tax dollars," the Ninth Circuit rejected the challenges. *Goehring*, 94 F.3d at 1301. The court explained that "the fiscal vitality of the University's fee system would be undermined if the plaintiffs in the present case were exempted from paying a portion of their student registration fee on free exercise grounds. Mandatory uniform participation by every student is essential to the insurance system's survival." *Id.* at 1301.

Like the Social Security program in *Lee* and the mandatory health insurance program in *Goehring*, the preventive services coverage provision could not function if individuals could opt out of paying for coverage for particular preventive services by asserting a religious objection to those services. If plaintiffs were granted such an exemption, the number of people who could "potentially claim the exemption," and the variety of preventive services for which they could claim the exemption, would be limitless. *Olsen v. CIR,* 709 F.2d 278, 281 (4th Cir. 1983) (it would be impossible "to limit in number the class of persons who might potentially claim the exemption or the scope of the exemption" if the appellant's exemption request were granted). Congress determined that mandatory, uniform coverage of recommended preventive services in all non-grandfathered health plans was necessary to make such services more accessible and more affordable and thereby improve public health. Because the soundness of the system Congress created "depends on the government's ability to apply the . . . law in a uniform and even-handed fashion, and the exemption of one presages the exemption of a great many others," *Graham*, 822 F.2d at 853, the preventive services coverage provision satisfies strict scrutiny.[9]

[9] Although the proper focus in this case for assessing the government's interest is the preventive services coverage provision as a whole, the contraceptive coverage requirement in particular also advances compelling governmental interests. Specifically, the contraceptive coverage requirement – which was adopted based on the recommendation of the Institute of Medicine after it conducted an extensive science-based review of the preventive services that are necessary for women's health and well-being – furthers the government's compelling interest in public health by reducing unintended pregnancies, and the negative health outcomes that disproportionately accompany such pregnancies, and promoting healthy birth spacing. IOM REP. at 2, 20-26, 102-04; *see also Dickerson v. Stuart*, 877 F. Supp.

Plaintiffs contend that the government interest underlying the preventive services coverage provision cannot be considered compelling because grandfathered plans are not required to cover recommended preventive services. Pls.' Mem. at 19. As an initial matter, grandfathering does not provide an exemption or opt out for individual plan participants or beneficiaries like the one plaintiffs seek here. Grandfathering occurs at the plan level, and thus, does not raise the administrative and financial feasibility problems discussed above that would result from allowing individual plan participants and beneficiaries to determine what preventive services they would like their premiums to cover based on their individual religious beliefs. There are in fact no individual opt outs for recommended preventive services, meaning that all participants and beneficiaries enrolled in plans that are required to include coverage for recommended preventive services will have such coverage whether they choose to use it or not.

In any event, 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. The grandfathering of certain plans is not really a permanent "exemption," but rather, over the long term, a transition in the marketplace with respect to several provisions of the ACA, including the preventive services coverage provision. The grandfathering provision reflects Congress's attempts to balance competing interests – specifically, the interest in spreading the benefits of the ACA 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, 34,540, 34,546 (June 17, 2010). This incremental transition does nothing to call into question the compelling interest furthered by the preventive services

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1556, 1559 (M.D. Fla. 1995) ("The State . . . has a compelling interest in the health of expectant mothers and the safe delivery of newborn babies."). The contraceptive coverage requirement also significantly advances the government's compelling interest in gender equality. As members of Congress explained "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). Congress's inclusion of gender-specific preventive health services for women in the preventive services coverage provision to "[a]ssur[e] women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests." *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984).

coverage provision. Even under the grandfathering provision, it is projected that more group health plans will transition to the preventive services coverage requirements as time goes on. Changes to a group health plan such as the elimination of certain benefits, an increase in cost-sharing requirements, or a decrease in employer contributions can cause a plan to lose its grandfathered status, *see* 45 C.F.R. § 147.140(g), and defendants estimate that, as a practical matter, a majority of group health plans will lose their grandfather status by 2013, *see* 75 Fed. Reg. at 34,552.[10] Thus, any purported damage to the compelling interest underlying the provision will be quickly mitigated, which is in stark contrast to the *permanent* exemption that plaintiffs seek. Plaintiffs would have this Court believe that an interest cannot truly be "compelling" unless Congress is willing to impose it on everyone all at once despite competing interests, but offers no support for such an untenable proposition. *See Legatus v. Sebelius*, 901 F. Supp. 2d 980, 994 (E.D. Mich. 2012) ("[T]he grandfathering rule seems to be a reasonable plan for instituting an incredibly complex health care law while balancing competing interests."), *appeal docketed*, No. 13-1092 (6th Cir. Jan. 24, 2013).[11]

Instead of explaining how the government could create an administratively and financially feasible system that allows plaintiffs and other individuals with religious objections to certain preventive services to opt out of paying for such coverage, plaintiffs conjure up several new statutory schemes they claim would be less restrictive. *See* Pls.' Mem. at 20-21. None of these imagined schemes addresses the problem the government has identified, i.e., making

[10] *See also* Kaiser Family Foundation and Health Research & Educational Trust, Employer Health Benefits 2012 Annual Survey at 7-8, 190, *available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/03/8345-employer-health-benefits-annual-survey-full-report-0912.pdf (last visited Sept. 9, 2013) (indicating that 58 percent of firms had at least one grandfathered health plan in 2012, down from 72 percent in 2011, and that 48 percent of covered workers were in grandfathered health plans in 2012, down from 56 percent in 2011).

[11] Contrary to plaintiffs' assertion (Pls.' Mem. 18-19), small employers are not exempted from the preventive services coverage provision. Like large businesses, small businesses that offer non-grandfathered health coverage to their employees are required to provide coverage for recommended preventive services without cost-sharing. Moreover, employees of small business (and large businesses) that do not offer health coverage to their employees will be required by the minimum coverage provision to obtain health coverage from another source (most likely the health insurance exchanges). And, because of the preventive services coverage provision, that coverage will include recommended preventive services.

recommended preventive services, not just contraceptive services, more accessible and more affordable. Moreover, plaintiffs point to no statutory authority for any of their proffered less restrictive alternatives. Nor is there any indication that Congress would have contemplated that agency action could be invalidated under RFRA because the agency in discharging its statutorily delegated authority failed to adopt an alternative scheme absent any statutory authority for doing so. Further, plaintiffs' suggestion – that, in the face of individual religious objections to a mandatory insurance coverage law, the government could just pay for or provide the covered services to everyone itself – would eviscerate the strict scrutiny test. It would become "strict in theory, but fatal in fact." *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011); *see also Adams v. CIR*, 170 F.3d 173, 180 n.8 (3d Cir. 1999) ("A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down.'" (quotations omitted)). RFRA does not require the government "to subsidize private religious practices," *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 94 (Cal. 2004), by expending significant resources to adopt an entirely new legislative scheme that "would place an unreasonable burden" on the government, *United States v. Lafley*, 656 F.3d 936, 942 (9th Cir. 2011).

For these reasons, plaintiffs' RFRA claim fails and should be dismissed.

B. Plaintiffs' Free Exercise Claim Fails

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. *Smith*, 494 U.S. at 879. The preventive services coverage provision falls squarely within this rubric and thus does not violate the Free Exercise Clause. Indeed, that was precisely the holding of nearly every court to address this claim.[12]

[12] *See* MK *Chambers Co. v. HHS*, No. 13-11379, 2013 WL 1340719, at *5 (E.D. Mich. Apr. 3, 2013); *Eden Foods, Inc. v. Sebelius*, No. 13-11229, 2013 WL 1190001, at *5 (E.D. Mich. Mar. 22, 2013);

"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*; *see also Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) (observing law was neutral and generally applicable where there is no evidence of "an intent to regulate religious worship" (quotation omitted)).

Unlike such selective laws, the preventive services coverage provision and, in particular, the contraceptive coverage requirement, are neutral and generally applicable. The provision was enacted "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 requirement reflects expert medical recommendations about the medical necessity of contraceptive services, without regard to any religious motivations for or against such services. *See, e.g.*, *Conestoga*, 917 F. Supp. 2d at 410 ("It is clear from the history of the regulations and the report published by the Institute of Medicine that the purpose of the [regulations] is not to target religion, but instead to promote public health and gender equality."); *Grote*, 914 F. Supp. 2d at 952-53 ("[T]he purpose of the regulations is a secular one, to wit, to promote public health and gender equality.").

The provision, moreover, does not pursue its purpose "only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545; *see United States v. Amer*, 110 F.3d 873, 879 (2d Cir. 1997) (concluding law that "punishe[d] conduct within its reach without regard to whether the conduct was religiously motivated" was generally applicable). The requirement applies to all

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Briscoe v. Sebelius, No. 13-cv-285, 2013 WL 755413, at *6 (D. Colo. Feb. 27, 2013); *Conestoga*, 917 F. Supp. 2d at 409-10; *Grote Indus., LLC v. Sebelius*, 914 F. Supp. 2d 943, 952-53 (S.D. Ind. 2012); *Autocam*, 2012 WL 6845677, at *5 (W.D. Mich.); *Korte v. HHS*, 912 F. Supp. 2d 735, 744-47 (S.D. Ill. 2012); *O'Brien*, 894 F. Supp. 2d at 1160-62; *see also Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468-69 (N.Y. 2006) (rejecting similar challenge to state law); *Catholic Charities of Sacramento*, 85 P.3d at 81-87 (same). *But see Sharpe Holdings, Inc. v. HHS*, No. 12-cv-92, 2012 WL 6738489, at *5 (E.D. Mo. Dec. 31, 2012); *Geneva Coll. v. Sebelius*, No. 12-cv-207, 2013 WL 838238, at *24-26 (W.D. Pa. Mar. 6, 2013).

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 [law] fall on religious organizations 'but almost no others.'" *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (quoting *Lukumi*, 508 U.S. at 536); *see O'Brien*, 894 F. Supp. 2d at 1162; *Autocam*, 2012 WL 6845677, at *5; *Grote*, 914 F. Supp. 2d at 953.[13]

The existence of express exceptions for objectively defined categories of entities, like grandfathered plans, religious employers, and eligible organizations, "does not mean that [the law does] not apply generally." *Autocam*, 2012 WL 6845677, at *5. "General applicability does not mean absolute universality." *Olsen*, 541 F.3d at 832. "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*.

Furthermore, the government's creation of an exemption for religious employers and an accommodation for eligible organizations in the absence of an "opt out" for individual plan participants and beneficiaries does not amount to improper religious gerrymandering. The First Amendment does not prohibit the government from distinguishing between certain individuals and/or entities when accommodating religion; it only prohibits the government from favoring one *religion*, *denomination*, or *sect* over another. *See Lukumi*, 508 U.S. at 535 (striking down law that singled out Santeria church members for disfavored treatment); *see also Children's Healthcare Is A Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1090-92 (8th Cir. 2000); *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 First Amendment even though "some individuals receive exemptions, and other individuals with identical beliefs do not"). Indeed, "[t]o hold that any religious exemption that is not all-inclusive renders a statute non-neutral

[13] Again, the requirement does *not* directly apply to plaintiffs, and no burdens of the law fall on plaintiffs.

would be to discourage the enactment of any such exemptions – and thus to restrict, rather than promote, freedom of religion." *O'Brien*, 894 F. Supp. 2d at 1161 (quoting *Diocese of Albany*, 859 N.E.2d at 464). Because neither the contraceptive coverage requirement nor the religious employer exemption nor the eligible organization accommodations "differentiate between religions, but [rather] appl[y] equally to all denominations," they do not evidence any discriminatory intent. *O'Brien*, 894 F. Supp. 2d at 1162; *see also Conestoga*, 917 F. Supp. 2d at 410 ("The fact that exemptions were made for religious employers . . . . shows that the government made efforts to accommodate religious beliefs, which counsels in favor of the regulations' neutrality."); *Grote*, 914 F. Supp. 2d at 953 ("[C]arving out an exemption for defined religious entities . . . tends to support an argument in favor of neutrality."). In short, the contraceptive coverage requirement is not rendered unlawful "merely because the [exemption] does not extend as far as Plaintiffs wish." *Grote*, 914 F. Supp. 2d at 953.

Plaintiffs maintain that, even if the preventive services coverage provision is neutral and generally applicable, it is still subject to strict scrutiny under a hybrid rights theory because plaintiffs have also asserted a parental rights claim. The Supreme Court, however, has never invoked this so-called "hybrid rights theory" to justify applying strict scrutiny to a free exercise claim. *See Church of Lukumi*, 508 U.S. at 567 (Souter, J., concurring in part and concurring in the judgment) (noting the hybrid rights exception would either swallow the *Smith* rule or be entirely unnecessary). And several circuits have specifically rejected the theory. *See Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) (characterizing *Smith*'s hybrid rights language as "dicta and not binding on this court" and declining to apply hybrid rights analysis); *Kissinger v. Board of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) (characterizing the hybrid rights exception as "completely illogical": "We do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the [F]ree Exercise Clause if it did not implicate other constitutional rights.").[14]

[14] Although the Eighth Circuit has discussed the hybrid-rights theory, the government is not aware of any case in which the Eighth Circuit has invoked it to justify the application of strict scrutiny. In

Nevertheless, assuming *arguendo* that the hybrid rights theory is valid, it applies only where the plaintiff's non-free-exercise claim is "independently viable." *Mahoney v. District of Columbia*, 662 F. Supp. 2d 74, 95 n.12 (D.D.C. 2009). Here, plaintiffs allege that the preventive services coverage provision violates both the right to free exercise of religion and their parental rights, but, as explained here and below, neither claim is viable. "[T]he combination of two untenable claims" does not "equal[] a tenable one." *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001). "[I]n law as in mathematics zero plus zero equals zero." *Id*. Thus, even if the hybrid rights theory were valid, it would not trigger strict scrutiny in this case.

For these reasons, plaintiffs' free exercise claim fails.[15]

C. Plaintiffs' Parental Rights Claim Fails

Plaintiffs' parental rights claim is baseless. It is no doubt true, as plaintiffs say, that the Constitution protects "freedom of personal choice in matters of marriage and family life." Pls' Mem. at 28 (quoting *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 639 (1974) (citing *Roe v. Wade*, 410 U.S. 113 (1973))). But none of the cases cited by plaintiffs stands for the extraordinary proposition that a parent's moral disapproval of a law, and the related desire to teach one's children that that which the law makes available is sinful, renders that law an unconstitutional intrusion on a parent's rights to raise children in the manner the parent seeks fit.

The paradigmatic case presenting a valid parental rights claim is *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), in which the Supreme Court struck down a law that required "every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years" to send the child to public school, *id.* at 530. Such a law, the Court said, would "unreasonably interfere[] with the liberty of parents and guardians to direct the upbringing and education of [their] children." *Id.* at 534. Similarly, in *Moore v. City of East Cleveland*, 431 U.S.

Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 473 (8th Cir. 1991), the court merely directed the district court to consider the plaintiff's hybrid rights claim on remand. And, in *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008), the court relied on the doctrine of collateral estoppel and judgments entered in cases predating *Smith*'s hybrid rights language.

[15] Even if the law were subject to strict scrutiny, plaintiffs' free exercise challenge still would fail because the preventive services coverage provision satisfies strict scrutiny. *See supra*.

494 (1977), the Court struck down a city ordinance that "select[ed] certain categories of relatives who may live together and declare[d] that others may not" because it impermissibly "intrude[d] on choices concerning family living arrangements," *id.* at 498-99. But whereas the laws in *Pierce* and *Moore* imposed outright bans on certain parental or familial choices – to live together, or to send children to religious schools – the law at issue here does not ban any parental or familial choices and, indeed, does not even apply to plaintiffs.[16]

The Wielands, and their children, are merely recipients of health benefits that Mr. Wieland's employer makes available. When one disapproves of something that is made available, one may opt out by not availing himself of it, and if the Wielands find contraception or contraceptive coverage morally objectionable, they are free not to use it and to encourage their daughters not to use it. The Wielands claim they want to "teach, believe, and foster in their daughters" the belief that contraception is wrong and sinful, Pls.' Mem. at 27, and absolutely nothing in the challenged law prevents them from doing so. Nothing in the law prevents the Wielands from explaining to their daughters that the fact that the group health plan offered by Mr. Wieland's employer covers contraception should not be understood as an endorsement by them of the use of contraception and that, in fact, the law that requires the coverage of contraception is something they strongly disagree with and wish were not the law. In short, they remain free to be parents. Plaintiffs' claim – that the government unconstitutionally interferes

[16] None of the other cases cited by plaintiffs is of any help to them. Two of those cases did not even involve claims brought by parents that their parental rights were infringed: *Meyer v. Nebraska*, 262 U.S. 390 (1923), involved a teacher convicted of violating a statute that criminalized the teaching of certain foreign languages in schools, and in *Cleveland Board of Education*, 414 U.S. at 634-35, the Court struck down a school board rule requiring a pregnant teacher to take unpaid maternity leave for five months before the expected birth of her child. In *Prince v. Massachusetts*, the Court *upheld* a parent's conviction for violating child labor laws, noting that a state's "authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience." 321 U.S. 158, 166 (1944). Plaintiffs come closest, while still landing wide of the mark, in their references to *Suboh v. Dist. Attorney's Office of Suffolk Dist.*, 298 F.3d 81, 91 (1st Cir. 2002), and *Heartland Academy Community Church v. Waddle*, 317 F. Supp. 2d 984 (E.D. Mo. 2004), because at least these two cases found an interference with a parental right. But in *Suboh*, state officials interfered with parental custody, 298 F.3d at 92-93, and in *Heartland Academy*, the court held that parents' rights were violated when their children were forcibly removed without notice from the school to which their parents had sent them, 317 F. Supp. 2d at 1099-1101. The law at issue here creates no such custodial interference whatsoever.

with parental rights when it simply makes available something a parent objects to being made available – thus bears no resemblance to the sort of total ban on a certain familial choice that was found unconstitutional in *Pierce* and *Moore*.

Indeed, it is telling that plaintiffs' citations to legal authority vanish when they move from general statements of the right to its alleged application in this case. But it should come as no surprise that plaintiffs have found no support for their extreme interpretation. The Constitution protects a parent's right to foster and teach his own set of values to his children, but it most certainly does not require the government to be conscripted into requiring the withholding of the mere availability of rights and benefits that the parent would rather teach his children not to exercise. To do so for every person in as heterogeneous a society as ours would be impossible, and the Constitution in no way prescribes the chaos that would ensue.

D. Plaintiffs' Free Speech Claim Fails

Plaintiffs' free speech claim fares no better.[17] 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 challenged provision does not require plaintiffs – or any other person, employer, or entity – to say anything. Nor does it limit what plaintiffs may say. Plaintiffs remain free to express whatever views they may have on the use of contraceptive services (or any other health care services) as well as their views on the requirement that certain group health plans and health insurance issuers cover contraceptive services. Plaintiffs also may encourage their daughters and others not to use contraceptive services. The preventive services coverage provision regulates conduct, not speech. *See id*. at 60-62 (concluding statute that required law schools to provide military recruiters with equal access to campus and students regulated conduct, not speech).

[17] Every court to consider a free speech claim brought by an employer – that, unlike plaintiffs here, is required to provide health coverage for contraceptive services – has rejected the claim. *See Conestoga*, 2013 WL 1277419, at *2; *MK Chambers*, 2013 WL 1340719, at *6; *Briscoe*, 2013 WL 755413, at *8; *Conestoga*, 917 F. Supp. 2d at 418-19; *Grote*, 914 F. Supp. 2d at 954-55; *Autocam*, 2012 WL 6845677, at *8; *O'Brien*, 894 F. Supp. 2d at 1165-67; *see also Catholic Charities of Sacramento*, 85 P.3d at 89; *Diocese of Albany*, 859 N.E.2d at 465.

Moreover, the conduct required by the preventive services coverage provision is not "inherently expressive," *id*. at 66, such that it is entitled to First Amendment protection. "Giving or receiving health care," or purchasing insurance coverage for health care, "is not a statement in the same sense as wearing a black armband or burning an American flag." *O'Brien*, 894 F. Supp. 2d at 1166-67 (internal citations omitted); *see also Autocam*, 2012 WL 6845677, at *8 ("Including contraceptive coverage in a health care plan is not inherently expressive conduct."). Accordingly, plaintiffs' free speech claim fails and should be dismissed.[18]

E. Plaintiffs' APA Claim Fails

Plaintiffs claim the preventive services coverage provision violates the APA because it conflicts with section 1303(b)(1) of the ACA. Compl. ¶ 128. Plaintiffs appear to reason that, because the provision requires group health plans to cover emergency contraception, such as Plan B, and certain IUDs, it requires plaintiffs to provide coverage for abortions in violation of federal law. *See id*. ¶ 35.

This claim should be rejected at the outset because plaintiffs lack 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); *see Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1037 (8th Cir. 2002). But the necessary link between plaintiffs and section 1303(b)(1) is missing here. Section 1303(b)(1) protects health insurance issuers that offer qualified health plans, 42 U.S.C. § 18023(b)(1), but plaintiffs are neither health insurance issuers nor purchasers of a qualified health plan.[19] They therefore do not fall within the

[18] Contrary to plaintiffs' assertion, the contraceptive coverage requirement does not require coverage of education and counseling "in favor" of contraceptive services. Pls.' Mem. at 31. It requires coverage of "patient education and counseling for all women with reproductive capacity," as prescribed by a health care provider, *see* HRSA Guidelines, *supra*, but does not purport to regulate the content of the education or counseling provided – that is between a patient and her health care provider.

[19] 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). Coverage through health insurance exchanges will not begin until January 1, 2014, and, until 2017, qualified health plans will only be available to individuals and small employers (likely excluding Mr. Wieland's employer). *Id.* §§ 18031(b), 18032(f). Because Mr.

zone of interests to be protected by the statute. *See O'Brien v. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1167-68 (E.D. Mo. 2012) (holding that plaintiff employer lacked prudential standing to raise a similar claim).

Even if the Court were to reach the merits of this claim, plaintiffs' premise that the preventive services coverage provision requires abortion coverage is fundamentally incorrect. The provision does 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, it requires 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*. The government has made clear that the preventive services covered by the law "do not include abortifacient drugs."[20] Although plaintiffs are certainly entitled to believe 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 views and with federal law. While plaintiffs' religious beliefs may define abortion more broadly than federal law to include emergency contraception and certain IUDs, 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, e.g.*, *Gov't Emps. Ins. Co. v. Benton*, 859 F.2d 1147, 1149 (3d Cir. 1988).

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. And the list of FDA-approved contraceptives includes emergency contraceptives such as Plan B. *See* FDA, Birth Control Guide, *available at* http://www.fda.gov/forconsumers/byaudience/forwomen/ucm118465.htm (last visited Sept. 9,

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Wieland's employer's health plan was not purchased on a health insurance exchange, it is not a "qualified health plan."

[20] HealthCare.gov, Affordable Care Act Rules on Expanding Access to Preventive Services for Women (August 1, 2011), *available at* http://www.healthcare.gov/news/factsheets/2011/08/womensprevention08012011a.html (last visited Sept. 9, 2013); *see also* IOM REP. at 22 (recognizing that abortion services are outside the scope of permissible recommendations).

2013). The basis for the inclusion of such drugs as 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 Contra for Use as Postcoital Emergency Contraception, 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997) (noting that "emergency contraceptive pills are not effective if the woman is pregnant" and that there is "no evidence that [emergency contraception] will have an adverse effect on an established pregnancy"); 45 C.F.R. § 46.202(f) ("Pregnancy encompasses the period of time from implantation until delivery."). 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 (e.g., rape, incest, or when the life of the woman would be in danger) – 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 Sept. 9, 2013); *see also* 42 U.S.C. §§ 300, 300a-6.

Because it reflects a settled understanding of FDA-approved contraceptives that is in accordance with existing federal laws prohibiting federal funding for certain abortions, the contraceptive coverage requirement is consistent with over a decade of regulatory policy and practice and thus cannot be deemed contrary to any law dealing with abortion. *See Bhd. of R.R. Signalmen v. Surface Transp. Bd.*, 638 F.3d 807, 815 (D.C. Cir. 2011) (giving particular deference to an agency's longstanding interpretation) (citing *Barnhart v. Walton*, 535 U.S. 212, 220 (2002)); *see also Siebrasse v. U.S. Dep't of Agric.*, 418 F.3d 847, 851 (8th Cir. 2005) ("When reviewing an agency decision, we accord substantial deference to the agency's interpretation of the statutes and regulations it administers."). Plaintiffs' APA claim, therefore, should be dismissed.

III. EVEN IF PLAINTIFFS COULD ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS, THEY ARE NOT ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF

Even if plaintiffs could establish a likelihood of success on the merits, their motion for temporary restraining order and preliminary injunction should be denied because they cannot satisfy the remaining preliminary injunction factors. Although "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), in this case, plaintiffs have not shown that the preventive services coverage provision intrudes upon their First Amendment rights, so there has been no "loss of First Amendment freedoms" for any period of time. In this respect, the merits and irreparable injury prongs of the preliminary injunction analysis merge together, and plaintiffs cannot show irreparable injury without also showing a likelihood of success on the merits, which they cannot do. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012) ("Because McNeilly does not have a likelihood of success on the merits . . . his argument that he is irreparably harmed by the deprivation of his First Amendment rights also fails."); *Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1004 (8th Cir. 2012). Moreover, contrary to plaintiffs assertion (Pls.' Mem. at 31), any showing of a likelihood of success on the merits of plaintiffs' RFRA claim – which plaintiffs in any event have not made – would not automatically establish irreparable injury; in the Eighth Circuit, it is only the loss of *First Amendment* freedoms that constitutes irreparable harm. *Child*, 690 F.3d at 1000.

Furthermore, granting plaintiffs' request for a preliminary injunction – even assuming Mr. Wieland's employer and the employer's health insurance provider subsequently decided to provide plaintiffs with a health plan that does not cover contraception, which, as explained above, they would be under no obligation to do – would harm both the government and the public. With regard to the government, "there is inherent harm to an agency in preventing it from enforcing [a law] that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *see also Richenberg v. Perry*, 73 F.3d 172, 173 (8th Cir. 1995) (indicating that granting an injunction against the

implementation of a likely constitutional statute would harm the government). Allowing the type of individual opt out that plaintiffs seek here would undermine Congress's goal of improving the public health. And it would all but lead to the end of group health coverage, which relies on common coverage for a set of insured individuals, thereby harming the public. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("[C]ourts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.").

CONCLUSION

For the forgoing reasons, the Court should deny plaintiffs' motion for temporary restraining order and preliminary injunction and grant defendants' motion to dismiss this case in its entirety.

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CERTIFICATE OF SERVICE

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