IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

EDEN FOODS, INC., *et al.*,	Case No. 2:13-cv-11229
Plaintiffs,	Judge Denise Page Hood
v.	Magistrate Judge Mark A. Randon
KATHLEEN SEBELIUS, *et al.*,	
Defendants.	

DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

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ISSUES PRESENTED

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2. Assuming the regulations substantially burden plaintiffs' religious exercise, do the regulations serve compelling governmental interests and are they the least restrictive means to achieve those interests?

3. Do the regulations violate the First Amendment's Free Exercise and Free Exercise Clauses?

4. Do the regulations violate the Administrative Procedure Act?

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

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INTRODUCTION

Advancing claims that are indistinguishable from those that the Sixth Circuit, as well as the Tenth and Third Circuits, have already deemed unlikely to succeed in similar litigation, plaintiffs—a for-profit natural foods corporation and its owner—challenge regulations that are intended to help ensure that women have access to health coverage, without cost-sharing, for preventive services that medical experts deem necessary for women's health and well-being.

Plaintiffs' challenge rests largely on the theory that Eden Foods, Inc., a for-profit, secular corporation, can exercise religion and thereby avoid the reach of laws designed to regulate commercial activity. This cannot be. Indeed, the Supreme Court has recognized that, "'[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.'" *Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, 2012 WL 6845677, *7 (W.D. Mich. Dec. 24, 2012) (quoting *United States v. Lee*, 455 U.S. 252, 261 (1982)), *motion for injunction pending appeal denied*, No. 12-2673 (6th Cir. Dec. 28, 2012), *reconsideration denied*, No. 12-2673 (6th Cir. Dec. 31, 2012). Nor can such a company's owners or officers eliminate the legal separation provided by the corporate form to impose their personal religious beliefs on the corporation's employees. To hold otherwise would permit for-profit, secular corporations and their shareholders and officers to become laws unto themselves, claiming countless exemptions from an untold number of general laws designed to improve the health and well-being of individual employees based on an infinite variety of alleged religious beliefs. Such a system would not only be unworkable, it would also cripple the government's ability to solve national problems through laws of general application. This Court, therefore, should reject plaintiffs' effort to bring about an unprecedented expansion of free exercise rights.

For these reasons and others, plaintiffs' claims should be dismissed. As this Court recognized in its March 22, 2013 Order denying plaintiffs' motion for a temporary restraining order, plaintiffs have not established that they are likely to succeed on the merits. *See* Order

Denying Emergency Mot. for TRO at 6-9 ("Order Denying TRO"), ECF No. 12. And in a case that plaintiffs conspicuously fail to cite, a motions panel for the Sixth Circuit determined in a nearly identical case that the plaintiffs had not established likelihood of success on the merits of their claims. *See* Order, *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012). The *Autocam* motions panel's analysis is persuasive, as was the district court's reasoning in that case, and therefore counsels strongly in favor of dismissing plaintiffs' claims for failure to state a claim upon which relief may be granted.

With respect to plaintiffs' Religious Freedom Restoration Act ("RFRA") claim, neither of the plaintiffs can show, as each must, that the regulations impose a substantial burden on any religious exercise. Eden Foods is a for-profit secular employer, and a secular entity—by definition—does not exercise religion. Every court to have directly addressed this question in cases similar to this one has held that "secular, for-profit corporations . . . do not have free exercise rights." *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1296 (W.D. Okla. 2012), *appeal docketed*, No. 12-6294 (10th Cir. Nov. 19, 2012); *see also, e.g.*, Order at 6, *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144 (3d Cir. Jan. 29, 2013) (Garth, J., concurring) ("As the District Court properly recognized, . . . *for-profit corporate entities*, unlike religious *non-profit corporations or organizations*, do not—and cannot—legally claim a right to exercise or establish a "corporate" religion under the First Amendment or the RFRA."); *Gilardi v. Sebelius*, Civil Action No. 13-104(EGS), 2013 WL 781150, at *7 (D.D.C. Mar. 3, 2013), (concluding that the for-profit corporation plaintiffs "are engaged in purely commercial conduct and do not exercise religion under RFRA"), *appeal docketed*, No. 13-5069 (D.C. Cir. Mar. 5, 2013); *Briscoe v. Sebelius*, Civil Action No. 13-cv-00285-WYD-BNB, 2013 WL 755413, at *5 (D. Colo. Feb. 27, 2013) ("Secular, for-profit corporations neither exercise nor practice religion."); *Korte v. U.S. Dep't of Health & Human Servs.*, Case No. 3:12-CV-01072-MJR, 2012 WL 6553996, at *6 (S.D. Ill. Dec. 14, 2012) ("[T]he exercise of religion [i]s a purely personal guarantee that cannot be extended to corporations" (quotation omitted)), *appeal docketed*, No. 12-3841 (7th Cir. Dec. 18, 2012).

Plaintiff Potter's allegations of a substantial burden on his own individual religious exercise fare no better, as the regulations that purportedly impose such a burden apply only to certain group health plans and health insurance issuers. It is well established that a corporation and its owners/shareholders are wholly separate entities, and the Court should not permit Mr. Potter to eliminate that legal separation to impose his personal religious beliefs on Eden Food's health plan or its employees. Only the company is subject to the challenged regulations, and thus the company's owners have not shown a substantial burden on their individual religious exercise. *See, e.g.*, *Hobby Lobby*, 870 F. Supp. 2d at 1294; *Conestoga Wood Specialties Corp. v. Sebelius*, Civil Action No. 12-6744, 2013 WL 140110, at *7-8 (E.D. Pa. Jan. 11, 2013); *Conestoga*, Order at 7 (Garth, J., concurring) (adopting the district court's reasoning); *Autocam*, 2012 WL 6845677, at *7; *Gilardi*, 2013 WL 781150, at *4-5; *Briscoe*, 2013 WL 755413, at *6. Mr. Potter cannot use the corporate form alternatively as a shield and a sword, depending on what suits him in any given circumstance.

Furthermore, even if a secular entity could exercise religion, the regulations still do not substantially burden Eden Foods's or Mr. Potter's exercise of religion for an independent reason; any burden caused by the regulations is simply too attenuated to qualify as a *substantial* burden. *See, e.g.*, *Autocam*, 2012 WL 6845677, at *6-7; *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, *3 (10th Cir. Dec. 20, 2012); *Hobby Lobby*, 870 F. Supp. 2d at 1294; *Conestoga*, 2013 WL 140110, at *12-14; *Grote v. Sebelius*, 708 F.3d 850, 856-68 (7th Cir. 2013) (Rovner, J., dissenting). Just as Eden Foods's employees have always retained the ability to choose whether to procure contraceptive services by using the salaries the corporation pays them, under the current regulations those employees retain the ability to choose what health services they wish to obtain according to their own beliefs and preferences. Plaintiffs remain free to advocate against their employees' use of contraceptive services (or any other services). Ultimately, an employee's health care choices remain those of the employee, not Eden Foods or Mr. Potter.

And even if the challenged regulations were deemed to substantially burden any religious exercise, the regulations would not violate RFRA because they are narrowly tailored to serve two compelling governmental interests: improving the health of women and children, and equalizing the provision of preventive care for women and men so that women who choose to can be a part of the workforce on an equal playing field with men.

Plaintiffs' First Amendment claims are equally meritless. The Free Exercise Clause does not prohibit a law that is neutral and generally applicable, even if the law prescribes conduct that an individual's religion proscribes. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). The preventive services coverage regulations fall within this rubric because they do not target, or selectively burden, religiously motivated conduct. The regulations apply to all non-exempt, non-grandfathered plans, not just those of employers with a religious affiliation. *See Briscoe*, 2013 WL 755413, at *6-7; *Hobby Lobby*, 870 F. Supp. 2d at 1287-90; *Conestoga*, 2013 WL 140110, at *6-9; *Autocam*, 2012 WL 6845677, at *4-5; *Grote Indus., LLC v. Sebelius*, No. 4:12-cv-00134-SEB-DML, 2012 WL 6725905, at *7-8 (S.D. Ind. Dec. 27, 2012); *Korte*, 2012 WL 6553996, at *6-8; *O'Brien*, 894 F. Supp. 2d at 1160-61. Plaintiffs' Establishment Clause claim is similarly flawed. The religious employer exemption distinguishes between *organizations* based on their purpose and composition; it does not favor one *religion*, *denomination*, or *sect* over another. The distinctions drawn by the exemption, therefore, simply do not violate the constitutional prohibition against denominational preferences.

Nor can plaintiffs succeed on their Administrative Procedure Act ("APA") claims. In promulgating the challenged regulations, defendants complied with the relevant procedural rulemaking requirements and the regulations are not arbitrary, capricious, or contrary to law.

For these reasons, and the reasons explained below, defendants respectfully ask the Court to grant defendants' motion to dismiss this case in its entirety.

BACKGROUND

I. STATUTORY AND REGULATORY 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."), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited May 20, 2013). Section 1001 of the ACA, which includes the preventive services coverage provision relevant here, seeks to cure this problem by making preventive care affordable and accessible for many more Americans. Specifically, the provision requires all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, "[for] women, such additional preventive care and screenings . . . as provided 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, HHS tasked the Institute of Medicine ("IOM") with developing recommendations to implement the requirement to provide preventive services for women. IOM REP. at 2.[1] After conducting an extensive science-based review, IOM recommended that HRSA guidelines include, as relevant here, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id.* at 10-12. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices (IUDs).[2] FDA, Birth Control Guide, *available at* http://www.fda.gov/forconsumers/

[1] 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.

[2] Although plaintiffs describe IUDs, Plan B, and Ella as abortion-causing devices and drugs, *See, e.g.*, Compl. ¶¶ 170-76, Mar. 20, 2013, ECF No. 1, these devices and drugs are not abortifacients within the meaning of federal law. *See, e.g.*, 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997) ("Emergency contraceptive pills are not effective if the woman is pregnant[.]"); 45 C.F.R. § 46.202(f).

byaudience/forwomen/ucm118465.htm (last visited May 20, 2013). IOM determined that coverage, without cost-sharing, for these services is necessary to increase access, and thereby reduce unintended pregnancies (and the negative health outcomes that disproportionately accompany unintended pregnancies) and promote healthy birth spacing. IOM REP. at 102-03.

On August 1, 2011, HRSA adopted IOM's recommendations, subject to an exemption relating to certain religious employers authorized by an amendment to the interim final regulations. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), *available at* http://www.hrsa.gov/womensguidelines/ (last visited May 20, 2013). The amendment, issued the same day, authorized HRSA to exempt group health plans established or maintained by certain religious employers (and associated group health insurance coverage) from any requirement to cover contraceptive services under HRSA's guidelines. 76 Fed. Reg. 46,603, 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A).[3]

In February 2012, the government adopted in final regulations the definition of "religious employer" contained in the 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. 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012). The government intends to amend the preventive services coverage regulations during the safe harbor period to further accommodate non-profit religious organizations' religious objections to covering contraceptive services. *Id.* at 8728. To this end, the government issued a NPRM on February 6, 2013. 78 Fed. Reg. 8456.

II. CURRENT PROCEEDINGS

Plaintiffs challenge the regulations to the extent they require the health coverage Eden

[3] To qualify, an employer must meet the following criteria: (1) The inculcation of religious values is the purpose of the organization; (2) the organization primarily employs persons who share the religious tenets of the organization; (3) the organization serves primarily persons who share the religious tenets of the organization, 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. 45 C.F.R. § 147.130(a)(1)(iv)(B). A recently published Notice of Proposed Rulemaking ("NPRM") would eliminate the first three criteria and modify the fourth criterion. 78 Fed. Reg. 8456, 8459, 8474 (Feb. 6, 2013).

Foods makes available to its employees to cover recommended contraceptive services. On March 20, 2013, nearly nineteen months after the contraceptive coverage requirement was established—plaintiffs filed suit and, on March 22, moved for a temporary restraining order and preliminary injunction, claiming that they will suffer irreparable harm if the regulations are not enjoined as to them. *See* Compl.; Pls.' Mot. for Emergency TRO & Prelim. Inj. ("Pls.' TRO & Prelim. Inj. Mot."), ECF No. 10. The Court denied plaintiffs motion for a TRO on the same day and took plaintiffs' motion for a preliminary injunction under advisement following a hearing on May 10.

STANDARD OF REVIEW

Defendants move to dismiss the Complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. 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 claim, *see infra* at 34, under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. The party invoking federal jurisdiction bears the burden of establishing its existence, and the Court must determine whether it has jurisdiction before addressing the merits of a claim. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 104 (1998).

ARGUMENT

I. THE COURT SHOULD DISMISS PLAINTIFFS' RELIGIOUS FREEDOM RESTORATION ACT CLAIM

A. The Preventive Services Coverage Regulations Do Not Substantially Burden Any Exercise of Religion By A For-Profit, Secular Company And Its Owner

Under the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb-1), the federal government generally may not "substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability.'" *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (quoting 42 U.S.C. § 2000bb-1(a)). But the government may substantially

burden the exercise of religion if the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

For several reasons, plaintiffs cannot show that the challenged regulations substantially burden any exercise of religion, and thus cannot succeed on their RFRA claim. First, Eden Foods is not an individual or a "religious organization," and thus cannot "exercise religion," under RFRA. Second, because the regulations apply only to the corporation, and not to Mr. Potter, Mr. Potter's religious exercise is not substantially burdened. And third, any burden imposed by the regulations is attenuated and thus cannot be substantial.

1. There is no substantial burden on Eden Foods because a for-profit, secular company does not exercise religion

Plaintiffs' claim that Eden Foods "exercise[s] . . . religion" within the meaning of RFRA, 42 U.S.C. § 2000bb-1(b), cannot be reconciled with Eden Foods's status as a secular company. The terms "religious" and "secular" are antonyms; a "secular" entity is defined as "not overtly or specifically religious." *See Merriam-Webster's Collegiate Dictionary* 1123 (11th ed. 2003). Thus, by definition, a secular company does not engage in any "exercise of religion," 42 U.S.C. § 2000bb-1(a), as required to assert a claim under RFRA. *See Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002) ("[T]he practice[] at issue must be of a religious nature."); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 83 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003). Numerous courts have rejected RFRA challenges nearly identical to Eden Foods on this basis. *See, e.g.*, *Korte*, 2012 WL 6553996, at *6 ("[T]he exercise of religion [i]s a purely personal guarantee that cannot be extended to corporations." (quotation omitted)); *Hobby Lobby*, 870 F. Supp. 2d at 1287, 1296 ("[S]ecular, for-profit corporations do not have free exercise rights.").[4] And, of course, this Court has already strongly suggested that a for-profit

[4] By contrast, those courts that have ruled against defendants in similar cases have bypassed the question of whether a for-profit, secular corporation can "exercise religion" under RFRA. *See, e.g.*, *Legatus v. Sebelius*, Case No. 12-12061, 2012 WL 5359630, at *5 (E.D. Mich. Oct. 31, 2012) ("[T]he court need not, and does not, decide whether [plaintiff], as a for-profit business, has an independent First Amendment right to free exercise of religion."); *Tyndale House Publishers, Inc. v. Sebelius*, Civil Action No. 12-1635 (RBW), 2012 WL 5817323, at *5 (D.D.C.

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corporation—like Eden Foods—cannot exercise religion within the meaning of RFRA or the Free Exercise Clause. *See* Order Denying TRO at 6-9.

Eden Foods is plainly secular. The company's pursuits and products are not religious; it is a for-profit natural food company. Compl. ¶ 34; Declaration of Michael Potter ("Potter Decl.") ¶ 3 (Mar. 22, 2013), ECF No. 10-5. The corporation was not organized for carrying out a religious purpose; its Articles of Incorporation make no reference at all to any religious purpose. *See* Eden Foods, Inc., Articles of Incorporation, *available at* http://www.dleg.state.mi.us/ bcs_corp/ sr_corp.asp (last visited May 20, 2013) (search by corporation name required). Nor does the corporation assert that it employs persons of a particular faith. Although defendants do not question the sincerity of Mr. Potter's religious beliefs as set forth in the Complaint at this stage of the litigation,[5] the sincere religious beliefs of a corporation's owners do not make the corporation religious. Otherwise, every corporation with a religious owner—no matter how secular the corporation's purpose—would be considered religious, which would dramatically expand the scope of RFRA and the Free Exercise Clause. *See Grote*, 708 F.3d at 856-58 (Rovner, J., dissenting) (describing the potential consequences of such an expansion); *see also Autocam*, 2012 WL 6845677, at *7-8.

The government is aware of no case in which a for-profit, secular employer like Eden Foods prevailed on a RFRA claim. Because Eden Foods is a secular employer, it is not entitled to the protections of the Free Exercise Clause or RFRA. This is because, although the First Amendment freedoms of speech and association are "right[s] enjoyed by religious and secular groups alike," the Free Exercise Clause "gives special solicitude to the rights of *religious* organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694,

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Nov. 16, 2012) ("This Court, like others before it, declines to address the unresolved question of whether for-profit corporations can exercise religion within the meaning of the RFRA and the Free Exercise Clause.").

[5] It has been reported, however, that Mr. Potter has made public comments that are at least somewhat at odds with those in his declaration concerning his alleged religious objections to the contraceptive coverage requirement. *See* Irin Carmon, *Eden Foods Doubles Down in Birth Control Flap*, Salon, Apr. 15, 2013, *available at* http://www.salon.com/2013/04/15/eden_foods_ceo_digs_himself_deeper_in_birth_control_outrage/.

706 (2012) (emphasis added). The cases are replete with statements like this. *See, e.g.*, *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (stating that the Supreme Court's precedent "radiates . . . a spirit of freedom for *religious* organizations, an independence from secular control or manipulation") (emphasis added); *Hosanna-Tabor*, 132 S. Ct. at 706 (Free Exercise Clause "protects a *religious* group's right to shape its own faith and mission") (emphasis added); *Werft v. Desert Sw. Annual Conference of the United Methodist Church*, 377 F.3d 1099, 1102 (9th Cir. 2004) ("The Free Exercise Clause protects . . . *religious* organizations . . . .") (citations and quotation marks omitted) (emphasis added); *Anselmo v. Cnty. of Shasta*, No. CIV. 2:12–361 WBS EFB, 2012 WL 2090437, at *13 (E.D. Cal. 2012) ("Although corporations and limited partnerships have broad rights, the court has been unable to find a single [Religious Land Use and Institutionalized Persons Act] case protecting the religious exercise rights of a non-religious organization such as Seven Hills."); *Hobby Lobby*, 870 F. Supp. 2d at 1288 (holding "secular, for-profit corporations . . . do not have constitutional free exercise rights"); *Korte*, 2012 WL 6553996, at *6, *9-*10. Because RFRA incorporates Free Exercise jurisprudence, the same logic applies. *See Holy Land Found.*, 333 F.3d at 167. In short, only a religious organization can "exercise religion" under RFRA.

Indeed, no court has ever held that a for-profit, secular corporation is a "religious corporation" for purposes of federal law. For this reason, secular companies such as Eden Foods cannot permissibly discriminate on the basis of religion in hiring or firing employees or otherwise establishing the terms and conditions of employment. Title VII of the Civil Rights Act generally prohibits religious discrimination in the workplace. *See* 42 U.S.C. § 2000e-2(a). But that bar does not apply to "a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [a corporation] of its activities." *Id.* § 2000e-1(a). It is clear that Eden Foods does not qualify as a "religious corporation." *See, e.g.*, *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007); *Spencer v. World Vision, Inc.*, 633 F.3d 723, 734, 748 (9th Cir. 2011) (explicitly holding that a for-profit entity can never qualify for the Title VII exemption); *cf. Univ.*

of Great Falls v. NLRB, 278 F.3d 1335, 1343 (D.C. Cir. 2002) (holding that an organization can only be religious, and thus exempt from NLRB jurisdiction, if it is organized as a non-profit).

It would be extraordinary to conclude that Eden Foods is not a "religious corporation" under Title VII (and it clearly is not) and thus cannot discriminate in employment on the basis of religion, 42 U.S.C. § 2000e-1(a), but nonetheless "exercise[s] . . . religion" within the meaning of RFRA, *id.* § 2000bb-1(b). Such a conclusion would allow a secular corporation to impose its owner's religious beliefs on its employees in a way that denies those employees the protection of general laws designed to protect their health and well-being. A host of laws and regulations would be subject to attack. Moreover, any secular corporation would have precisely the same right as a religious organization to, for example, require that its employees "observe the [company owner's] standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco." *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330 n.4 (1987). These consequences underscore why the Free Exercise Clause, RFRA, and Title VII distinguish between secular and religious organizations, with only the latter receiving special protection.

Supreme Court Free Exercise jurisprudence is not to the contrary, as no case has held that a for-profit corporation may exercise religion. For example, *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Thomas v. Review Board*, 450 U.S. 707 (1981); and *Lee*, 455 U.S. 252, all involved *individual* plaintiffs. Sherbert was an employee discharged for refusing to work on Saturdays; Yoder was a member of the Old Order Amish religion who objected to a compulsory school attendance law; Thomas was a Jehovah's Witness who objected to fabricating turrets for military tanks; and Lee was also a member of the Old Order Amish who objected to paying social security tax for his employees. None of the plaintiffs was a secular, for-profit corporation. Nor are plaintiffs helped by *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), or *EEOC v. Townley Eng'g and Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988). Both cases expressly declined to decide whether "a for-profit corporation can assert its own rights under the Free Exercise Clause." *Stormans*, 586 F.3d at 1119; *see also Townley*, 859

F.2d at 619-20. Instead, they held that the particular plaintiff corporations had standing to raise the rights of their owners. *Stormans*, 586 F.3d at 1119-22; *Townley*, 859 F.2d at 619-20 & n.15. But this case does not present that standing question, as Mr. Potter is also a plaintiff here. *See Hobby Lobby*, 870 F. Supp. 2d at 1288 n.10. None of the other cases cited by plaintiffs fares any better. *Id.* at 1288 ("Plaintiffs have not cited, and the court has not found, any case concluding that secular, for-profit corporations . . . have a constitutional right to the free exercise of religion.").[6]

It is significant that Mr. Potter elected to organize Eden Foods as a secular, for-profit entity and to enter commercial activity. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261; *see also McClure v. Sports & Health Club*, 370 N.W.2d 844, 853 (Minn. 1985) ("By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs."). Having chosen this path, the corporation may not impose its owners' personal religious beliefs on its employees (many of whom may not share the owners' beliefs), by refusing to cover contraception. *Lee*, 455 U.S. at 261 ("Granting an exemption from social security taxes to an employer operates to

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[6] The profound lack of authority, from the Supreme Court or anywhere else, for the proposition that a secular, for-profit corporation has free exercise rights provides powerful evidence that Congress did not intend that a secular, for-profit corporation could engage in any "exercise of religion" under RFRA either. After all, RFRA was intended only to reinstate the pre-*Smith* compelling interest test, 42 U.S.C. § 2000bb-1(b), *not* to *expand* the scope of that test. As the Sixth Circuit explained in the parallel RLUIPA context:

> The U.S. Supreme Court has not yet defined "substantial burden" as it applies to RLUIPA. Neither does the statute itself contain any definition of the term. The statute's legislative history, however, indicates that the "term 'substantial burden' as used in this Act is *not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise*." 146 Cong. Rec. S7774–01, 7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy).

Living Water Church of God v. Charter Twp. of Meridian, 258 Fed. App'x 729, 733-34 (6th Cir. 2007) (emphasis added). Because RFRA expressly incorporates the definition of "exercise of religion" contained in RLUIPA, *see* 42 U.S.C. § 2000bb-2(4); *id.* § 2000cc-5(7)(A), the Sixth Circuit's observation is equally apt in the RFRA context.

impose the employer's religious faith on the employees."); *Hobby Lobby*, 870 F. Supp. 2d at 1295-96. In this respect, "[v]oluntary commercial activity does not receive the same status accorded to directly religious activity." *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) (interpreting the Free Exercise Clause of the Alaska Constitution).[7]

2. The regulations do not substantially burden Mr. Potter's religious exercise because the regulations apply only to Eden Foods, a separate and distinct legal entity

The preventive services coverage regulations also do not substantially burden the religious exercise of Eden Foods's owner, Mr. Potter. By their terms, the regulations apply to group health plans and health insurance issuers. *See, e.g.*, 45 C.F.R. §147.130. Mr. Potter is neither. Nonetheless, Mr. Potter claims that the regulations substantially burden *his* religious exercise because the regulations require the group health plan sponsored by his for-profit secular *company* to provide health insurance that includes certain contraceptive coverage. But 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 Hobby Lobby,* 870 F. Supp. 2d at 1293-96; *Korte*, 2012 WL 6553996, *9-11; *see also Grote*, 2012 WL 6725905, at *6 (explaining that for a burden to be substantial, it must apply directly to the plaintiff). "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Indeed, "[i]n our modern regulatory state, virtually all legislation (including neutral laws of general applicability) imposes an incidental burden at some level by placing indirect costs on an individual's activity. Recognizing this . . . [t]he federal government . . . ha[s] identified a

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[7] A for-profit, secular employer like Eden Foods therefore stands in a fundamentally different position from a church or a religiously affiliated non-profit organization. *Cf. Amos*, 483 U.S. at 344 (Brennan, J., concurring in the judgment) ("The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation . . . . but that [its] activities themselves are infused with a religious purpose."); *see also Hobby Lobby*, 870 F. Supp. 2d at 1288.

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); *Civil Liberties for Urban Believers*, 342 F.3d at 761 (warning, in the RLUIPA context, that "[a]pplication of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise . . . would render meaningless the word 'substantial'"); *Living Water Church of God*, 258 Fed. App'x at 734 ("In the 'Free Exercise' context, the Supreme Court has made clear that the 'substantial burden' hurdle is high.").

Here, any burden on the religious exercise of Eden Foods's owner results from obligations that the regulations impose on a legally separate, secular corporation's group health plan. This type of attenuated burden is not cognizable under RFRA. Indeed, cases that find a substantial burden uniformly involve a direct burden on the plaintiff rather than a burden imposed on another, legally separate, entity. *See, e.g.*, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524 (1993); *Potter v. Dist. of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009); *Grote*, 2012 WL 6725905, at *5-6. Not so here, where the regulations apply to the group health plans sponsored by Eden Foods, but not to its owner. *See Hobby Lobby*, 870 F. Supp. 2d at 1294; *Korte*, 2012 WL 6553996, at *9 ("[T]he RFRA 'substantial burden' inquiry makes clear that business forms and so-called 'legal fictions' cannot be entirely ignored—in this situation, they are dispositive"); *Autocam*, 2012 WL 6845677, at *7.

Mr. Potter's theory boils down to the claim that what's done to the corporation (or group health plan sponsored by the corporation)[8] is also done to its owner. But, as a legal matter, that is simply not so. Mr. Potter has chosen to enter into commerce and elected to do so by establishing a for-profit corporation—a "creature of statute" that is its "own 'person' under Michigan law, [] distinct and separate from [its] owners." *Handley v. Wyandotte Chems. Corp.*, 325 N.W.2d 447, 449 (Mich. Ct. App. 1982). Indeed, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural

[8] The attenuation here is in fact twice removed, as a group health plan is a legally separate entity from the company that sponsors it. 29 U.S.C. § 1132(d).

individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). In short, "[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." *Id.*

"Generally, if a harm has been directed toward the corporation, then only the corporation has standing to assert a claim," and this "shareholder standing rule applies even if the plaintiff is the sole shareholder of the corporation." *Potthoff v. Morin*, 245 F.3d 710, 716 (8th Cir. 2001) (citing cases); *see also Bartel v. Kemmerer City*, 482 F. App'x 323, 326 (10th Cir. 2012) (unpublished). Mr. Potter "'may not move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms.'" *Potthoff*, 245 F.3d at 717 (citation omitted). "So long as the business's liabilities are not [Mr. Potter's] liabilities—which is the primary and 'invaluable privilege' conferred by the corporate form, *Torco Oil Co. v. Innovative Thermal Corp.*, 763 F. Supp. 1445, 1451 (N.D. Ill. 1991) (Posner, J., sitting by designation)—neither are the business's expenditures [Mr. Potter's] own expenditures." *Grote*, 708 F.3d at 858 (Rovner, J., dissenting). The money used to pay for health coverage under the Eden Foods group health plan "belongs to the company, not to" Mr. Potter. *Id*. Mr. Potter should not be permitted to eliminate the legal separation between corporation and owner only when it suits him to impose his personal religious beliefs on the corporate entity's group health plan or its employees. For this reason, numerous courts have rejected RFRA challenges nearly identical to Mr. Potter's claim.[9]

[9] *See Gilardi*, 2013 WL 781150, at *4-5, *9-10; *Briscoe*, 2013 WL 755413, at *5-6; *Conestoga*, 2013 WL 140110, at *14; *Autocam*, 2012 WL 6845677, at *7; *Korte*, 2012 WL 6553996, at *9-11; *Hobby Lobby*, 870 F. Supp. 2d at 1293-96.

On the other hand, the courts to have granted preliminary injunctive relief in cases similar to this one have uniformly ignored or disregarded the legal separation between corporations and their owners. A company and its owners, however, cannot be treated as alter-egos for some purposes and not others; if the corporate veil is pierced, it is pierced for all purposes. *See, e.g.*, *Nautilus Ins. Co. v. Reuter*, 537 F.3d 733, 738 (7th Cir. 2008); *Korte*, 2012 WL 6553996, at *11; *Autocam*, 2012 WL 6845677, at *7 ("Whatever the ultimate limits of this principle may be, at a minimum it means the corporation is not the alter ego of its owners for purposes of religious belief and exercise."); *Conestoga*, 2013 WL 140110, at *8 ("It would be entirely inconsistent to allow the [corporation's owners] to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations."); *Grote*, 708 F.3d at 856 (Rovner, J., dissenting).

A contrary view would expand RFRA's scope in an extraordinary way. All corporations act through human agency; but that cannot mean that any legal obligation imposed on a corporation is also the obligation of the owners or that the owners' and corporation's rights and responsibilities are coextensive. If that were the rule, any of the millions of shareholders of publicly traded companies could assert RFRA claims on behalf of those companies and thereby impose the owners' or shareholders' beliefs on the companies' employees in a way that deprives those employees of legal rights they would otherwise have, such as by discriminating against the company's employees on the basis of religion in establishing the terms and conditions of employment notwithstanding the limited religious exemption that Congress established under Title VII. This result would constitute a wholesale evasion of the rule that a company must be a "religious organization" to assert free exercise rights, *Hosanna-Tabor*, 132 S. Ct. at 706, or a "religious corporation" to permissibly discriminate on the basis of religion in employment, 42 U.S.C. § 2000e-1(a).

3. Alternatively, any burden imposed by the regulations is too attenuated to constitute a substantial burden

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

Indeed, in denying the plaintiffs' motion for emergency relief pending appeal, a motions panel of the Sixth Circuit concluded as much. *See Autocam*, Order at 2 (relying on the district court's reasoned opinion in determining that the plaintiffs had not established more than a mere

possibility of relief). And other courts, too, have relied on similar reasoning to reject similar plaintiffs' RFRA claims. *See Hobby Lobby*, 2012 WL 6930302, at *3; *O'Brien*, 894 F. Supp. 2d at 1159 ("[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."), *appeal pending*, No. 12-3357 (8th Cir. Oct. 4, 2012).[10] 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*, 2013 WL 140110, at *12; *see also 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."). For the reasons set forth above, any burden imposed by the challenged regulations is not substantial within the meaning of RFRA.

B. 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

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

Even if plaintiffs were able to demonstrate a substantial burden on their religious exercise, they would not prevail because the challenged regulations are justified by two compelling governmental interests, and are the least restrictive means to achieve those interests. The promotion of public health is unquestionably a compelling governmental interest. *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011); *see also, e.g.*, *Buchwald v. Univ. of N.M. Sch. of*

[10] *See also Conestoga Wood Specialties, Corp. v. Sebelius*, No. 13-1144, 2013 WL 1277419, at *2 (3d Cir. Feb. 8, 2013); *Grote*, 708 F.3d at 856-60 (Rovner, J., dissenting); *Conestoga*, 2013 WL 140110, at *13-14; *Annex Med.*, 2013 WL 101927, at *4-5; *Grote Industries*, 2012 WL 6725905, at *4-7; *Hobby Lobby*, 870 F. Supp. 2d at 1293-96.

Med., 159 F.3d 487, 498 (10th Cir. 1998); *Dickerson v. Stuart*, 877 F. Supp. 1556, 1559 (M.D. Fla. 1995). And the challenged regulations further this compelling interest.

As explained in the interim final regulations, the primary predicted benefit of the regulations is that "individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of disease." 75 Fed. Reg. 41,726, 41,733 (July 19, 2010); *see also* 77 Fed. Reg. at 8728. Indeed, "[b]y expanding coverage and eliminating cost sharing for recommended preventive services, these interim final regulations could be expected to increase access to and utilization of these services, which are not used at optimal levels today." 75 Fed. Reg. at 41,733. Increased access to FDA-approved contraceptive services is a key part of these predicted health outcomes, as a lack of contraceptive use has proven in many cases to have negative health consequences for both women and a developing fetus. As IOM concluded in identifying services recommended to "prevent conditions harmful to women's health and well-being," unintended pregnancy may delay "entry into prenatal care," prolong "behaviors that present risks for the developing fetus," and cause "depression, anxiety, or other conditions." IOM REP. at 20, 103-04. Contraceptive coverage also helps to avoid "the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." *Id.* at 103. In fact, "pregnancy may be contraindicated for women with serious medical conditions such as pulmonary hypertension . . . and cyanotic heart disease, and for women with the Marfan Syndrome." *Id.* at 103-04.

Closely tied to this interest is a related, but separate, compelling interest that is furthered by the regulations. As the Supreme Court explained in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (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." 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); IOM REP. at 19. These costs result in women often forgoing preventive care. *See, e.g.*, 155 Cong. Rec. S12265-02, S12274 (daily ed. Dec. 3, 2009); IOM REP. at 20. Accordingly, this disproportionate burden on women creates "financial barriers . . . that prevent women from achieving health and well-being for themselves and their families." IOM REP. at 20. Thus, Congress's goal was to equalize the provision of health care for women and men in the area of preventive care, including the provision of family planning services for women. *See, e.g.*, 155 Cong. Rec. at S12271; *see also* 77 Fed. Reg. at 8728. 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).[11]

Plaintiffs miss the point when they attempt to minimize the magnitude of these interests by arguing that contraception is widely available and even subsidized for certain low-income individuals. *See* Pls.' TRO & Prelim. Inj. Mot. at 14-15. Although a majority of employers cover FDA-approved contraceptives, *see* IOM REP. at 109, many women forgo preventive services, including certain reproductive health care, because of cost-sharing imposed by their health plans,

[11] To the degree plaintiffs assert that defendants must show a compelling interest as to Eden Foods specifically, separately analyzing the need for the regulations as to each and every employer and employee in America, plaintiffs are mistaken. That level of specificity would be nearly impossible to establish and would render this regulatory scheme—and potentially any regulatory scheme challenged due to religious objections—completely unworkable. In practice, courts have not required the government to analyze the impact of a regulation on the single entity seeking an exemption, but have expanded the inquiry to all similarly situated individuals or organizations. *See, e.g.*, *Lee*, 455 U.S. at 260; *United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001) (per curiam); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990). *O Centro* is not to the contrary, as the Court construed the scope of the requested exemption as encompassing *all* members of the plaintiff religious sect. *O Centro*, 546 U.S. at 433. The Court's warning against "slippery-slope" arguments was a rejection of arguments by analogy—that is, speculation that providing an exemption to one group will lead to exemptions for other non-similarly situated groups. It was not an invitation to ignore the reality that an exemption for a particular claimant might necessarily lead to an exemption for an entire category of similarly situated entities.

see id. at 19-20, 109. The challenged regulations eliminate that cost-sharing. 77 Fed. Reg. at 8728. And, of course, the government's interest in ensuring access to contraceptive services is *particularly* compelling for women employed by that do not offer such coverage, like Eden Foods.

Taking into account the "particular claimant whose sincere exercise of religion is [purportedly] being substantially burdened," *O Centro*, 546 U.S. at 430-31, exempting Eden Foods and other similar companies from the obligation of their health plans to cover contraceptive services without cost-sharing would remove its employees (and their employees' families) from the very protections that were intended to further the compelling interests recognized by Congress. *See, e.g.*, *Graham v. Comm'r*, 822 F.2d 844, 853 (9th Cir. 1987) ("Where, as here, the purpose of granting the benefit is squarely at odds with the creation of an exception, we think the government is entitled to point out that the creation of an exception does violence to the rationale on which the benefit is dispensed in the first instance.").

Women who work for Eden Foods or similarly situated companies would be, as a whole, less likely to use contraceptive services in light of the financial barriers to obtaining them and would then be at risk of unhealthier outcomes, both for themselves and their newborn children. IOM REP. at 102-03. They also would have unequal access to preventive care and would be at a competitive disadvantage in the workforce due to their inability to decide for themselves if and when to bear children. These harms would befall female employees (and covered spouses and dependents) who do not necessarily share Mr. Potter's religious beliefs. Plaintiffs' desire not to provide a health plan that permits such individuals to exercise their own choice must yield to the government's compelling interest in avoiding the adverse and unfair consequences that such individuals would suffer as a result of the company's decision to impose the company's owners' religious beliefs on them. *See Lee*, 455 U.S. at 261 (noting that a religious exemption is improper where it "operates to impose the employer's religious faith on the employees").

Plaintiffs appear to suggest that the interests underlying the regulations cannot be considered compelling when millions of people are not protected by the regulations at the

moment. Pls.' TRO & Prelim. Inj. Mot. at 18-19. But 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. Many of the "exemptions" referred to by plaintiffs are not exemptions from the preventive services coverage regulations at all, but are instead provisions of the ACA that exclude individuals and entities from other requirements imposed by the ACA. They reflect the government's attempts to balance the compelling interests underlying the challenged regulations against other significant interests supporting the complex administrative scheme created by the ACA. *See Lee*, 455 U.S. at 259 ("The Court has long recognized that balance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions."); *Winddancer*, 435 F. Supp. 2d at 695-98 (recognizing that the regulations governing access to eagle parts "strike a delicate balance" between competing compelling interest). And, unlike the exemption plaintiffs seek for all employers that object to the regulations on religious grounds, the existing exemptions do not undermine the government's interests in any significant way. *See Lukumi*, 508 U.S. at 547; *S. Ridge Baptist Church*, 911 F.2d at 1208-09 (rejecting the plaintiff's argument that the existence of exemptions indicates that a law is the not the least restrictive means of achieving a compelling interest where the exemptions do not undermine that interest).

For example, the grandfathering of certain health plans with respect to certain provisions of the ACA is not specifically limited to the preventive services coverage regulations. *See* 42 U.S.C. § 18011; 45 C.F.R. § 147.140. In fact, the effect of grandfathering is not 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, 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. at 34,540, 34,546.

The incremental transition of the marketplace into the ACA administrative scheme does nothing to call into question the compelling interests furthered by the preventive services coverage regulations. 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 estimate that, as a practical matter, a majority of group health plans will lose their grandfather status by 2013. *See id.* at 34,552. Thus, any purported damage to the compelling interests underlying the regulations will be quickly mitigated, which is in stark contrast to the *permanent* exemption from the regulations 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 plaintiffs offer no support for such an untenable proposition. *See Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *9 (E.D. Mich. Oct. 31, 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).

Second, 26 U.S.C. § 4980H(c)(2) does *not*, as plaintiffs assert, exempt small employers from the preventive services coverage regulations. *See* 42 U.S.C. § 300gg-13(a); 76 Fed. Reg. at 46,622 n.1. Instead, it excludes employers with fewer than fifty full-time equivalent employees from the employer responsibility provision, meaning that, starting in 2014, such employers are not subject to assessable payments if they do not provide health coverage to their full-time employees and certain other criteria are met.[12] *See* 26 U.S.C. § 4980H(c)(2). Employees of these small businesses can get health insurance through other ACA provisions, primarily premium tax credits and health insurance exchanges, and the coverage they receive will include all preventive

[12] In contrast, beginning in 2014, certain large employers face assessable payments if they fail to provide health coverage for their employees under certain circumstances. 26 U.S.C. § 4980H.

services, including contraception.[13] In addition, small businesses that offer non-grandfathered health coverage to their employees are required to provide coverage for recommended preventive services, including contraceptive services, without cost-sharing. And there is reason to believe that many small employers will continue to offer health coverage to their employees, because the ACA, among other things, provides for tax incentives for small businesses to encourage the purchase of health insurance. *See id.* § 45R.

Third, although 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 will require certain individuals who fail to maintain a minimum level of health insurance to pay a tax penalty beginning in 2014. It provides no exemption from the preventive services coverage regulations, as it only excludes certain *individuals* from the requirement to obtain health coverage and says nothing about the requirement that non-grandfathered group health plans provide preventive services coverage to their participants. It is also clearly an attempt by Congress to *accommodate* religion and, unlike the broad exemption sought by plaintiffs, is sufficiently narrow so as not to undermine the larger administrative scheme. *See Lee*, 455 U.S. at 260-61.

Furthermore, exempting these discrete and "readily identifiable," *id.*, 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

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[13] For this reason, even if there were some connection between the preventive services coverage provision and the employer responsibility provision, excluding small employers from the employer responsibility provision would not undermine the government's compelling interest in ensuring that employees have access to recommended preventive services. As noted, employees of small employers that do not provide health coverage will be able to obtain health coverage through health insurance exchanges, and, if eligible, receive premium tax credits and cost-sharing reductions to assist them in affording such coverage. *See* 42 U.S.C. § 18021; *id.* § 18031(d)(2)(B)(i). Because the preventive services coverage requirement applies to the health plans being offered through the exchanges, the coverage individuals buy there will necessarily cover recommended contraceptive services. *Id.* § 300gg-13(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.

The only true exemption from the preventive services coverage regulations cited by plaintiffs is the exemption for "religious employer[s]," 45 C.F.R. § 147.130(a)(1)(iv)(B). But there is a rational distinction between the narrow exception currently in existence and the expansion plaintiffs seek. A "religious employer" is an employer that, among other things, has the "inculcation of religious values" as its purpose and "primarily employs persons who share the religious tenets of the organization." *Id*. Thus, the exception does not undermine the government's compelling interests. It anticipates that the impact on employees of exempted organizations will be minimal, given that any religious objections of the exempted organizations are presumably shared by most of the individuals actually making the choice of whether to use contraceptive services. *See* 77 Fed. Reg. at 8728.

The same is not true for Eden Foods, which does not and cannot discriminate based upon religious beliefs in hiring, and therefore almost certainly employs many individuals who do not share Mr. Potter's religious beliefs. If courts were to grant plaintiffs' request to extend the protections of RFRA to any employer whose owners or shareholders object to the regulations, it is difficult to see how the regulations could continue to function or be enforced in a rational manner. *See O Centro*, 546 U.S. at 435. Providing for voluntary participation among for-profit, secular employers would be "almost a contradiction in terms and difficult, if not impossible, to administer." *Lee,* 455 U.S. at 258. We are a "cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld*, 366 U.S. at 606; *see also S. Ridge Baptist Church*, 911 F.2d at 1211, and many people object to countless medical services. If any organization, no matter the high degree of attenuation between the mission of that organization and the exercise of religious belief, were able to seek an exemption from the operation of the

preventive services coverage regulations, it is difficult to see how defendants could administer the regulations in a manner that would achieve Congress's goals of improving the health of women and children and equalizing the coverage of preventive services for women. *See United States v. Israel*, 317 F.3d 768, 772 (7th Cir. 2003) (recognizing that granting plaintiff's RFRA claim "would lead to significant administrative problems for the [government] and open the door to a . . . proliferation of claims"). Indeed, women who receive their health coverage through corporations like Eden Foods would face negative health and employment outcomes because they had obtained employment with a company that imposes its owners' religious beliefs on their health care needs. *See id.* at 772 (noting consequences "for the public and the government"); 77 Fed. Reg. at 8728.

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

The preventive services coverage regulations, moreover, are the least restrictive means of furthering the government's interests. When determining whether a particular regulatory scheme is "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 interest. *See, e.g.*, *United States v. Schmucker*, 815 F.2d 413, 417 (6th Cir. 1987) (describing the least restrictive means 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*. 1289. Instead, the government need only "refute the alternative schemes offered by the challenger." *Id.*

Instead of explaining how Eden Foods and similarly situated secular companies could be exempted from the regulations without significant damage to the government's compelling interests, plaintiffs conjure up several new statutory and regulatory schemes—most of which would require the government to pay for contraceptive coverage—that they claim would be less

restrictive. *See* Pls.' TRO & Prelim. Inj. Mot. at 16. Rather than suggesting modifications to the current employer-based system that Congress enacted, *see generally* H.R. Rep. No. 111-443, pt. II, at 984-86 (2010), plaintiffs would have the system turned upside-down to accommodate Mr. Potter's beliefs at enormous administrative and financial cost to the government. But just because plaintiffs can devise an entirely new legislative and administrative scheme does not make that scheme a feasible less restrictive means. *See Wilgus*, 638 F.3d at 1289; *Adams v. Comm'r of Internal Revenue*, 170 F.3d 173, 180 n.8 (3d Cir. 1999) ("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)).

In effect, plaintiffs want the government "to subsidize private religious practices," *Catholic Charities of Sacramento*, 85 P.3d at 94, by expending significant resources to adopt an entirely new legislative or administrative scheme or fundamentally alter an existing one. But a proposed alternative scheme is not an adequate alternative—and thus not a viable less restrictive means to achieve the compelling interest—if it is not feasible or plausible. *See, e.g.*, *New Life Baptist Church Acad. v. Town of E. Longmeadow*, 885 F.2d 940, 947 (1st Cir. 1989) (Breyer, J.); *Graham*, 822 F.2d at 852. In determining whether a proposed alternative scheme is feasible, courts often consider the additional administrative and fiscal costs of the scheme. *See, e.g.*, *e.g.*, *S. Ridge Baptist Church*, 911 F.2d at 1206; *Fegans v. Norris*, 537 F.3d 897, 905-06 (8th Cir. 2008); *United States v. Lafley*, 656 F.3d 936, 942 (9th Cir. 2011); *New Life Baptist*, 885 F.2d at 947. Plaintiffs' alternatives would impose considerable new costs and other burdens on the government and would otherwise be impractical. *See, e.g.*, *Lafley*, 656 F.3d at 942; *Gooden v. Crain*, 353 F. App'x 885, 888 (5th Cir. 2009); *Adams v. Comm'r of Internal Revenue*, 170 F.3d 173, 180 n.8 (3d Cir. 1999).[14]

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[14] In addition, plaintiffs' challenge is to regulations promulgated by defendants, not to the ACA itself. But it is the ACA that requires that recommended preventive services be covered without cost-sharing through the existing employer-based system. *See* H.R. Rep. No. 111-443, pt. II, at 984-86. Thus, even if defendants wanted to adopt one of plaintiffs' non-employer-based alternatives, they would be constrained by the statute from doing so.

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

II. PLAINTIFFS' FIRST AMENDMENT CLAIMS LACK MERIT, AND SHOULD BE DISMISSED

A. The Regulations Do Not Violate the Free Exercise Clause

Plaintiffs' Free Exercise claim fails at the outset because, as explained above, a for-profit, secular employer like Eden Foods does not engage in any exercise of religion protected by the First Amendment. But even if it did, the services coverage regulations do not violate the Free

Exercise Clause because—as numerous courts have held—the regulations are neutral laws of general applicability. *See, e.g.*, *Autocam*, 2012 WL 6845677 at *5.

A neutral and generally applicable law does not violate the Free Exercise Clause even if it prescribes conduct that an individual's religion proscribes or has the incidental effect of burdening a particular religious practice. *Smith*, 494 U.S. at 879; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The challenged regulations are neutral and generally applicable because they "do[] not target a particular religion or religious practice or have as [their] objective the interference with a particular religion or religious practice." *Autocam*, 2012 WL 6845677 at *5. Rather, the regulations "appl[y] to all non-exempt, non-grandfathered plans," and, to the extent the regulations burden on plaintiffs' religious exercise, they do so only "incidentally." *Id.*

The Complaint suggests the regulations are not neutral and generally applicable because the regulations contain exemptions and because some groups qualify for those exemptions and others do not. Compl. ¶¶ 196, 215-17. But as numerous courts have recognized, the existence of categorical exemptions "does not mean that the law does not apply generally." *Autocam*, 2012 WL 6845677 at *5 (citing *United States v. Lee*, 455 U.S. 252, 261 (1982)); *see Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004); *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006); *Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 961 (9th Cir. 1991). And indeed, the regulations and the exemptions are categorical and are neutral with respect to religion. To warrant strict scrutiny, a system of exemptions must be so individualized so as to enable the government to engage in subjective, case-by-case inquiries, and the government must utilize that system to grant exemptions only for secular reasons and not for religious reasons. *Smith*, 494 U.S. at 884. Plaintiffs point to no such system with respect to the challenged regulations, and there is none. Rather, the regulations "appl[y] to all non-grandfathered, non-exempt plans, regardless of employers' religious persuasions, and this is enough to create a neutral law of general application." *Autocam*, 2012 WL 6845677 at *5.

Virtually every court to consider similar claims has agreed with this conclusion. *See* Conestoga, Order at 3; *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-CV-476 (CEJ), 2012 WL 4481208, *7-9 (E.D. Mo. Sept. 28, 2012), *stay pending appeal granted on other grounds*, No. 12-3357 (8th Cir. Nov. 28, 2012); *Conestoga*, 2013 WL 140110, at *6-9, *18; *Briscoe*, Order at 14; *Grote Indus., LLC v. Sebelius*, No. 4:12-cv-00134-SEB-DML, 2012 WL 6725905, *7-8 (S.D. Ind. Dec. 27, 2012), *injunction pending appeal granted on other grounds*, No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013); *Hobby Lobby*, 870 F. Supp. 2d at 1287-91; *see also Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468-69 (N.Y. 2006); *Catholic Charities of Sacramento*, 85 P.3d at 81-87.[15]

Because the regulations are neutral and generally applicable, they do not run afoul of the Free Exercise Clause.[16]

B. The Regulations Do Not Violate the Establishment Clause

Plaintiffs' Establishment Clause claim has been rejected by every court to consider it,[17] and this Court should do the same. "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[ing] one religion over another" is subject to strict scrutiny. *Id.* at 246. Thus, for example, the Supreme Court has struck down on Establishment Clause grounds a state statute that was "drafted with the explicit intention" of requiring "particular religious denominations" to comply with registration and reporting requirements while excluding other religious denominations. *Id.* at 254; *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v.*

[15] Plaintiffs misunderstand the regulations when they assert that HRSA has "unbridled discretion" to grant or deny an exemption to the plan of an employer that meets the religious employer criteria. Compl. ¶¶ 216, 223. Any plan that meets the criteria is not required to cover contraceptive services. *See* HRSA Guidelines.

[16] Even if the regulations were subject to strict scrutiny, plaintiffs' Free Exercise challenge would still fail. As explained above, *see supra* at 17-27, the regulations satisfy strict scrutiny.

[17] *See Conestoga*, 2013 WL 1277419, at *2; *Briscoe*, 2013 WL 755413, at *7-8; *Conestoga*, 2013 WL 140110, at *15; *Grote*, 2012 WL 6725905, at *8-9; *O'Brien*, 2012 WL 4481208, at *9-10; *see also Diocese of Albany*, 859 N.E.2d at 468-69; *Catholic Charities of Sacramento*, 85 P.3d at 83-87.

Grumet, 512 U.S. 687, 703-07 (1994) (striking down statute that "single[d] out a particular religious sect for special treatment"). The Court, on the other hand, has upheld a statute that provided an exemption from military service for persons who had a conscientious objection to all wars, but not those who objected to only a particular war. *Gillette v. United States*, 401 U.S. 437 (1971). The Court explained that the statute did not discriminate among religions because "no particular sectarian affiliation" was required to qualify for conscientious objector status. *Id*. at 450-51. "[C]onscientious objector status was available on an equal basis to both the Quaker and the Roman Catholic." *Larson*, 456 U.S. at 247 n.23; *see also Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005).

Like the statute at issue in *Gillette*, the preventive services coverage regulations do not grant any denominational preference or otherwise discriminate among religions. It is of no moment that the religious employer exemption applies to some religious employers but not others. *See Droz v. Comm'r of IRS*, 48 F.3d 1120, 1124 (9th Cir. 1995); *Diocese of Albany*, 859 N.E.2d at 468-69 ("this kind of distinction—not between denominations, but between religious organizations based on the nature of their activities—is not what *Larson* condemns"). The relevant inquiry is whether the distinction drawn by the regulations between exempt and non-exempt entities is based on religious affiliation. Here, it is not.

The regulations' definition of "religious employer" does not refer to any particular denomination. The criteria for the exemption focus on the purpose and composition of the organization, not on its sectarian affiliation. The exemption is available on an equal basis to organizations affiliated with any and all religions. The regulations, therefore, do not promote some religions over others. Indeed, the Supreme Court upheld a similar statutory exemption for houses of worship in *Walz v. Tax Commission of New York*, 397 U.S. 664, 672-73 (1970). The same result should obtain here. Nothing in the Establishment Clause, or the cases interpreting it, requires the government to create an exemption for for-profit, secular companies whenever it

creates an exemption for religious organizations. *See, e.g.*, *Amos*, 483 U.S. at 334. Thus, plaintiffs' Establishment Clause claim fails.[18]

For these reasons, plaintiffs' First Amendment claims fail.[19]

III. PLAINTIFFS' ADMINISTRATIVE PROCEDURE ACT CLAIMS ARE MERITLESS, AND SHOULD BE DISMISSED

A. Issuance of the Regulations Was Procedurally Proper

Plaintiffs' claim that defendants failed to follow the procedures required by the APA in issuing the preventive services coverage regulations, Compl. ¶¶ 245-47, is baseless. *See Grote*, 2012 WL 6725905, *11 (rejecting identical APA claim). The APA's rulemaking provisions generally require that agencies provide notice of a proposed rule, invite and consider public comments, and adopt a final rule that includes a statement of basis and purpose. *See* 5 U.S.C. § 553(b), (c). Defendants complied with these requirements

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

[18] Even if the regulations discriminate among religions (and they do not), they are valid under the Establishment Clause because they satisfy strict scrutiny. *See supra* at 17-27; *Larson*, 456 U.S. at 251-52.

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

health coverage on an interim final basis.[20] *Id.* at 46,624. Defendants requested comments for a period of 60 days on the amendment to the regulations and specifically on the definition of "religious employer" contained in the exemption authorized by the amendment. *Id.* at 46,621. After receiving and carefully considering thousands of comments, defendants adopted the definition of "religious employer" contained in the amended interim final regulations, and created a temporary enforcement safe harbor period during which time defendants would consider additional amendments to the regulations to further accommodate religious organizations' religious objections to providing contraception coverage. 77 Fed. Reg. at 8,726-27. Because defendants provided notice and an opportunity to comment on the amendment to the interim final regulations, they satisfied the APA's procedural requirements.

B. The Regulations Are neither Arbitrary nor Capricious

Plaintiffs also contend that defendants acted arbitrarily and capriciously by failing to exempt Eden Foods and other similar organizations from the scope of the preventive services coverage regulations. Compl. ¶¶ 250-52. But plaintiffs' contention is belied by defendants' careful consideration of the scope of the religious employer exemption, which is intended to "reasonably balance the extension of any coverage of contraceptive services . . . to as many women as possible, while respecting the unique relationship between certain religious employers and their employees in certain religious positions." 76 Fed. Reg. at 46,623. An identical APA claim was accordingly rejected in *O'Brien*. *See* 2012 WL 4481208, at *14.

In response to comments on the amended interim final regulations, defendants "carefully considered whether to eliminate the religious employer exemption or to adopt an alternative definition of religious employer, including whether the exemption should be extended to a broader set of religiously-affiliated sponsors of group health plans and group insurance coverage." 77 Fed. Reg. at 8727. Ultimately, defendants chose not to expand the exemption, as a

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

broader exemption "would lead to more employees having to pay out of pocket for contraceptive services, thus making it less likely that they would use contraceptives, which would undermine the benefits described above." *Id.* at 8728. Defendants also explained that including a broader class of employers within the scope of the exemption "would subject their employees to the religious views of the employer, limiting access to contraceptives, and thereby inhibiting the use of contraceptive services and the benefits of preventive care." *Id.* Although plaintiffs may take issue with defendants' purported omission of a discussion about for-profit corporate employers *per se*, plaintiffs cannot dispute that defendants' conclusions in the final rules as applied to religiously-affiliated organizations could only apply with greater force to for-profit, secular corporations like Eden Foods. *See Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (indicating that, under the arbitrary and capricious standard, agency action must be upheld, so long as "the agency's path may reasonably be discerned" (quotations omitted)); *Heartwood, Inc. v. U.S. Forest Serv.*, 230 F.3d 947, 953 (7th Cir. 2000) (under APA, reviewing court "may not substitute the [its] judgment for that of the agency"); *O'Brien*, 2012 WL 4481208, at *14. Defendants' consideration of the relevant concerns shows that they acted neither arbitrarily nor capriciously.

C. The Regulations Do Not Violate Federal Restrictions Relating to Abortion

Plaintiffs also contend that the preventive services coverage regulations violate the APA because they conflict with two federal prohibitions relating to abortions: (1) § 1303(b)(1) of the ACA, and (2) the Weldon Amendment to the Consolidated Appropriations Act of 2012. Compl. ¶¶ 255-58, 264-67. Section 1303(b)(1)(A) of the ACA provides that "nothing in this title . . . shall be construed to require a qualified health plan to provide" abortion services. 42 U.S.C. § 18023(b)(1)(A). The Weldon Amendment denies funds made available in the Consolidated Appropriations Act of 2012 to any federal, state, or local agency, program, or government that "subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Pub. L. No. 112-74, § 506(d)(1), 125 Stat. 786, 1111 (2012). Plaintiffs appear to reason that, because the

preventive services regulations require group health plans to cover emergency contraception, such as Plan B, they in effect require plaintiffs to provide coverage for abortions in violation of federal law.

Plaintiffs' claim that the regulations conflict with § 1303(b)(1) of the ACA should be dismissed at the outset because plaintiffs lack prudential standing to assert it. The doctrine of prudential standing requires that a plaintiffs' 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 plaintiffs and § 1303(b)(1)—which protects health insurance issuers that offer qualified health plans, 42 U.S.C. § 18023(b)(1)—is missing here, as plaintiffs do not allege that it is either a health insurance issuer or the purchaser of a qualified health plan. Nor could it reasonably do so. Because § 1303(b)(1) is inapplicable to the health plan that Eden Foods offers to its employees, the Court should dismiss this claim for lack of prudential standing. *See Dialysis Ctrs., Ltd. v. Schweiker*, 657 F.2d 135, 138 (7th Cir. 1981); *O'Brien*, 2012 WL 4481208, at *14 (holding that similar plaintiff lacked prudential standing to raise identical claim).

Even if the Court were to reach the merits of plaintiffs' claims that the regulations violate § 1303(b)(1) and the Weldon Amendment, the Court should nevertheless dismiss those claims because they are based on a misunderstanding of the scope of these laws as they relate to emergency contraceptives. The preventive services coverage regulations do not, in contravention of federal law, mandate that any health plan cover abortion as a preventive service or that it cover abortion at all. Rather, they require that non-grandfathered 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*. In fact, the government has made clear that these regulations "do not include abortifacient drugs." 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 May 20, 2012); *see also* IOM REP. at 22

(recognizing that abortion services are outside the scope of permissible recommendations).

In recommending what contraceptive services should be covered by health plans without cost-sharing, the IOM Report identified those 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, *supra*. 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:

> Emergency contraceptive pills are not effective if the woman is pregnant; they act by delaying or inhibiting ovulation, and/or altering tubal transport of sperm and/or ova (thereby inhibiting fertilization), and/or altering the endometrium (thereby inhibiting implantation). Studies of combined oral contraceptives inadvertently taken early in pregnancy have not shown that the drugs have an adverse effect on the fetus, and warnings concerning such effects were removed from labeling several years ago. There is, therefore, no evidence that these drugs, taken in smaller total doses for a short period of time for emergency contraception, will have an adverse effect on an established pregnancy.

Prescription Drug Products; Certain Combined Oral Contraceptives for Use as Postcoital Emergency Contraception, 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997). In light of this conclusion by the FDA, HHS over 15 years ago informed Title X grantees, which are required to offer a range of acceptable and effective family planning methods and may not offer abortion, 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 Nov. 14, 2012); *see also* 42 U.S.C. § § 300, 300a-6.

Thus, although plaintiffs might seek to re-litigate this issue in the present context, the preventive services coverage regulations simply adopted a settled understanding of FDA-approved emergency contraceptives that is in accordance with existing federal laws prohibiting federal funding for certain abortions. Such an approach cannot be deemed arbitrary or capricious or contrary to law when it is consistent with over a decade of regulatory policy and practice. *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)).

The conclusion that the term "abortion" in these federal laws was not intended to cover contraceptives, including emergency contraceptives, is reinforced by the legislative history of the Weldon Amendment. The Amendment was initially passed by the House of Representatives as part of the Abortion Non-Discrimination Act of 2002, and was later incorporated as a "rider" to the Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, 118 Stat. 2809 (2005), and subsequent years. *See California ex rel. Lockyer v. United States*, 450 F.3d 436, 439 (9th Cir. 2006). During the floor debate on the House vote, Representative David Weldon, after whom the Amendment is named, went out of his way to clarify that the definition of "abortion" is a narrow one. Weldon remarked:

> There have been people who have come to this floor today and tried to assert that the language in this bill would bar the provision of contraception services in many institutions that are already providing it. Please show me in the statute where you find that interpretation. I think it could be described as a tremendous misinterpretation or a tremendous stretch of the imagination.
>
> 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. Now some religious groups may interpret that as abortion, but we make no reference in this statute to religious groups or their definitions; and under the current FDA policy that is considered contraception, and it is not affected at all by this statute.

148 Cong. Rec. H6566, H6580 (daily ed. Sept. 25, 2002). That Representative Weldon himself did not consider "abortion" to include FDA-approved emergency contraceptives leaves little doubt that the Weldon Amendment was not intended to apply to those items. *See Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (indicating that a statement of one of the legislation's sponsors deserves to be accorded substantial weight in interpreting a statute).

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

CONCLUSION

For the foregoing reasons, defendants respectfully ask that the Court dismiss this case in its entirety.

Respectfully submitted this 20th day of May, 2013,

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CERTIFICATE OF SERVICE

I certify that, on May 20, 2013, I electronically filed the foregoing paper with the Clerk of Court using the ECF system, which will send notification of such filing to the following:

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