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' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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2. Assuming the regulations substantially burden plaintiffs' religious exercise, have plaintiffs shown a likelihood of success on their claim that the regulations do not serve compelling governmental interests or are not the least restrictive means to achieve those interests?

3. Have plaintiffs shown a likelihood of success on their claims that the regulations violate the First Amendment's Free Exercise and Free Speech Clauses?

4. Assuming plaintiffs have shown a likelihood of success on the merits, have plaintiffs established irreparable harm and that the public interest weighs in favor of granting a preliminary injunction?

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INTRODUCTION

Plaintiffs ask this Court to preliminarily enjoin 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. The regulations require all group health plans and health insurance issuers offering non-grandfathered group or individual health coverage to provide coverage for certain recommended preventive services without cost-sharing (such as a copayment, coinsurance, or a deductible). As relevant here, except as to group health plans of certain non-profit religious employers, the preventive services that must be covered include all Food and Drug Administration ("FDA")-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider.

The plaintiffs in this case are Eden Foods, Inc., a for-profit natural foods corporation, and its owner, Michael Potter. Plaintiffs' challenge rests largely on the theory that a for-profit, secular corporation can exercise religion and thereby avoid the reach of laws designed to regulate commercial activity. This cannot be. The Supreme Court has recognized that, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *United States v. Lee*, 455 U.S. 252, 261 (1982). Nor can the owner of a for-profit, secular corporation eliminate the legal separation provided by the corporate form, which the owner has chosen because it benefits him, to impose his personal religious beliefs on the corporate entity's employees. To hold otherwise would permit for-profit, secular companies and their owners to become laws unto themselves. Because there are an infinite variety of alleged religious beliefs, such companies and their owners could claim countless exemptions from an untold number of general commercial laws designed to protect against unfair discrimination in the workplace and to protect the health and well-being of individual employees and their families. 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.

As this Court recognized in its March 22, 2013 Order denying plaintiff's motion for a TRO, plaintiffs have not established likelihood of success on the merits. *See* Order Denying Emergency Mot. for TRO at 6-9 ("Order Denying TRO"), ECF No. 12. Indeed, in a case that plaintiffs fail to cite, a motions panel for the Sixth Circuit denied an analogous motion for preliminary injunctive relief pending appeal. *See* Order, *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012). Although not binding on this Court, the Sixth Circuit's analysis is persuasive, as was the district court's reasoning in that case, and therefore counsels strongly against granting plaintiffs' motion.

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 their 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).

Mr. 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 Foods's health plans 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 Corp. v. Sebelius*, No. 1:12-CV-1096, 2012 WL 6845677, at *7 (W.D. Mich. Dec. 24, 2012), *appeal pending*, No. 12-2673 (6th Cir.); *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 do not substantially burden Eden Foods's or Mr. Potter's exercise of religion because any burden caused by the regulations is simply too attenuated to qualify as a *substantial* burden. *See 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); *Grote Industries, LLC v. Sebelius*, No. 4:12-cv-00134-SEB-DML, 2012 WL 6725905, at *5-7 (S.D. Ind. Dec. 27, 2012), *motion for reconsideration denied*, 2013 WL 53736 (S.D. Ind. Jan. 3, 2013), *appeal docketed*, No. 13-1077 (7th Cir. Jan. 9, 2013); *Gilardi*, 2013 WL 781150, at *8-9; *Korte*, 2012 WL 6553996, at *10; *Annex Med., Inc. v. Sebelius*, Civil No. 12-

2804 (DSD/SER), 2013 WL 101927, at *4-5 (D. Minn. Jan. 8, 2013); *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1159-60 (E.D. Mo. 2012), *appeal docketed*, No. 12-3357 (8th Cir. Oct. 4, 2012). 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 claim is also 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. Indeed, all but one court to have addressed Free Exercise challenges to these regulations have concluded that the regulations are neutral and generally applicable. *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*, 2012 WL 6725905, at *7-8; *Korte*, 2012 WL 6553996, at *6-8; *O'Brien*, 894 F. Supp. 2d at 1160-61. *But see Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-CV-92-DDN, 2012 WL 6738489, at *6 (E.D. Mo. Dec. 31, 2012).

Plaintiffs also cannot establish the remaining requirements for obtaining a temporary

restraining order. Even if plaintiffs could show a likelihood of success on the merits—which they cannot—the Court should not grant their request for injunctive relief, because, in light of a delay of over a year and a half between the establishment of the contraceptive coverage requirement and the initiation of this suit, plaintiffs cannot establish irreparable harm. The purported urgency of plaintiffs' current request for emergency injunctive relief is belied by the tardiness of that request. Furthermore, the balance of equities tips toward the government. Enjoining application of the regulations as to plaintiffs would prevent the government from achieving Congress's goals of improving the health of women and children and equalizing the playing field for women and men. It would also harm the public, given Eden Foods's employees—as well as any covered spouses and other dependents—who could suffer the negative health and other consequences that the regulations are intended to prevent.

For these reasons, and the reasons explained below, defendants respectfully ask the Court to deny plaintiffs' motion for a temporary restraining order.

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. 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/byaudience/forwomen/ucm118465.htm. 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/. 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]

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[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. ¶ 268, 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).

[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)

(continued on next page…)

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.

ARGUMENT

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

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

A. Plaintiffs' Religious Freedom Restoration Act Claim Is Without Merit

1. The 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

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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).

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.

a. 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); *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 ("secular, for-profit corporations do not have free exercise rights").[4] And, of course, this Court has already

[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. 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.").

strongly suggested that a for-profit corporation—like Eden Foods—cannot exercise religion within the meaning of RFRA or the Free Exercise Clause. *See* Order Denying TRO at 7-8.

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 (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 secular, for-profit 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, 706 (2012) (emphasis added). The cases are replete with statements like this. *See, e.g.*, *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (the

[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/.

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); *Anselmo v. Cnty. of Shasta*, 873 F. Supp. 2d 1247 (E.D. Cal. 2012). 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." *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).

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.[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 by refusing to cover certain contraceptive services. *Lee*, 455 U.S. at 261.

b. 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 regulations also do not substantially burden Mr. Potter's religious exercise. 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. 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.

[6] The cases plaintiffs cite did not hold that a for-profit, secular corporation may exercise religion, and the government is not aware of any such case, *see Hobby Lobby*, 870 F. Supp. 2d at 1288. *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), involved *individual* plaintiffs, not corporations. And *Braunfeld v. Brown*, 366 U.S. 599 (1961), rejected a free exercise challenge to a state law that regulated retail store hours and kosher food labels. Moreover, *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), and *EEOC v. Townley Engineering and Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988), both declined to decide whether a for-profit corporation can assert its own rights under the Free Exercise. Clause.

520, 524 (1993); *Potter v. Dist. of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009).

Mr. Potter's theory boils down to the claim that what's done to the corporation (or group health plan sponsored by the corporation)[7] 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," *Handley v. Wyandotte Chems. Corp.*, 325 N.W.2d 447, 449 (Mich. Ct. App. 1982), that is its "own 'person' under Michigan law, [] distinct and separate from [its] owners," *Hills & Dales General Hosp. v. Pantig*, 812 N.W.2d 793, 797 (Mich. App. 2011) (citing, *inter alia*, *Jones v. Martz & Meek Constr. Co., Inc.*, 362 Mich. 107 N.W.2d 802 (1961)). Indeed, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). 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

[7] 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).

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.[8]

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).

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[8] *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 850, 856 (Rovner, J., dissenting).

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

Although the 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).[9] Although "[c]ourts are not arbiters of scriptural interpretation," *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981), "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

[9] *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.

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.

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

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

Even if 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 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. 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 8727. 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.

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. United States 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* 155 Cong. Rec. at S12271.

Plaintiffs miss the point when they attempt to minimize the magnitude of the government's interests by arguing that contraception is widely available and even subsidized for certain individuals at lower income levels. *See* Pls.' Mot. for an Emergency TRO & Prelim. Inj. ("Pls.' Mot.") at 14-15, Mar. 22, 2013, ECF No. 10. 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,

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.").[10] 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

[10] 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.

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").

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

The preventive services coverage regulations, moreover, are the least restrictive means of furthering the underlying interests. When determining whether a particular regulatory scheme is "least restrictive," the 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.*, *S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1206 (6th Cir. 1990) (describing the least restrictive means test as "the extent to which accommodation of the defendant would impede the state's objectives"); *see also, e.g.*, *United States v. Wilgus*, 638 F.3d 1274, 1289-95 (10th Cir. 2011); *New Life Baptist Church Acad. v. Town of E. Longmeadow*, 885 F.2d 940, 946 (1st Cir. 1989) (Breyer, J.). The government is not required "to do the impossible—refute each and every conceivable alternative regulation scheme." *Wilgus*, 638 F.3d at 1289. The government need only "refute the alternative schemes offered by the challenger." *Id.*

Plaintiffs do not explain how they and similarly situated entities could be exempted from the regulations without significant damage to the governmental interests in public health and gender equality; and they do not offer any less restrictive means, except perhaps vague suggestions that the government could simply provide contraceptive services directly. *See* Pls.' Mot. at 15-16. Instead, plaintiffs contend that the regulations cannot be the least restrictive means of achieving the government's compelling interests when defendants "ha[ve] carved out a number of exemptions for secular purposes." *Id.* at 16.

But, contrary to plaintiffs' assertions, this is not a case where underinclusive enforcement of a law suggests that the government's "supposedly vital interest" is not really compelling. *Lukumi*, 508 U.S. at 546-47. Nor do the "exemptions" mentioned by plaintiffs change the fact that the regulations are the least restrictive means of advancing the government's compelling interests. First, 26 U.S.C. § 4980H9(c)(2) does *not* exempt small employers from the preventive services coverage regulations. *See* 42 U.S.C. § 300gg-13(a); 76 Fed. Reg. at 46,622 n.1. Instead, it excludes employers with fewer than 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. *See* 26 U.S.C. § 4980H(c)(2). Employees of these small businesses can get their health insurance through other ACA provisions, primarily premium tax credits and health insurance Exchanges, and the coverage they receive will include all preventive services, including contraception. In addition, small businesses that choose to 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

Second, 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. 34,538, 34,540, 34,546 (June 17, 2010). 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* 75 Fed. Reg. 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 offers no support for such an untenable proposition. *See Legatus*, 2012 WL 5359630, at *9; *Korte*, 2012 WL 6553996, at *7.[11]

Finally, even in this Court were to consider plaintiffs' vague suggestions that the government could provide preventive services as a less restrictive means, it should reject them as entirely infeasible. Rather than suggesting modifications to the current employer-based system that Congress enacted, *see generally* H.R. Rep. No. 111-443, pt. II, at 984-86 (2010) (explaining why Congress chose to build on the employer-based system), plaintiffs would have the system turned upside-down to accommodate Monaghan'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; *New Life Baptist*, 885 F.2d at 946. In effect, plaintiffs want

[11] The third and last "exemption" mentioned by plaintiffs is "waivers for high grossing employers." Pls. Br. at 16. It is not clear what plaintiffs mean, but for purposes of discussion the government assumes that they are referring to the annual limits waiver program. *See* 42 U.S.C. § 300gg-11; 45 C.F.R. § 126. The annual limits provision of the ACA restricts annual dollar limits on essential health benefits provided by health insurance issuers and group health plans. *See id.* The Secretary of HHS had the authority to waive these restrictions for plans if compliance "would result in a significant decrease in access to benefits under the plan or health coverage." 45 C.F.R. § 147.126(d)(3). These waivers are not related to the preventive services coverage regulations, and those non-exempt, non-grandfathered plans that received annual limits waivers are still required to provide the required preventive services coverage.

the government "to subsidize private religious practices," *Catholic Charities of Sacramento v. Sup. Ct.*, 85 P.3d 67, 94 (Cal. 2004), 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." *New Life Baptist*, 885 F.2d at 947. In determining whether a proposed alternative scheme is feasible, courts often consider the additional administrative and fiscal costs of the scheme. *See, e.g.*, *id.* at 947. Plaintiffs' alternatives would impose considerable costs and burdens and would otherwise be impractical.[12]

Nor would the proposed alternatives be equally effective in advancing the government's compelling interests. As discussed above, Congress determined that the best way to achieve the goals of the ACA, including expanding preventive services coverage, was to utilize the existing employer-based system. Plaintiffs' alternatives would require establishing entirely new government programs 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 suggestions as to how these programs could be integrated with the employer-based system or how women would obtain government-provided preventive services in practice.

B. Plaintiffs' Free Exercise Claim Is Without Merit

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 regulations are neutral laws of general applicability and

[12] 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, the statute would prevent them from doing so.

therefore do not violate the Free Exercise Clause. *See Smith*, 494 U.S. at 879. That was precisely the holding of every court but one that has addressed this claim.[13]

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. A law is neutral if it does not target religiously motivated conduct but rather has as its purpose something other than the disapproval of a particular religion, or of religion in general. *Lukumi*, 508 U.S. at 533, 545. A law is generally applicable if it does not selectively impose burdens only on conduct motivated by religious belief. *Id*. at 535-37, 545. The regulations at issue here are neutral and generally applicable, as they do not target religiously motivated conduct; their purpose is to promote public health and gender equality by increasing access to and utilization of recommended preventive services, including those for women. *See Hobby Lobby*, 870 F. Supp. 2d at 1289-90; *O'Brien*, 894 F. Supp. 2d at 1158-59; *Korte*, 2012 WL 6553996, at *7-8. The regulations reflect expert recommendations about the medical need for the services, without regard to any religious motivations for or against such services. As the IOM Report shows, this purpose is entirely secular in nature. IOM REP. at 2-4, 7-8.[14]

Plaintiffs maintain that the regulations are not generally applicable because they contain certain categorical exceptions. *See* Pls.' Mot. at 18-19. But the existence of "express exceptions

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[13] *See Conestoga*, 2013 WL 1277419, at *2; *Briscoe*, 2013 WL 755413, at *6-7; *Conestoga*, 2013 WL 140110, at *8-9; *Grote*, 2012 WL 6725905, at *7-8; *Autocam*, 2012 WL 6845677, at *5 (W.D. Mich.); *Korte*, 2012 WL 6553996, at *7-8; *Hobby Lobby*, 870 F. Supp. 2d at 1289-90; *O'Brien*, 2012 WL 4481208, at *7-9; *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. *But see Sharpe Holdings*, 2012 WL 6738489, at *5.

[14] Plaintiffs' characterization of the regulations as an attempt to target non-insularly focused religious objectors is mere rhetorical bluster. Plaintiffs provide no evidence to show that the regulations were designed as an assault on some religious objectors, as opposed to an effort to increase women's access to and utilization of recommended preventive services. And plaintiffs cannot dispute that defendants have made efforts to accommodate religion (i.e., the religious employer exemption and the NPRM) in ways that will not undermine the goal of ensuring that women have access to coverage for recommended preventive services without cost-sharing. This case, therefore, is a far cry from *Lukumi*, 508 U.S. 520, where the legislature specifically targeted the religious exercise of members of a single church (Santeria) by enacting ordinances that used terms such as "sacrifice" and "ritual," *id*. at 533-34, and prohibited few, if any, animal killings other than Santeria sacrifices, *id*. at 535-36.

for objectively defined categories of [entities]," like the ones plaintiffs reference, does not negate a law's general applicability. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004). None of the "exemptions" to the regulations cited by plaintiffs interferes with the regulations' general applicability. For example, the exception for grandfathered plans is available on equal terms to all employers, whether religious or secular. *See O'Brien*, 894 F. Supp. 2d at 1162-63; *Hobby Lobby*, 870 F. Supp. 2d at 1290; *see also Ungar v. N.Y.C. Hous. Auth.*, 363 F. App'x 53, 56 (2d Cir. 2010); *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008). Plaintiffs also maintain that defendants have created a system of individualized exemptions. Pls.' Mot. at 18-19. To warrant strict scrutiny, however, a system of individualized exemptions must be one that enables the government to make a subjective, case-by-case inquiry of the reasons for the relevant conduct, and the government must utilize that system to grant exemptions for secular reasons but not for religious reasons. *Smith*, 494 U.S. 884. Plaintiffs point to no such system with respect to the challenged regulations, and there is none.[15] Because the regulations are neutral laws of general applicability, plaintiffs' free exercise claim is without merit.[16]

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

Although "[t]he loss of First Amendment freedoms," or a violation of RFRA, "for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), plaintiffs have not shown that the challenged regulations violate their First Amendment or RFRA rights, so there has been no "loss of First Amendment freedoms" for any period of time, *id.* In this respect, the merits and irreparable injury prongs of the preliminary injunction analysis merge together, and plaintiffs cannot show irreparable injury without also

[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 exemption criteria. Pls.' Mot. at 19. Any plan that meets the criteria is not required to cover contraceptive services. *See* HRSA Guidelines.

[16] Even if the regulations were not neutral and generally applicable, they would not violate the Free Exercise Clause because they satisfy strict scrutiny. *See supra* pp. 15-21.

showing a likelihood of success on the merits, which they cannot do. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012).

Plaintiffs' inexplicable delay in filing this suit further counsels against a finding of irreparable harm. The contraceptive coverage requirement was established on August 1, 2011. Yet plaintiffs waited more than nineteen months—until March 2013—to bring suit and seek preliminary injunctive relief. Such a substantial delay seriously undermines plaintiffs' claim of irreparable harm. *See, e.g.*, *Huron Mountain Club v. U.S. Army Corps of Eng'rs*, No. 2:12-CV-197, 2012 WL 3060146, at *14 (W.D. Mich. July 25, 2012) ("Since an application for preliminary injunction is based on an urgent need for the protection of [a] Plaintiff's rights, a long delay in seeking relief indicates that speedy action is not required.") (quotations omitted); *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (denying preliminary injunction and noting that delay of forty-four days after final regulations were issued was "inexcusable").[17]

Moreover, enjoining the regulations as to for-profit, secular companies would undermine the government's ability to achieve Congress's goals of improving the health of women and children and equalizing the coverage of preventive services for women and men. It would also be contrary to the public interest to deny Eden Foods's employees (and their families) the benefits of the preventive services coverage regulations. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Because Eden Foods is a for-profit, secular employer and thus cannot discriminate on the basis of religion in hiring, many of its employees may not share the owners' religious beliefs. Those employees should not be deprived of the benefits of obtaining a health plan through their employer that covers the full range of recommended contraceptive services.

[17] *See also, e.g.*, *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) ("[T]he failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury."); *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("[L]ong delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.").

CONCLUSION

For the foregoing reasons, defendants respectfully ask that the Court deny plaintiffs' motion for a preliminary injunction.

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CERTIFICATE OF SERVICE

I certify that, on April 19, 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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