IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDEN FOODS, INC., and MICHAEL POTTER Owner and Sole Shareholder of Eden Foods, Inc.,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of Health and Human Services, et al.,

Defendants-Appellees

No. 13-1677

APPELLEES' OPPOSITION TO MOTION FOR AN INJUNCTION PENDING APPEAL; AND APPELLEES' MOTION TO HOLD THIS APPEAL IN ABEYANCE PENDING THIS COURT'S DECISION IN *AUTOCAM CORP. V. SEBELIUS*, No. 12-2673 (6th Cir.)

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT 4

A. Statutory and Regulatory Background 4

B. Factual Background and District Court Proceedings 7

ARGUMENT 8

A. RFRA Does Not Authorize A For-Profit, Secular Corporation To Deny Employee Benefits On The Basis Of Religion 8

B. The Obligation To Cover Contraceptives Lies With Eden Foods, Not With The Corporation's Shareholder 14

C. The Decisions That Employees Make About How To Use Their Comprehensive Health Coverage Cannot Properly Be Attributed To Their Employer 16

D. The Contraceptive-Coverage Requirement Is Narrowly Tailored To Advance Compelling Governmental Interests 19

CONCLUSION 20

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases: **Page**

Annex Medical, Inc. v. Sebelius,
No. 13-1118 (8th Cir. Feb. 1, 2013) 1

Autocam Corp. v. Sebelius,
No. 12-2673 (6th Cir.) 1, 20

Autocam Corp. v. Sebelius,
2012 WL 6845677 (W.D. Mich. Dec. 24, 2012).................... 3, 15, 17, 18

Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc.,
862 F.2d 597 (6th Cir. 1988) 15

Catholic Charities of Sacramento, Inc. v. Superior Court,
85 P.3d 67 (Cal. 2004) 20

Cedric Kushner Promotions, Ltd. v. King,
533 U.S. 158 (2001)....................3, 14

Conestoga Wood Specialties Corp. v. Sebelius,
__ F. Supp. 2d __, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013),
appeal pending, No. 13-1144 (3d Cir.).................... 3, 14, 15, 17

Conestoga Wood Specialties Corp. v. Sebelius,
No. 13-1144 (3d Cir. Feb. 7, 2013) 1

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,
483 U.S. 327 (1987).................... 2, 9, 11, 12

Cutter v. Wilkinson,
544 U.S. 709 (2005)....................12

Doremus v. Board of Ed. of Hawthorne,
342 U.S. 429 (1952).................... 18, 19

Gilardi v. HHS,
No. 13-5069 (D.C. Cir. March 29, 2013) 1

Grote v. Sebelius,
708 F.3d 850 (2013)..18

Hein v. Freedom from Religion Foundation, Inc.,
551 U.S. 587 (2007)... 18, 19

Hobby Lobby Stores, Inc. v. Sebelius,
No. 12-6294 (10th Cir. Dec. 20, 2012)...1, 8

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,
132 S. Ct. 694 (2012)... 2, 9, 10

Kennedy v. St. Joseph's Ministries, Inc.,
657 F.3d 189 (4th Cir. 2011) 11

Korte v. HHS,
No. 12-3841 (7th Cir. Dec. 28, 2012)...1

Kush v. American States Ins. Co.,
853 F.2d 1380 (7th Cir. 1988) 14, 15, 17

Laskowski v. Spellings,
546 F.3d 822 (7th Cir. 2008) 19

LeBoon v. Lancaster Jewish Community Center Ass'n,
503 F.3d 217 (3d Cir. 2007) 11

McNeilly v. Land,
684 F.3d 611 (6th Cir. 2012) 8

Mitchell v. Helms,
530 U.S. 793 (2000)..12

NLRB v. Catholic Bishop of Chicago,
440 U.S. 490 (1979)..11

O'Brien v. HHS,
No. 12-3357 (8th Cir. Nov. 28, 2012) 1

Obama for America v. Husted,
697 F.3d 423 (6th Cir. 2012) 8

Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County,
450 F.3d 1295 (11th Cir. 2006) 11

Spencer v. World Vision, Inc.,
633 F.3d 723 (9th Cir. 2011) 11, 13

Thomas v. Review Bd. of Ind. Emp't Sec. Div.,
450 U.S. 707 (1981)..17

United States v. Lee,
455 U.S. 252 (1982)..16

University of Great Falls v. NLRB,
278 F.3d 1335 (D.C. Cir. 2002).. 12, 13, 15

Winter v. Natural Res. Def. Council, Inc.,
555 U.S. 7 (2008)..8

Statutes:

42 U.S.C. § 300gg-13(a)(1) 5

42 U.S.C. § 300gg-13(a)(2) 5

42 U.S.C. § 300gg-13(a)(3) 5

42 U.S.C. § 300gg-13(a)(4) 5

42 U.S.C. § 2000e *et seq* 8

42 U.S.C. § 2000e-1(a) 9

42 U.S.C. § 2000bb-1(a) 8

42 U.S.C. § 2000bb-1(b) 8

42 U.S.C. § 12113(d)(1) 9

42 U.S.C. § 12113(d)(2) 9

Regulations:

45 C.F.R. § 147.130(a)(1)(iv)(B) 6

75 Fed. Reg. 34,5382 (June 17, 2010) 19, 20

77 Fed. Reg. 8725 (Feb. 15, 2012) 5

78 Fed. Reg. 8456 (Feb. 6, 2013) 6

Legislative Material:

139 Cong. Rec. S14350-01 (daily ed. Oct. 26, 1993) 17

S. Rep. No. 103-111 (1993) 13

INTRODUCTION

The government respectfully submits this opposition to plaintiffs' motion for an injunction pending appeal, and also moves to hold this appeal in abeyance pending this Court's decision in *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir.), which will be heard on June 11 before Judges Gibbons, Stranch, and Hood.

This appeal presents the same Religious Freedom Restoration Act ("RFRA") claim that is pending before this Court in *Autocam*. In both cases, the plaintiffs contend that for-profit, secular corporations must be exempted from the federal requirement that the group health plans sponsored by the corporations include coverage of contraceptives. The district courts in both cases denied preliminary injunctions, finding that the plaintiffs failed to establish a likelihood of success on the merits of their RFRA claims.

The *Autocam* plaintiffs moved for an injunction pending appeal, which this Court denied. *See* No. 12-2673 (6th Cir. Dec. 28, 2012). The *Autocam* plaintiffs sought reconsideration of that order after the Seventh Circuit issued an injunction pending appeal in another contraceptive-coverage case, *Korte v. HHS*, No. 12-3841 (7th Cir. Dec. 28, 2012). This Court denied the motion for reconsideration. *See* No. 12-2673 (6th Cir. Dec. 31, 2012).[1]

---

[1] The Third Circuit and the Tenth Circuit also denied motions to enjoin the contraceptive-coverage requirement pending appeal. *See Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144 (3d Cir. Feb. 7, 2013); *Hobby Lobby*

This Court should deny the motion for an injunction pending appeal in this case for the same reasons. Plaintiffs contend that Eden Foods—which is a for-profit corporation that packages and distributes natural foods—should be exempted from the requirement that the Eden Foods group health plan cover Food and Drug Administration ("FDA")-approved contraceptives, as prescribed by a health care provider for Eden Foods employees or their family members. No court has ever granted a religious exemption to a for-profit corporation. Plaintiffs note that "corporations" have brought free exercise claims, Pl. Mot. 14 n.16, but the cases they cite involved claims by churches or synagogues—not for-profit, secular corporations.

In a series of federal employment statutes, Congress has granted non-profit, religious institutions latitude to rely on religion to defeat the rights of their employees, but these religious exemptions have never been extended to for-profit corporations. Nothing in RFRA overrode the distinction between religious institutions and for-profit, secular corporations. That distinction is rooted in "the text of the First Amendment," *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 706 (2012), and embodied in federal law.

Stores, Inc. v. Sebelius, No. 12-6294 (10th Cir. Dec. 20, 2012). The Eighth Circuit and the D.C. Circuit granted such motions, but the orders did not address the merits of the claims. *See O'Brien v. HHS*, No. 12-3357 (8th Cir. Nov. 28, 2012); *Annex Medical, Inc. v. Sebelius*, No. 13-1118 (8th Cir. Feb. 1, 2013); *Gilardi v. HHS*, No. 13-5069 (D.C. Cir. March 29, 2013).

Plaintiffs cannot circumvent this distinction by claiming that the contraceptive-coverage requirement is a substantial burden on the personal religious beliefs of Mr. Potter, who is the sole shareholder of Eden Foods. As the district court explained in *Autocam*, the obligation to provide contraceptive coverage lies with the corporation that sponsors a group health plan, not with a shareholder in his individual capacity. Although plaintiffs declare that Mr. Potter is "indistinguishable" from Eden Foods, Pl. Mot. 13 n.13, the Supreme Court has emphasized that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). As *Cedric Kushner* illustrates, that bedrock tenet of corporate law "remains fully applicable even where, as here, the individual who seeks redress for corporate injuries is the corporation's sole shareholder." *B&V Distributing Co., Inc. v. Dottore Companies, LLC*, 278 Fed. App'x 480, 485 (6th Cir. 2008). "It would be entirely inconsistent to allow [Mr. Potter] to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging" the contraceptive-coverage requirement. *Conestoga Wood Specialties Corp. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 140110, *8 (E.D. Pa. Jan. 11, 2013), *appeal pending*, No. 13-1144 (3d Cir.) (following the reasoning of *Autocam*).

Plaintiffs' position has no discernible limits. On their reasoning, any sincerely held religious objection that is asserted by an officer or shareholder of a for-profit, secular corporation would be a basis to subject a corporate regulation to strict scrutiny. That is not a tenable interpretation of RFRA.[2]

STATEMENT

A. Statutory and Regulatory Background

Congress has long regulated certain terms of group health plans, and the Patient Protection and Affordable Care Act establishes additional minimum standards for such plans. As a component of the Act's emphasis on cost-saving preventive care, Congress provided that a non-grandfathered plan must cover certain preventive health services without cost sharing, that is, without requiring plan participants to make co-payments or pay deductibles. These preventive health services include immunizations recommended by the Advisory Committee on

---

[2] We note also that, in recent public interviews, Mr. Potter has called into question the sincerity of his stated religious objection to contraceptive coverage. Mr. Potter reportedly told one interviewer:

> I've got more interest in good quality long underwear than I have in birth control pills. . . . I don't care if the federal government is telling me to buy my employees Jack Daniel's or birth control. What gives them the right to tell me that I have to do that? That's my issue, that's what I object to, and that's the beginning and end of the story.

Http://thinkprogress.org/justice/2013/04/15/1866301/how-a-right-wing-ceos-big-mouth-could-kill-his-attack-on-birth-control/.

Immunization Practices, *see* 42 U.S.C. § 300gg-13(a)(2); items or services that have an "A" or "B" rating from the U.S. Preventive Services Task Force, *see id.* § 300gg-13(a)(1); preventive care and screenings for infants, children, and adolescents as provided in guidelines of the Health Resources and Services Administration ("HSRA"), a component of the Department of Health and Human Services ("HHS"), *see id.* § 300gg-13(a)(3); and certain additional preventive services for women as provided in HRSA guidelines, *see id.* § 300gg-13(a)(4).

Collectively, these preventive health services provisions require coverage of an array of recommended services including immunizations, blood pressure screening, mammograms, cervical cancer screening, and cholesterol screening.[3] HRSA commissioned a study by the Institute of Medicine to help it develop the statutorily required preventive services guidelines for women. Consistent with the Institute's recommendations, the regulations require coverage for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity, as prescribed by a provider." 77 Fed. Reg. 8725 (Feb. 15, 2012) (internal quotation marks omitted). FDA-approved contraceptive methods include diaphragms, oral

[3] *See*, *e.g.*, U.S. Preventive Services Task Force "A" and "B" Recommendations, *available at* http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm.

contraceptive pills, injections and implants, emergency contraceptive drugs, and intrauterine devices.[4]

The regulations authorize an exemption from the contraceptive-coverage requirement for the group health plan of any organization that qualifies as a religious employer. *See* 45 C.F.R. § 147.130(a)(1)(iv)(B). The Departments that issued the regulations have proposed to simplify this exemption and also have set out proposals to accommodate religious objections to the provision of contraceptive coverage raised by other non-profit, religious organizations. *See* 78 Fed. Reg. 8456, 8461-62 (Feb. 6, 2013) (notice of proposed rulemaking). The proposed accommodations do not extend to for-profit, secular corporations such as Eden Foods. *See id*. at 8462. The Departments explained that "[r]eligious accommodations in related areas of federal law, such as the exemption for religious organizations under Title VII of the Civil Rights Act of 1964, are available to nonprofit religious organizations but not to for-profit secular organizations." *Ibid*. Consistent with this longstanding federal law, the Departments proposed to limit the definition of organizations eligible for the accommodations "to include nonprofit religious organizations, but not to include for-profit secular organizations." *Ibid*.

---

[4] *See* Birth Control Guide, FDA Office of Women's Health, *available at* http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM282014.pdf (last updated Jan. 2013).

B. Factual Background and District Court Proceedings

Eden Foods is a for-profit corporation that packages and distributes natural foods. *See* R.1 at Page ID ##6-8 (complaint). The corporation has 128 full-time employees. *See id*. at Page ID #5.

Mr. Potter is the sole shareholder, chairman, and president of Eden Foods. *See id*. at Page ID #5. Mr. Potter alleges that all forms of contraception are contrary to his religious beliefs. *See id*. at Page ID ##12-13. The corporation, however, does not hire employees on the basis of their religion, and the employees thus need not share Mr. Potter's religious beliefs.[5]

The Eden Foods group health plan provides health coverage as one of the non-cash benefits that employees receive as part of their compensation packages. *See id*. at Page ID #14. The plan currently covers contraceptives. *See id*. at Page ID #16. Plaintiffs contend that, under RFRA, the Eden Foods plan must be exempted from the requirement to cover FDA-approved contraceptives, as prescribed by a health care provider. The district court denied a preliminary injunction, concluding that plaintiffs failed to establish a likelihood of success on the merits of their RFRA claim. *See* R.22 at Page ID ##606-615.

---

[5] As noted above, Mr. Potter's recent public interviews called into question the sincerity of his own stated religious objection to contraceptives. *See* n.2, *supra*.

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 seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest.'" *Obama for America v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012) (quoting *Winter*, 555 U.S. at 20). The district court correctly held that plaintiffs cannot establish a likelihood of success on the merits of their RFRA claim.[6]

A. RFRA Does Not Authorize A For-Profit, Secular Corporation To Deny Employee Benefits On The Basis Of Religion.

RFRA provides that the government shall not substantially burden a person's exercise of religion unless that burden is the least restrictive means to advance a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1(a), (b). Plaintiffs contend that, by enacting this statute, Congress gave for-profit, secular

[6] Even assuming that the "sliding scale" standard that plaintiffs cite survives *Winter*, *see* Pl. Mot. 3, plaintiffs must establish a likelihood of success because they seek "to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme," *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir. Dec. 20, 2012), and because their asserted harm (a substantial burden on religious exercise) depends on their likelihood of success on the merits. *See*, *e.g.*, *McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012) ("Because [plaintiff] does not have a likelihood of success on the merits . . . his argument that he is irreparably harmed by the deprivation of his First Amendment rights also fails.").

corporations the right to deny employee benefits on the basis of religion. That is not a plausible interpretation of RFRA.

Congress enacted RFRA against the backdrop of federal employment statutes that allow religious organizations to deny their employees certain benefits on the basis of religion. These exemptions have never been extended to for-profit, secular corporations. Likewise, RFRA cannot properly be interpreted to extend to for-profit, secular corporations the prerogatives that Congress has otherwise reserved to religious organizations. The distinction between religious organizations and for-profit, secular corporations is rooted in "the text of the First Amendment," *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 706 (2012), and it avoids the Establishment Clause problems that would arise if religious exemptions were extended to entities that operate in the "commercial, profit-making world." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987).

In the context of employment, granting a religious exemption to an employer comes at the expense of the employees, who lose benefits to which they are otherwise entitled. Under the Supreme Court's free exercise jurisprudence, even a church has only a limited right to invoke religion to defeat the rights of its employees. "Since the passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* and other employment discrimination laws, the Courts of

Appeals have uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705 (2012). This "ministerial exception" does not extend to lay employees, however. "The exception instead ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical,'—is the church's alone." *Id*. at 709 (citation omitted).

Congress has authorized specific exemptions for religious employers in federal statutes that regulate the employment relationship, but these religious exemptions have never been extended to for-profit corporations. Under Title VII of the Civil Rights Act of 1964, an employer cannot discriminate on the basis of religion in the terms or conditions of employment, including employee compensation, unless the employer is "a religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1(a) (collectively, "religious organization"). Similarly, the Americans with Disabilities Act ("ADA"), which prohibits employment discrimination on the basis of disability, includes specific exemptions for religious organizations. *See* 42 U.S.C. § 12113(d)(1), (2). And the National Labor Relations Act ("NLRA"), which gives employees collective bargaining and other rights against their employers, has been

interpreted to exempt church-operated educational institutions from the jurisdiction of the National Labor Relations Board. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

The organizations found to qualify for these religious exemptions all have been non-profit, religious organizations, as in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987). There, the Supreme Court held that Title VII's religious employer exemption allowed the Mormon Church to discharge a building engineer who failed to observe the Church's standards in such matters as church attendance, tithing, and abstinence from coffee, tea, and alcohol. *See id*. at 330 & n.4.[7]

The Supreme Court in *Amos* rejected the claim that Title VII's religious employer exemption impermissibly advances religion in violation of the Establishment Clause. The Court recognized that, "[a]t some point, accommodation may devolve into an unlawful fostering of religion," but it concluded that *Amos* was not such a case. *Id*. at 335-336 (citation and quotation marks omitted). The Court explained that the concern identified by the district

[7] *See also, e.g., LeBoon v. Lancaster Jewish Community Center Ass'n*, 503 F.3d 217, 221 (3d Cir. 2007) (non-profit Jewish community center); *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 190 (4th Cir. 2011) (non-profit nursing-care facility run by an order of the Roman Catholic Church); *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724-725 (9th Cir. 2011) (per curiam) (non-profit Christian humanitarian organization); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1300 (11th Cir. 2006) (non-profit Hispanic Baptist congregation affiliated with the Southern Baptist Convention).

court in *Amos*—that "sustaining the exemption would permit churches with financial resources impermissibly to extend their influence and propagate their faith by entering the commercial, profit-making world"—was not implicated by the facts of *Amos*, which involved only a church's "nonprofit activity." *Id*. at 337. The concurring opinions in *Amos* likewise stressed that only nonprofit activities were at issue.[8] *See also Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (reiterating that the "Federal Government may exempt secular nonprofit activities of religious organizations from Title VII's prohibition on religious discrimination in employment") (citing *Amos,* 483 U.S. at 329-330).

No court has ever extended the religious employer exemptions in Title VII, the NLRA, the ADA, or any other federal statute to a "commercial, profit-making" entity. *Amos*, 483 U.S. at 337. The D.C. Circuit has explained that an entity's non-profit status is an objective criterion that allows courts to distinguish potentially religious organizations from secular companies, without "'trolling through a person's or institution's religious beliefs.'" *University of Great Falls v. NLRB*, 278 F.3d 1335, 1341-42 (D.C. Cir. 2002) (quoting *Mitchell v. Helms*, 530

[8] *See Amos*, 483 U.S. at 341 (Brennan, J., concurring) ("I write separately to emphasize that my concurrence in the judgment rests on the fact that these cases involve a challenge to the application of § 702's categorical exemption to the activities of a *nonprofit* organization."); *id*. at 349 (O'Connor, J., concurring) ("Because there is a probability that a nonprofit activity of a religious organization will itself be involved in the organization's religious mission, in my view the objective observer should perceive the Government action as an accommodation of the exercise of religion rather than as a Government endorsement of religion.").

U.S. 793, 828 (2000) (plurality opinion)). "As the *Amos* Court noted, it is hard to draw a line between the secular and religious activities of a religious organization." *Id*. at 1344. By contrast, "it is relatively straight-forward to distinguish between a non-profit and a for-profit entity." *Ibid*.[9]

Plaintiffs contend that RFRA should be interpreted to "trump" Title VII and other federal employment statutes, and to extend to profit-making commercial businesses the type of religious exemptions that Congress otherwise has reserved to non-profit religious institutions. R.18 at Page ID #481. When Congress enacted RFRA, however, it specified that nothing in RFRA should be construed to affect Title VII's religious accommodation. *See* S. Rep. No. 103-111, at 13 (1993). As Congress understood, extending religious exemptions to corporate employers that operate in the "commercial, profit-making world," *Amos*, 483 U.S. at 337, would impermissibly advance religion to the detriment of the employees, who are autonomous human beings with rights and beliefs of their own.

Plaintiffs do not contend that Eden Foods, qualifies for the religious employer exemptions in Title VII, the ADA, the NLRA, or any other federal statute that regulates the employment relationship. Likewise, RFRA provides no basis to exempt the corporation from the regulations that govern the health

---

[9] The Ninth Circuit has suggested that even a non-profit religious organization might not qualify for a religious exemption if it "engage[s] primarily or substantially in the exchange of goods or services for money beyond nominal amounts." *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011).

coverage under the Eden Foods group health plan, which is a significant aspect of employee compensation.

B. The Obligation To Cover Contraceptives Lies With Eden Foods, Not With The Corporation's Shareholder.

Plaintiffs cannot circumvent the distinction between non-profit, religious organizations and for-profit, secular corporations by declaring that the regulation of the Eden Foods group health plan is a substantial burden on Mr. Potter's personal exercise of religion. Federal law does not require Mr. Potter to provide health coverage to Eden Food employees, or to satisfy the myriad other requirements that federal law places on Eden Foods. These obligations lie with the corporation itself.

Although plaintiffs seek to blur this distinction, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). As *Cedric Kushner* illustrates, that principle applies with equal force where, as here, an individual is the corporation's sole shareholder. "Indeed, in one sense the rule may be more rigid in a sole shareholder situation." *Kush v. American States Ins. Co.*, 853 F.2d 1380, 1384 (7th Cir. 1988). If an individual chooses "to operate his business in corporate form," that form gives him "several advantages over operations as an unincorporated sole proprietorship, not the least

of which was limitation of liability." *Ibid*. An individual "may not move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms." *Ibid*.; *see also Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc.,* 862 F.2d 597, 602-603 (6th Cir. 1988) ("the circuits are consistent in holding that 'an action to redress injuries to a corporation . . . cannot be maintained by a stockholder in his own name'") (citing cases).

Just as *Cedric Kushner* interpreted the federal RICO statute in a way that reflects these background principles of corporate law, RFRA too is properly construed to reflect the same background principles. "It would be entirely inconsistent to allow [Mr. Potter] to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging" the contraceptive-coverage requirement. *Conestoga Wood Specialties Corp. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 140110, *8 (E.D. Pa. Jan. 11, 2013). "The law protects that separation between the corporation and its owners for many worthwhile purposes." *Autocam Corp. v. Sebelius*, 2012 WL 6845677, *7 (W.D. Mich. Dec. 24, 2012). "Neither the law nor equity can ignore the separation when assessing claimed burdens on the individual owners' free exercise of religion caused by requirements imposed on the corporate entities they own." *Ibid*.

The Supreme Court has never suggested that the regulation of a corporation could be regarded as a substantial burden on the personal religious beliefs of a

controlling shareholder. Plaintiffs rely on *United States v. Lee*, 455 U.S. 252 (1982), *see* Pl. Mot. 15, but *Lee* considered a free exercise claim raised by an individual Amish employer—not by a corporation or its shareholder. Moreover, even with respect to the individual employer, *Lee* rejected the free exercise claim. The Supreme Court emphasized that, "[w]hen followers of a particular sect enter into commercial activities 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. The Court explained that "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees," *ibid.*, who would be denied their social security benefits if the employer did not pay the social security taxes.

C. The Decisions That Employees Make About How To Use Their Comprehensive Health Coverage Cannot Properly Be Attributed To Their Employer.

For the reasons discussed above, plaintiffs' attempt to conflate Eden Foods with its controlling shareholder cannot salvage their RFRA claim. Even apart from this central flaw in plaintiffs' position, their claim fails because an employee's decision to use her health coverage for a particular item or service cannot properly be attributed to her employer, much less to a corporation's shareholders.

A plaintiff does not "show[] a burden to be substantial simply by claiming that it is." *Conestoga Wood*, 2013 WL 140110, *10. Although "'courts are not the arbiters of scriptural interpretation, *Thomas v. Review Bd. of Ind. Emp't Sec. Div*., 450 U.S. 707, 718 (1981), the RFRA still requires the court to determine whether the burden imposes on a plaintiff's stated religious beliefs is 'substantial.'" *Ibid*. Otherwise, "the standard expressed by Congress under the RFRA would convert to an 'any burden' standard." *Id*. at *13. Congress, however, amended the initial version of RFRA to add the word "substantially," and thus made clear that "any burden" would not suffice. *See* 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy & text of Amendment No. 1082).

Eden Foods employees are free to use the wages they receive from the corporation to pay for contraceptives. Plaintiffs do not suggest that these individual decisions by Eden Foods employees can be attributed to the corporation or to Mr. Potter, or that the federal minimum wage law implicates Mr. Potter's religious exercise. "Implementing the challenged mandate will keep the locus of decision-making in exactly the same place: namely, with each employee, and not" the corporation or its shareholder. *Autocam Corp.*, 2012 WL 6845677, *6. "It will also involve the same economic exchange at the corporate level: employees will earn a wage or benefit with their labor, and money originating from [Eden Foods] will pay for it." *Ibid*.

A group health plan "covers many medical services, not just contraception." *Grote v. Sebelius*, 708 F.3d 850, 865 (2013) (Rovner, J., dissenting). "To the extent" that Mr. Potter is "funding anything at all—and . . . one must disregard the corporate form to say that" he is—he is "paying for a plan that insures a comprehensive range of medical care that will be used in countless ways" by the employees and their family members who participate in the Eden Foods group health plan. *Ibid*. "No individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [Mr. Potter's] decision or action." *Ibid*.

The religious objection that plaintiffs assert here most closely resembles the religious objection that the Supreme Court has long deemed non-cognizable in the taxpayer standing context. In *Doremus v. Board of Ed. of Hawthorne,* 342 U.S. 429 (1952), the Court explained that "'the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure.'" *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 600 (2007) (plurality op.) (quoting *Doremus*, 342 U.S. at 433). The *Doremus* Court "therefore rejected a state taxpayer's claim of standing to challenge a state law authorizing public school teachers to read from the Bible because 'the grievance which [the plaintiff] sought to litigate ... is not a direct dollars-and-cents

injury but is a religious difference.'" *Id*. at 600-601 (quoting *Doremus*, 342 U.S. at 434); *see also id*. at 609-610 (there is "no taxpayer standing to sue under Free Exercise Clause").[10] Here, too, the connection between an employer's contribution to premiums for a comprehensive insurance policy and the decisions that employees make about how to use that comprehensive coverage is too attenuated to establish a cognizable burden on the employer's exercise of religion, much less to demonstrate that the putative burden is substantial.

D. The Contraceptive-Coverage Requirement Is Narrowly Tailored To Advance Compelling Governmental Interests.

The contraceptive-coverage requirement is also narrowly tailored to advance compelling governmental interests. Plaintiffs contend that an employee's interest in obtaining coverage of women's preventive health services cannot be compelling because grandfathered plans are not subject to the statutory requirement to cover preventive health services. But the grandfathering provision on which plaintiffs rely does not establish the type of permanent exemption that plaintiffs demand here. The grandfathering provision is transitional in effect, and it is expected that a majority of plans will lose their grandfathered status by the end of 2013. *See* 75 Fed. Reg. 34,538, 34,552 (June 17, 2010). Changes to a group health plan such as the elimination of certain benefits, an increase in cost-sharing requirements, or a

[10] "Justice Alito's plurality opinion in *Hein* 'is controlling because it expresses the narrowest position taken by the Justices who concurred in the judgment.'" *Laskowski v. Spellings*, 546 F.3d 822, 827 (7th Cir. 2008) (citations omitted).

decrease in employer contributions can cause a plan to lose its grandfathered status. *See* 45 C.F.R. § 147.140(g). The Eden Foods plan is not grandfathered because plaintiffs made the economic decision to increase the percentage that plan participants and beneficiaries pay through cost-sharing. *See* R.1 at Page ID #20 (complaint ¶ 118). Having made that economic decision, plaintiffs cannot now contend that the Eden Foods plan should be treated as if it were grandfathered.

Plaintiffs alternatively contend that, instead of regulating the terms of group health plans, the federal government could "subsidize contraception" for Eden Foods employees. Pl. Mot. 18-19. This argument reflects a fundamental misunderstanding of the "least restrictive means" test, which does not require the government to "subsidize private religious practices." *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 94 (Cal. 2004).

CONCLUSION

Plaintiffs' motion for an injunction pending appeal should be denied, and this appeal should be held in abeyance pending this Court's decision in *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir.).

Respectfully submitted,

MARK B. STERN
(202) 514-1597

/s Alisa B. Klein

ALISA B. KLEIN
(202) 514-1597
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Room 7235
Washington, D.C. 20530

May 31, 2013

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2013, I filed and served the foregoing opposition and motion on counsel of record through this Court's CM/ECF system.

/s Alisa B. Klein

Alisa B. Klein