IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANCIS A. GILARDI, JR., *et al.*	)	
Plaintiffs,	)	
v.	)	Case No. 1:13-cv-104-EGS
KATHLEEN SEBELIUS, *et al.*	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR 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 certain preventive services that medical experts deem necessary for women's health and well-being. The preventive services coverage regulations that plaintiffs challenge 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).[1] As relevant here, except as to group health plans of certain non-profit religious employers (and group coverage sold in connection with those plans), 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 contraceptive coverage requirement is intended to improve the health of women and newborns, ensure that women have equal access to preventive care, and level the playing field for women in the workplace.

The plaintiffs in this case are Fresh Unlimited, Inc., d/b/a Freshway Foods, and Freshway Logistics, Inc. – two for-profit, secular companies based in Ohio (referred to collectively as the "Freshway companies" or the "Freshway corporations"), engaged in the business of fresh produce processing and packing, and for-hire carrying of refrigerated products – as well as the owners of the Freshway corporations, Francis A. Gilardi, Jr. and Philip M. Gilardi (the "Gilardis"). Plaintiffs claim that their sincerely held religious beliefs prohibit them from providing health coverage for contraceptive services. Plaintiffs' challenge rests largely on the theory that for-profit, secular corporations engaged in processing, packing, and carrying produce 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

[1] A grandfathered plan is one that was in existence on March 23, 2010 and that has not undergone any of a defined set of changes. 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140.

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 owners of a for-profit, secular corporation eliminate the legal separation provided by the corporate form, which the owners have chosen because it benefits them, to impose their personal religious beliefs on the corporation's employees.

To hold otherwise would permit for-profit, secular corporations and their owners to become laws unto themselves. In fact, plaintiffs' theory in this case is that, by enacting RFRA, Congress gave for-profit corporations the "right to ignore anti-discrimination laws, . . . refuse to pay payroll taxes, violate OSHA requirements, etc." in the name of religious freedom, unless these requirements survive "strict scrutiny," Pls.' Statement of Law and Auth. in Support of Pls.' Mot. for Prelim. Inj., ("Pls.' Br.") at 15, ECF No. 6, which is "'the most demanding test known to constitutional law,'" *id.* at 17 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)). This cannot be. Because there are an infinite variety of alleged religious beliefs, such companies and their owners could claim exemptions from an untold number of general 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. Three of the five circuits to have considered claims similar to those in this case have agreed with the government and denied injunctions pending appeal. This Court should do the same, and reject plaintiffs' effort to bring about an unprecedented expansion of constitutional and statutory free exercise rights.

For these reasons and others, plaintiffs' motion for preliminary injunction should be denied because plaintiffs are not likely to succeed on the merits of their claims under the Religious Freedom Restoration Act (RFRA) – the only claim for which plaintiffs seek a preliminary injunction. Plaintiffs cannot show, as they must under RFRA, that the preventive services coverage regulations impose a substantial burden on their religious exercise. Three of

the five circuits to have considered this question have agreed with the government's position when plaintiffs' have sought injunctions pending appeal. The Freshway corporations are for-profit, secular employers, and a secular entity – by definition – does not exercise religion. Indeed, 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.*, *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, slip op. at 6 (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."); *Korte v. U.S. Dep't of Health & Human Servs.*, __ F Supp. 2d __, 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).[2]

The claim that the regulations burden the religious exercise of the Freshway corporations' owners fares 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 the Gilardis to eliminate that legal separation to impose their personal religious beliefs on the corporate entities' group health plans or their employees. Only the corporations are subject to the

[2] By contrast, those courts that have ruled against defendants in similar cases have unanimously bypassed the question of whether a for-profit, secular corporation can "exercise religion" under RFRA. *See, e.g., Tyndale House Publishers, Inc. v. Sebelius*, __ F. Supp. 2d __, 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 religions within the meaning of the RFRA and the Free Exercise Clause."). While defendants firmly believe that they are likely to prevail on this question, the Court need not reach the issue in order to rule in defendants' favor and deny a preliminary injunction. *See, e.g., Grote Industries, LLC v. Sebelius*, __ F. Supp. 2d __, 2012 WL 6725905, at *4 (S.D. Ind. Dec. 27, 2012) (expressing "doubts regarding whether a secular, for-profit corporation can be deemed to possess free exercise rights," but declining to reach the issue and finding that the challenged regulations do "not place a 'substantial burden' on either" the corporation's or its owners' free exercise rights even assuming that corporations have such rights).

challenged regulations, and thus the corporations' 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*, __ F Supp. 2d __, 2013 WL 140110, at *7-*8 (E.D. Pa. Jan. 11, 2013); *Conestoga*, slip op. 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.). The owners and shareholders of the Freshway corporations cannot use the corporate form alternatively as a shield and a sword, depending on what suits them in any given circumstance.

Furthermore, even if a secular entity could exercise religion, the regulations still do not substantially burden the companies' or their owners' exercise of religion for an independent reason: any burden caused by the regulations is simply too attenuated to qualify as a *substantial* burden. *See Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012); *Hobby Lobby*, 870 F. Supp. 2d at 1294; *Conestoga*, 2013 WL 140110, at *12-*14; *Autocam*, 2012 WL 6845677, at *6-*7; *Grote v. Sebelius*, __ F.3d __, 2013 WL 362725, at *9, *13-*14 (7th Cir. Jan. 30, 2013) (Rovner, J., dissenting); *Grote Industries, LLC v. Sebelius*, __ F. Supp. 2d __, 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 pending*, No. 13-1077 (7th Cir.); *Korte*, 2012 WL 6553996, at *10; *Annex Medical, Inc. v. Sebelius*, No. 12-cv-2804, 2013 WL 101927, at *4-*5 (D. Minn. Jan. 8, 2013); *O'Brien v. HHS*, __ F. Supp. 2d __, 2012 WL 4481208, at *5-*7 (E.D. Mo. Sept. 28, 2012), *appeal docketed*, No. 12-3357 (8th Cir. Oct. 4, 2012). Just as employees of the Freshway corporations have always retained the ability to choose whether to procure contraceptive services by using the salaries the company 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' (or their employees' spouses or dependents) use of contraceptive services (or any other services). But ultimately, an employee's health care choices remain those

of the employee and his or her family, in consultation with their health care provider, not of plaintiffs.

And even if the challenged regulations were deemed to substantially burden any plaintiff's religious exercise, the regulations would not violate RFRA because they are narrowly tailored to serve two compelling governmental interests: improving the health of women and 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 also cannot establish the remaining requirements for obtaining preliminary injunctive relief. Even if plaintiffs could show a likelihood of success on the merits – which they cannot – the Court should not grant their request for a preliminary injunction because, in light of a delay of almost a year and a half between the enactment of the challenged regulations 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. Plaintiffs should not be rewarded for creating their own alleged emergency. 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 the large number of employees at the Freshway corporations – 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.

In support of their arguments, plaintiffs rely heavily on Judge Walton's decision in *Tyndale House Publishers, Inc. v. Sebelius*, __ F. Supp. 2d __, 2012 WL 5817323 (D.D.C. Nov. 16, 2012). This reliance is misplaced for two reasons. First, with due respect to Judge Walton and as explained in more detail throughout this brief, *Tyndale* was wrongly decided. The Tyndale court erred in several respects. For example, the court erroneously concluded – contrary to settled corporate law – that corporations and their owners are inseparable, and thus that a requirement imposed on a corporation – as to which the corporation's owners are not asked to

comply – can nonetheless impose a substantial burden on the owners themselves. In addition, the court held that the challenged regulations substantially burden the plaintiffs' religious exercise even though any burden is highly attenuated and depends on the choices of individual employees to use the covered contraceptive service. Second, even if this Court believes that *Tyndale* was correctly decided, it is easily distinguishable from this case. Judge Walton's ruling was explicitly based on Tyndale's "unique corporate structure," which distinguished *Tyndale* from other cases involving secular, for-profit corporate plaintiffs similar to the Freshway corporations. *Id.* at *7 n.10.

Finally, defendants note that plaintiffs dramatically overstate the extent to which their arguments are supported by other decisions in cases similar to this one. *See* Pls.' Br. at 2. Fourteen district courts have considered RFRA challenges to the contraceptive coverage regulations brought by for-profit companies and/or their owners. Exactly half have ruled in defendants' favor.[3] And of the seven district courts that ruled against defendants, three did not actually find that the plaintiffs had a likelihood of success on the merits of their RFRA claims,[4]

[3] *See Hobby Lobby*, 870 F. Supp. 2d 1278; *Conestoga*, 2013 WL 140110; *Autocam*, 2012 WL 6845677; *Grote*, 2012 WL 6725905; *Korte*, 2012 WL 6553996; *Annex Medical*, 2013 WL 101927; *O'Brien*, 2012 WL 4481208. Although the plaintiffs in *Grote*, *Korte*, *Annex Medical*, and *O'Brien* have been granted injunctions pending appeal by motions panels of the Seventh and Eighth Circuits (over dissents), *see Grote*, 2013 WL 362725; *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012); *Annex Medical, Inc. v. Sebelius*, No. 13-1118, slip op. (8th Cir. Feb. 1, 2013); *O'Brien v. HHS*, No. 12-3357, slip. op. (8th Cir. Nov. 28, 2012), those decisions are not binding and do not overrule the district court opinions, which are still good law. "Often a motions panel must decide an issue 'on a scanty record,' and its ruling is 'not entitled to the weight of a decision made after plenary submission.'" *United States v. Henderson*, 536 F.3d 776, 778 (7th Cir. 2008); *see also In re Rodriquez*, 258 F.3d 757, 759 (8th Cir. 2001); *Lambert v. Blackwell*, 134 F.3d 506, 513 n.17 (3d Cir. 1997). Indeed, the decision of a motions panel is not even binding on the merits panel in the same case. *See, e.g., Henderson*, 536 F.3d at 778; *cf. Homans v. City of Albuquerque*, 366 F.3d 900, 904-05 (10th Cir. 2004). Furthermore, for the reasons stated in this brief, defendants believe that the decisions of the motions panels were incorrect.

[4] *See Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012) (applying a relaxed preliminary injunction standard, by which the court did not require the plaintiffs to show a likelihood of success on the merits, and not deciding whether a for-profit company can exercise religion or whether the regulations impose a substantial burden on the exercise of religion, but only recognizing that these are "difficult questions of first impression"), *appeal pending*, No. 12-1380 (10th Cir.); *American Pulverizer Co. v. U.S. Dep't of Health and Human Servs.*, No. 12-cv-3459, 2012 WL 6951316, at *4 (W.D. Mo. Dec. 20, 2012) (same); *Legatus v. Sebelius*, __ F. Supp. 2d __, 2012 WL 5359630, at *6, *13 (E.D. Mich. Oct. 31, 2012) (assuming that plaintiffs could show a substantial burden on their religious exercise and entering a preliminary injunction despite finding that plaintiffs had not shown a likelihood of success on the merits), *appeals pending*, Nos. 13-1092 & 13-1093 (6th Cir.); *see also Conestoga*, 2013 WL 140110, at *4 (noting that "other courts that have decided cases with similar facts and ruled in favor of injunctive relief have generally applied a less rigorous standard" and citing cases).

which is a prerequisite for a preliminary injunction in this Circuit, *see, e.g.*, *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 304 (D.C. Cir. 2006), and one court did not actually address the merits of the plaintiffs' RFRA claims, but instead determined – incorrectly, *see supra* note 3 – that it was bound by appellate court rulings granting injunctions pending appeal.[5] And the outcomes slightly favor defendants in the appellate courts, where three circuits – the Third, Sixth, and Tenth – have ruled that plaintiffs are not entitled to injunctive relief pending appeal, *see Hobby Lobby*, 2012 WL 6930302; *Conestoga*, No. 13-1144, slip op.; *Autocam Corp. v. Sebelius*, No. 12-2673, slip op. (6th Cir. Dec. 28, 2012); while two circuits – the Seventh and Eighth – have reached the opposite conclusion, *see Grote*, 2013 WL 362725; *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012); *Annex Medical, Inc. v. Sebelius*, No. 13-1118, slip op. (8th Cir. Feb. 1, 2013); *O'Brien v. HHS*, No. 12-3357, slip. op. (8th Cir. Nov. 28, 2012).[6] The Supreme Court has also denied relief pending appeal to a for-profit, secular corporation like the Freshway companies, albeit applying a more rigorous standard. *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12A644, 2012 WL 6698888 (Dec. 26, 2012) (Sotomayor, J., in chambers).

For the reasons articulated above and throughout this brief, the Court should follow the rulings of the majority of courts and deny plaintiffs' motion for a preliminary injunction.

[5] *See Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs.*, Minute Entry, No. 1:12-cv-06756 (N.D. Ill. Jan 3, 2013), ECF No. 49.

[6] Furthermore, the Eighth Circuit has provided no explanation for its position. A motions panel issued a stay pending appeal in *O'Brien* in a one-sentence order that gave no reasons for its decision and was issued over a dissent. Shortly thereafter, a second motions panel issued a stay in *Annex Medical*, relying only on "a significant interest in uniform treatment of comparable requests for interim relief within this circuit." *See* No. 13-1118, slip op. at 5. As explained previously, the decision of a motions panel is not entitled to the weight of the decision of a merits panel. *See supra* note 3. That is particularly so where, as in *O'Brien* and *Annex Medical*, a motions panel gives no reasons for its action. *See, e.g., Gonzalez v. Arizona*, 485 F.3d 1041, 1046 (9th Cir. 2007) (noting Supreme Court vacated an injunction "because the motions panel gave no reasons for its action"); *Grote*, 2012 WL 6725905, at *3 n.3 ("Plaintiffs apparently believe that the Eighth Circuit's one sentence order constitutes a holding that a substantial burden and successful RFRA claim had been found, which, of course it does not."); *Korte*, 2012 WL 6553996, at *11 n.16 (noting that the Eighth Circuit's "one-sentence order" is not "tantamount to a holding that a substantial burden and successful RFRA claim had been found"). The Eighth Circuit panels' decisions stand in sharp contrast to the well-reasoned analysis provided by the Tenth, Sixth, and Third Circuit panels.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

Before the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), many Americans did not receive the preventive health care they needed to stay healthy, avoid or delay the onset of disease, lead productive lives, and reduce health care costs. Due largely to cost, Americans used preventive services at about half the recommended rate. *See* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 19-20, 109 (2011) ("IOM REP."), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited Feb. 25, 2013). Section 1001 of the ACA – which includes the preventive services coverage provision relevant here – seeks to cure this problem by making preventive care affordable and accessible for many more Americans. Specifically, the provision requires all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, "[for] women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]." 42 U.S.C. § 300gg-13(a)(4).

The government issued interim final regulations implementing the preventive services coverage provision on July 19, 2010. 75 Fed. Reg. 41,726. Those regulations provide, among other things, that a group health plan or health insurance issuer offering non-grandfathered health coverage must provide coverage for newly recommended preventive services, without cost-sharing, for plan years that begin on or after the date that is one year after the date on which the new recommendation is issued. 26 C.F.R. § 54.9815-2713T(b)(1); 29 C.F.R. § 2590.715-2713(b)(1); 45 C.F.R. § 147.130(b)(1). 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.[7] After 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). FDA, Birth Control Guide, *available at* http://www.fda.gov/forconsumers/byaudience/forwomen/ucm118465.htm (last visited Feb. 25, 2013). IOM determined that coverage, without cost-sharing, for these services is necessary to increase access, and thereby reduce unintended pregnancies (and the negative health outcomes that disproportionately accompany unintended pregnancies) and promote healthy birth spacing. IOM REP. at 102-03; *see infra* at 23.

On August 1, 2011, HRSA adopted IOM's recommendations, subject to an exemption relating to certain religious employers authorized by an amendment to the interim final regulations. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Feb. 25, 2013). The amendment, issued the same day, authorized HRSA to exempt group health plans established or maintained by certain religious employers (and associated group health insurance coverage) from any requirement to cover contraceptive services under HRSA's guidelines. 76 Fed. Reg. 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A).[8] The religious

[7] IOM was established in 1970 by the National Academy of Sciences and is funded by Congress. IOM REP. at iv. It secures the services of eminent members of appropriate professions to examine policy matters pertaining to the health of the public and provides expert advice to the federal government. *Id.*

[8] To qualify, an employer must meet all of the following criteria: (1) The inculcation of religious values is the purpose of the organization; (2) the organization primarily employs persons who share the religious tenets of the organization; (3) the organization serves primarily persons who share the religious tenets of the organization, and (4) the organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended. 45 C.F.R. § 147.130(a)(1)(iv)(B). However, a recently published Notice of Proposed Rulemaking (NPRM) would eliminate the first three criteria and modify the fourth criterion, thereby ensuring "that an otherwise exempt employer plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths." 78 Fed. Reg. 8456, 8459 (Feb. 6, 2013); *see also id.* at 8474.

employer exemption was modeled after the religious accommodation used in multiple states that already required health insurance issuers to cover contraception. 76 Fed. Reg. at 46,623.[9]

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 (and any associated group health insurance coverage). 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012). During the safe harbor, the government intends to amend the preventive services coverage regulations to further accommodate non-exempt, non-grandfathered religious organizations' religious objections to covering contraceptive services. *Id.* at 8728. The government began the process of further amending the regulations on March 21, 2012, when it published an Advance Notice of Proposed Rulemaking ("ANPRM") in the Federal Register, 77 Fed. Reg. 16,501 (Mar. 21, 2012), and took the next step in that process with the recent publication of a Notice of Proposed Rulemaking (NPRM), 78 Fed. Reg. 8456 (Feb. 6, 2013). The proposed accommodations do not extend to for-profit, secular corporations such as the Freshway companies. *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." *Id.* Consistent with these longstanding provisions, the Departments proposed to limit the definition of organizations eligible for the accommodation "to include nonprofit religious organizations, but not to include for-profit secular organizations." *Id.*

II. CURRENT PROCEEDINGS

Plaintiffs challenge the regulations to the extent they require the health coverage the Freshway companies make available to their employees to cover recommended contraceptive

[9] At least 28 states have laws requiring health insurance policies that cover prescription drugs to also provide coverage for FDA-approved contraceptives. *See* Guttmacher Institute, State Policies in Brief: Insurance Coverage of Contraceptives (Nov. 1, 2012), *available at* http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf (last visited Feb. 25, 2013).

services. Nearly a year and a half after the contraceptive coverage requirement was established, plaintiffs filed suit and moved for a preliminary injunction, claiming they will suffer irreparable harm if the regulations are not enjoined as to them. *See* Compl., ECF No. 1; Pls.' Br., ECF No. 6.

STANDARD OF REVIEW

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 equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20.

ARGUMENT

III. PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE THEIR RELIGIOUS FREEDOM RESTORATION ACT CLAIM IS WITHOUT MERIT

A. The preventive services coverage regulations do not substantially burden any exercise of religion by for-profit, secular companies and their owners

Under the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-1), the federal government generally may not "substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability.'" *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (quoting 42 U.S.C. § 2000bb-1(a)). But the government may substantially burden the exercise of religion if the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

For several reasons, plaintiffs cannot show that the challenged regulations substantially burden any exercise of religion, and thus cannot succeed on their RFRA claim. First, the Freshway companies are not individuals or "religious organizations," and thus cannot "exercise religion," under RFRA. *See, e.g.*, *Conestoga*, slip op. at 6 (Garth, J., concurring); *Conestoga*,

2013 WL 140110, at *6-*7; *Hobby Lobby*, 870 F. Supp. 2d at 1287-88, 1291-92; *Korte*, 2012 WL 6553996, at *6. Second, because the challenged regulations apply only to the corporations, and not to their owners, the religious exercise of the owners is not substantially burdened. *See Hobby Lobby*, 870 F. Supp. 2d at 1293-96; *Korte*, 2012 WL 6553996, at *9-*11; *Autocam*, 2012 WL 6845677, at *7; *Conestoga*, 2013 WL 140110, at *8; *Conestoga*, No. 13-1144, slip op. at 7 (Garth, J., concurring); *Grote*, 2013 WL 362725, at *6 (Rovner, J., dissenting). And third, any burden imposed by the regulations is attenuated and thus cannot be substantial. *See Hobby Lobby*, 2012 WL 6930302, at *3; *Hobby Lobby*, 870 F. Supp. 2d at 1294; *Conestoga*, 2013 WL 140110, at *12-*14; *Autocam*, 2012 WL 6845677, at *6-*7; *Grote*, 2013 WL 362725, at *9, *13-*14 (Rovner, J., dissenting); *Grote*, 2012 WL 6725905, at *5-*7; *Korte*, 2012 WL 6553996, at *10; *Annex Medical*, 2013 WL 101927, at *4-*5; *O'Brien*, 2012 WL 4481208, at *5-*7.

1. There is no substantial burden on the Freshway companies because a secular, for-profit corporation does not exercise religion

Plaintiffs' contention that the Freshway corporations "exercise . . . religion" with the meaning of RFRA, 42 U.S.C. § 2000bb-1(b), cannot be reconciled with the Freshway corporations' status as secular companies. 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 by RFRA. *See Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002) ("[T]he practice[] at issue must be of a religious nature."); *see also Hobby Lobby*, 870 F. Supp. 2d at 1291-92; *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). The Freshway companies are plainly secular. The companies' pursuits are not religious; they are for-profit, limited liability companies engaged in the processing, packing, and shipping of produce and other refrigerated products. *See* Compl. ¶¶ 16-18, ECF No. 1. Although defendants do not question the sincerity of the Gilardis' religious beliefs, the sincere religious beliefs of a company's owner do not make the company religious. Otherwise, every company

with a religious owner – no matter how secular the company's purpose – would be considered religious, which would dramatically expand the scope of RFRA and the Free Exercise Clause. *See Grote v. Sebelius*, __ F. 3d __, 2013 WL 362725, at *14 (7th Cir. Jan. 30, 2013) (Rovner, J., dissenting) (describing some of the potential consequences of such an expansion).

The government is aware of no case in which a for-profit, secular employer like the Freshway companies prevailed on a RFRA claim. Because the Freshway companies are secular employers, they are 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) (stating that the Supreme Court's precedent "radiates . . . a spirit of freedom for *religious* organizations, an independence from secular control or manipulation") (emphasis added); *Hosanna-Tabor*, 132 S. Ct. at 706 (Free Exercise Clause "protects a *religious* group's right to shape its own faith and mission") (emphasis added); *Werft v. Desert Sw. Annual Conference of the United Methodist Church*, 377 F.3d 1099, 1102 (9th Cir. 2004) ("The Free Exercise Clause protects . . . *religious* organizations . . . .") (citations and quotation marks omitted) (emphasis added); *Anselmo v. Cnty. of Shasta*, No. CIV. 2:12–361 WBS EFB, 2012 WL 2090437, at *13 (E.D. Cal. 2012) ("Although corporations and limited partnerships have broad rights, the court has been unable to find a single [Religious Land Use and Institutionalized Persons Act] case protecting the religious exercise rights of a non-religious organization such as Seven Hills."); *Hobby Lobby*, 870 F. Supp. 2d at 1288 (holding "secular, for-profit corporations . . . do not have constitutional free exercise rights"); *Conestoga*, 2013 WL 140110, at *6-*7; *Korte*, 2012 WL 6553996, at *6, *9-*10. Because RFRA incorporates Free Exercise jurisprudence, the same logic applies. *See Holy Land Found.*, 333 F.3d at 167. In short, only a religious organization can "exercise religion" under RFRA.

Indeed, no court has ever held that a for-profit, secular corporation is a "religious corporation" for purposes of federal law. For this reason, secular companies such as the Freshway companies cannot permissibly discriminate on the basis of religion in hiring or firing employees, or otherwise establishing the terms and conditions of employment. Title VII of the Civil Rights Act generally prohibits religious discrimination in the workplace. *See* 42 U.S.C. § 2000e-2(a). But that bar does not apply to "a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [a corporation] of its activities." *Id*. § 2000e-1(a). It is clear that the Freshway corporations do not qualify as "religious corporation[s]"; they are for-profit, they are not affiliated with a formally religious entity such as a church or synagogue, and they sell secular services. *See, e.g.*, *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007); *Spencer v. World Vision, Inc.*, 633 F.3d 723, 734, 748 (9th Cir. 2011) (explicitly holding that a for-profit entity can never qualify for the Title VII exemption); *cf. Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002) (holding that an organization can only be religious, and thus exempt from National Labor Relations Board jurisdiction, if it is organized as a non-profit).[10]

In this respect, the Freshway companies are very different from the corporate plaintiff in *Tyndale*, and are more comparable to the for-profit companies that have asserted similar claims in other litigation challenging the contraceptive coverage regulations, and that are engaged in a variety of secular pursuits such as the manufacture and sale of vehicle safety systems (*Grote*), wood cabinets (*Conestoga*), fuel systems (*Autocam*), arts and crafts supplies (*Hobby Lobby*), and mineral and chemical products (*O'Brien*). In *Tyndale*, Judge Walton explicitly stated that the company's "unique corporate structure" distinguished that case from those involving secular,

[10] The Americans with Disabilities Act, which prohibits employment discrimination on the basis of disability, also includes specific exemptions for religious organizations. *See* 42 U.S.C. § 12113(d)(1), (2); *Hosanna-Tabor*, 132 S. Ct. at 701 n.1 (discussing these exemptions). Similarly, the National Labor Relations Act 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). Defendants are unaware of any decision finding a for-profit entity to fall within the religious exemptions of any of these federal statutes or any other federal law.

for-profit corporate plaintiffs, such as those in this case. 2012 WL 5817323, at *7 n.10; *see also Grote*, 2013 WL 362725, at *5 (Rovner, J., dissenting) (distinguishing *Tyndale* from cases involving ordinary for-profit, secular corporations). The court noted that, although the corporation in *Tyndale* is a for-profit company, 96.5 percent of its shares are owned by – and the same percentage of its profits are donated to – a "non-profit religious entity" that distributes the funds to various religious charitable causes. *Id.* at *2-3, *6. And the court emphasized that the company in *Tyndale* was established to publish Bibles and Christian books, and that its Articles of Incorporation mention several religious purposes. *Id*. at *3, *6-*7. In fact, the court suggested that, due to its unusual corporate structure and characteristics, the corporation might qualify as a "religious corporation" under Title VII. *See id.* at *9 n.13. The Freshway companies share *none* of these characteristics with the corporation in *Tyndale*. *See* Compl. ¶ 28 (providing "[e]xamples of how Plaintiffs further their religious beliefs and moral values"). Instead, it appears that "the mission of [the Freshway companies], like that of any other for-profit, secular business, is to make money in the commercial sphere." *Grote*, 2013 WL 362725, at *5 (Rovner, J., dissenting). Although defendants respectfully disagree with Judge Walton's ruling in *Tyndale*, and believe that the company in *Tyndale* would not qualify as a religious corporation under Title VII and cannot exercise religion under RFRA, this case is clearly distinguishable in any event.[11]

It would be extraordinary to conclude that the Freshway companies are "religious corporation[s]" under Title VII (and they clearly are not) and thus cannot discriminate in employment on the basis of religion, 42 U.S.C. § 2000e-1(a), but nonetheless "exercise . . . religion" within the meaning of RFRA, *id.* § 2000bb-1(b).[12] Such a conclusion would allow a

[11] The corporate plaintiff in *Tyndale* has several other features that the Freshway companies do not share. For example, the corporation is directed by a trust "whose trustees adhere to a bibilical statement of faith and are the same individuals who serve as the board members" of the corporation. Compl. ¶ 2, *Tyndale*, No. 1:12-cv-1635-RBW, ECF No. 1; *see also id.* ¶¶ 21-39 (describing other characteristics of the corporation in *Tyndale*).

[12] Indeed, such a conclusion would undermine Congress's decision to limit the exemption in Title VII to religious organizations; any company that does not qualify for Title VII's exemption could simply sue under RFRA for an exemption from Title VII's prohibition against discrimination in employment. *See, e.g.*, *Franklin v. United States*, 992 F.2d 1492, 1502 (10th Cir. 1993) ("[E]ven where two statutes are not entirely harmonious, courts must, if possible, give effect to both, unless Congress clearly intended to repeal the earlier statute.") (citation omitted)).
(continued on next page…)

secular company 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. *See Autocam*, 2012 WL 686845677, at *7. Moreover, any secular company 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.

The Supreme Court cases relied on by plaintiffs, *see* Pls.' Br. at 12, are not to the contrary, as none of them held that a for-profit corporation may exercise religion. For example, *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981), all involved *individual* plaintiffs, not companies. Sherbert was an employee discharged for refusing to work on Saturdays; Yoder was a member of the Old Order Amish religion who objected to a compulsory school attendance law; and Thomas was a Jehovah's Witness seeking unemployment benefits. Similarly, the plaintiff in *Lee*, 455 U.S. 252, was an Amish individual who employed several other people on his farm; the plaintiff was not a secular company, much less a corporation with layers of legal separation from its owner. Nor are plaintiffs helped by *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), or *EEOC v. Townley Eng'g and Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988).

Judge Walton downplayed this concern in *Tyndale*, suggesting that subjecting Title VII to strict scrutiny would not have drastic consequences. *See* 2012 WL 5817323, at *9 n.13. But as the district court recognized in *Autocam*, "this theory would mean that every government regulation could be subject to the compelling interest and narrowest possible means test of RFRA based simply on an asserted religious basis for objections," which would "paralyze the normal process of governing." 2012 WL 6845677, at *7. For example, an employer with a religious objection to any other type of medical treatment – or to health insurance as a whole – might be able to refuse to provide coverage for such treatment. *See Grote*, 2013 WL 362725, at *14 (Rovner, J., dissenting). The owner of a corporation who has a religious objection to women in the workplace might be able to discriminate in hiring or salary. At the very least, federal laws that protect employees from such treatment would be subject to strict scrutiny – "the most demanding test known to constitutional law," *City of Boerne*, 521 U.S. at 534.

Plaintiffs' statement that both cases recognized that "corporations may assert their own free exercise rights," Pls.' Br. at 11 n.6, is fundamentally incorrect. Both cases expressly declined to decide whether "a for-profit corporation can assert its own rights under the Free Exercise Clause." *Stormans*, 586 F.3d at 1119; *see also Townley*, 859 F.2d at 619-20.[13] Instead, they held that the particular plaintiff corporations had standing to raise the rights of their owners. *Stormans*, 586 F.3d at 1119-22; *Townley*, 859 F.2d at 619-20 & n.15.[14] In fact, the government is not aware of a single case that held that a for-profit corporation can exercise religion under RFRA and the Free Exercise Clause. *See Hobby Lobby*, 870 F. Supp. 2d at 1288 ("Plaintiffs have not cited, and the court has not found, any case concluding that secular, for-profit corporations . . . have a constitutional right to the free exercise of religion.").

It is significant that the Gilardis elected to organize the Freshway companies as secular, for-profit entities 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. Having chosen this path, the corporation may not impose its owners' personal religious beliefs on its employees (many of whom may not share the owners' beliefs) by refusing to cover contraception. *See Lee*, 455 U.S. at 261 ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."); *Hobby Lobby*, 870 F. Supp. 2d at 1295-96; *Conestoga*, 2013 WL 140110, at *10. In this respect, "[v]oluntary commercial activity does not receive the same status accorded to directly religious activity." *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) (interpreting the Free Exercise Clause of the Alaska Constitution). For-profit, secular employers like the Freshway companies therefore stand

[13] The same is true of *Morr-Fitz, Inc. v. Blagojevich*, No. 2005-CH-000495, 2011 WL 1338081 (Ill. Cir. Ct. 7th, Apr. 5, 2011), which plaintiffs also cite. *See* Pls.' Br. at 11 n.6. The court in *Morr-Fitz* had no need to, and did not, address the question of whether a for-profit corporation can exercise religion. *See* 2011 WL 1338081.

[14] As explained in more detail shortly, neither *Stormans* nor *Townley* (nor any other case cited by plaintiffs) says anything about whether a burden on a corporation is also a burden on its owners. *See infra* at 22 & n.16.

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

2. The regulations do not substantially burden the religious exercise of the Freshway companies' owners because the regulations apply only to the corporations, which are separate and distinct legal entities

The preventive services coverage regulations also do not substantially burden the Gilardis' religious exercise. By their terms, the regulations apply to group health plans and health insurance issuers. 42 U.S.C. § 300gg-91(a)(1); 26 C.F.R. § 54.9815-2713T; 29 C.F.R. § 2590.715-2713; 45 C.F.R. § 147.130. The Gilardis do not challenge any obligations imposed directly on them. Thus, they cannot claim that the regulations substantially burden *their* religious exercise because the regulations require the group health plans sponsored by their for-profit secular *companies* to provide health insurance that includes contraceptive coverage. As several courts have explained in some detail, a plaintiff cannot establish a substantial burden on his religious exercise by invoking this type of trickle-down theory; to constitute a substantial burden within the meaning of RFRA, the burden must be imposed on the plaintiff himself. *See Hobby Lobby*, 870 F. Supp. 2d at 1293-96; *Conestoga*, 2013 WL 140110, at *8, *14; *Korte*, 2012 WL 6553996, *9-11; *Autocam*, 2012 WL 6845677, at *7; *see also Grote*, 2012 WL 6725905, at *5 (explaining that for a burden to be substantial, it must apply directly to the plaintiff). "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Indeed, "[i]n our modern regulatory state, virtually all legislation (including neutral laws of general applicability) imposes an incidental burden at some level by placing indirect costs on an individual's activity. Recognizing this . . . [t]he federal government . . . ha[s] identified a substantiality threshold as the tipping point for requiring heightened

justifications for governmental action." *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 262 (3d Cir. 2008) (Scirica, C.J., concurring); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (warning, in the RLUIPA context, that "[a]pplication of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise . . . would render meaningless the word 'substantial'"); *Living Water Church of God v. Charter Twp. of Meridian*, 258 Fed. App'x 729, 734 (6th Cir. 2007) ("In the 'Free Exercise' context, the Supreme Court has made clear that the 'substantial burden' hurdle is high.").

Here, any burden on the Gilardis' religious exercise results from obligations that the regulations impose on a legally separate, secular corporation's group health plan. This type of attenuated burden is not cognizable under RFRA.[15] Indeed, cases that find a substantial burden uniformly involve a direct burden on the plaintiff rather than a burden imposed on another entity. *See, e.g.*, *Lukumi*, 508 U.S. at 524; *Potter v. Dist. of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009); *Grote*, 2012 WL 6725905, at *5; *Conestoga*, 2013 WL 140110, at *14. Not so here, where the regulations apply to the group health plans sponsored by the Freshway companies, but not to their owners. *See Hobby Lobby*, 870 F. Supp. 2d at 1294; *Korte*, 2012 WL 6553996, at *9 ("[T]he RFRA 'substantial burden' inquiry makes clear that business forms and so-called 'legal fictions' cannot be entirely ignored – in this situation, they are dispositive."); *Autocam*, 2012 WL 6845677, at *7; *Conestoga*, 2013 WL 140110, at *8; *Conestoga*, No. 13-1144, slip op. at 7 (Garth, J., concurring); *Grote*, 2013 WL 362725, at *6 (Rovner, J., dissenting).

It is simply not the case, as plaintiffs claim, that "requiring the [Freshway] corporations to provide group health coverage that the Gilardis consider immoral is the same as requiring the Gilardis themselves to provide such immoral coverage." Pls.' Br. at 14. The Gilardis have chosen to enter into commerce and elected to do so by establishing for-profit corporations, which are legal entities separate and distinct from their shareholders and officers. *See, e.g.*, *My Father's*

[15] The attenuation is in fact twice removed. A group health plan is a legally separate entity from the company that sponsors it. 29 U.S.C. § 1132(d); *see also, e.g.*, *Grote*, 2013 WL 362725, at *6 (Rovner, J., dissenting). And, as explained below, the Freshway companies are legally separate entities from their owners.

House No. 1 v. McCardle, __ N.E.2d __, 2013 WL 500492, at *6 (Ohio App. 3 Dist. Feb. 11, 2013) ("It is well settled that a corporation is a separate legal entity from its shareholders, even when the corporation only has one shareholder."). 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). As Ohio for-profit corporations, the Freshway companies have broad powers – they may, for example, conduct business, sue and be sued, and appoint or employ agents. *See, e.g.*, Ohio Rev. Code Ann. § 1701.13. In the company's employment relationships, the Freshway companies – not their owners – "[are] the employing party." *Sipma v. Mass. Cas. Ins. Co.*, 256 F.3d 1006, 1010 (10th Cir. 2001). And the companies' officers and shareholders are generally not personally liable for the corporations' actions. *See, e.g.*, *LeRoux's Billyle Supper Club v. Ma*, 602 N.E.2d 685, 688. 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." *Cedric Kushner Promotions*, 533 U.S. at 163; *see also Grote*, 2013 WL 362725, at *6 (Rovner, J., dissenting). "So long as the business's liabilities are not the [Gilardis'] liabilities – which is the primary and 'invaluable privilege' conferred by the corporate form – neither are the business's expenditures the [Gilardis'] own expenditures." *Grote*, 2013 WL 362725, at *6 (Rovner, J., dissenting) (quoting *Torco Oil Co. v. Innovative Thermal Corp.*, 763 F. Supp. 1445,1451 (N.D. Ill.1991) (Posner, J., sitting by designation)). The money used to pay for the Freshway companies' group health plans "belongs to the company, not to the [Gilardis]." *Id.* The Gilardis should not be permitted to eliminate that legal separation only when it suits them to impose their personal religious beliefs on the Freshway companies' employees. *See Autocam*, 2012 WL 6845677, at *7; *Conestoga*, 2013 WL 140110, at *8; *Grote*, 2013 WL 362725, at *6 (Rovner, J., dissenting).

A contrary view would expand RFRA's scope in an extraordinary way. All corporations act through human agency; but that cannot mean that any legal obligation imposed on a

corporation is also the obligation of the owner or that the owner's and corporation's rights and responsibilities are coextensive. *See, e.g.*, *Hobby Lobby*, 870 F. Supp. 2d at 1294-95; *Conestoga*, 2013 WL 140110, at *8; *Conestoga*, No. 13-1144, slip op. at 7 (Garth, J., concurring); *Autocam*, 2012 WL 6845677, at *7; *Grote*, 2013 WL 362725, at *6 (Rovner, J., dissenting). If that were the rule, any of the millions of shareholders of publicly-traded companies could assert RFRA claims on behalf of those companies. Moreover, if an owner's religious beliefs were automatically imputed to the company, any secular company with a religious owner or shareholder (or with one or more, but not all, religious owners or shareholders) could impose his own religious beliefs on his employees in a way that deprives those employees of legal rights they would otherwise have, *see Autocam*, 2012 WL 6845677, at *7; *Grote*, 2012 WL 6725905, at *6; *Grote*, 2013 WL 362725, at *14 (Rovner, J., dissenting), such as 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).

The courts that have granted preliminary injunctive relief in cases similar to this one have uniformly ignored or disregarded the legal separation between corporations and their owners, *see, e.g.*, *Korte*, 2012 WL 6757353, at *3 (stating, without analysis, "[t]hat the Kortes operate their business in the corporate form is not dispositive of their claim"); *Grote*, 2013 WL 362725, at *3 (same); *Sharpe Holdings*, 2012 WL 6738489, at *5 (ignoring the issue entirely), thereby allowing the corporations' owners to take advantage of the benefits of the corporate structure, such as limited liability, when it suits them, but to insist that they and the corporation are one and the same when the corporate form does not suit them. For example, the court in *Tyndale* erroneously equated the analysis of standing under Article III with RFRA's substantial burden requirement. 2012 WL 5817323, at *7-8. But the existence of a corporation's *standing* to assert

the rights of its owners does not mean that a requirement, which is not imposed on the corporation's owners at all, amounts to a *substantial burden* on the owners' exercise of religion. *Compare United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973) (an "identifiable trifle" is sufficient to establish injury in fact), *with Hobby Lobby*, 870 F. Supp. 2d at 1293-96 (discussing meaning of "substantial burden"). The existence of a corporation's *standing* does not mean that a requirement, which is not imposed on the corporation's owners at all, amounts to a *substantial burden* on the owners' exercise of religion. If standing and substantial burden were equivalent, courts would never need to undertake a substantial burden analysis; rather, they would move straight to the compelling interest prong of RFRA once a plaintiff established standing. This is clearly not how the substantial burden analysis works. *See, e.g.*, *Mead v. Holder*, 766 F. Supp. 2d 16, 26, 42 (D.D.C. 2011) (concluding plaintiff had standing to challenge statute but that statute nonetheless did not impose a substantial burden on any exercise of religion), *aff'd*, *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *cert. denied*, 133 S. Ct. 63 (2012). *Stormans* and *Townley* – on which the *Tyndale* court relied – do not suggest otherwise. Both cases held that the plaintiff corporations had standing to raise the rights of their owners. But neither case had anything to say about whether an alleged burden on a corporation could also be a *substantial* burden on its owners. *See Conestoga*, 2013 WL 140110, at *7-*8 (disagreeing with the *Tyndale* court's reliance on *Stormans* and *Townley*).[16]

Finally, the court in *Tyndale* also erred by treating the company and its owners as "alter-ego[s] . . . for religious purposes." 2012 WL 5817323, at *8. A company and its owners 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

[16] While *Stormans* discussed whether the challenged rules were neutral and generally applicable, *see* 586 F.3d at 1130-37, it did not address the substantial burden prong at all. Similarly, nothing in *Townley* suggests that a burden on a corporation is also a burden on its owners. Although the court allowed the company to assert the rights of its owners, *see* 859 F.2d at 619-20 & n.15, it did not find that Title VII imposed a substantial burden on the owners' religious exercise. Rather, *Townley* acknowledged that the challenged statute "to some extent would adversely affect [plaintiffs'] religious practices," and then proceeded to uphold Title VII on compelling interest grounds. *Id.* at 620.

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*, 2013 WL 362725, at *6 (Rovner, J., dissenting) ("To suggest, for purposes of the RFRA, that monies used to fund the Grote Industries health plan – including, in particular, any monies spent paying for employee contraceptive care – ought to be treated as monies from the Grotes' own pockets would be to make an argument for piercing the corporate veil. I do not understand the Grotes to be making such an argument.").

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

Although the preventive services coverage regulations do not require the Freshway companies or their owners to provide contraceptive services directly, plaintiffs' complaint appears to be that, through the companies' group health plans and the benefits they provide to employees, plaintiffs will facilitate conduct (the use of certain contraceptives) that they find objectionable. 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, numerous courts have concluded as much. *See Hobby Lobby*, 2012 WL 6930302, at *3; *Hobby Lobby*, 870 F. Supp. 2d at 1294; *Conestoga*, 2013 WL 140110, at *12-*14; *Autocam*, 2012 WL 6845677, at *6-*7; *Grote*, 2013 WL 362725, at *9, *13-*14 (Rovner, J., dissenting); *Grote*, 2012 WL 6725905, at *5-*7; *Korte*, 2012 WL 6553996, at *10; *Annex Medical*, 2013 WL 101927, at *4-*5; *O'Brien*, 2012 WL 4481208, at *5-*7. For example, assuming, but not deciding, that the for-profit company in *O'Brien* could exercise religion, the

court nevertheless determined that any burden on that exercise (as well as the owner's exercise of religion) is too attenuated to state a claim for relief. 2012 WL 4481208, at *5-*7. The court explained that "the plain meaning of 'substantial,'" as used in RFRA, "suggests that the burden on religious exercise must be more than insignificant or remote." *Id*. at *5; *see also Hobby Lobby*, 870 F. Supp. 2d at 1294; *Conestoga*, 2013 WL 140110, at *12-*14; *Korte*, 2012 WL 6553996, at *10-*11; *Grote*, 2012 WL 6725905, at *5; *Autocam*, 2012 WL 6845677, at *6-*7. And cases presenting the test that RFRA was intended to restore – *Sherbert* and *Yoder* – confirm this "common-sense conclusion." *O'Brien*, 2012 WL 4481208, at *5; *see also Grote*, 2012 WL 6725905, at *5. The plaintiff in *Sherbert*, the court explained, "was forced to 'choose between following the precepts of her religion [by resting, and not working, on her Sabbath] and forfeiting [unemployment] benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other.'" *O'Brien*, 2012 WL 4481208, at *5 (quoting *Sherbert*, 374 U.S. at 404). Similarly, in *Yoder*, the state compulsory-attendance law "affirmatively compel[led] [plaintiffs], under threat of criminal sanction to perform acts undeniably at odds with the fundamental tenets of their religious beliefs." *O'Brien*, 2012 WL 4481208, at *5 (quoting *Yoder*, 406 U.S. at 218); *see also Grote*, 2012 WL 6725905, at *5 (discussing *Sherbert* and *Yoder*).

In contrast to the direct and substantial burdens imposed in those cases, the court in *O'Brien* determined that the preventive services coverage regulations result in only an indirect and *de minimis* impact on the plaintiffs. *Id*. at *6-*7.

> [T]he challenged regulations do not demand that plaintiffs alter their behavior in a manner that will directly and inevitably prevent plaintiffs from acting in accordance with their religious beliefs. [Plaintiff] is not prevented from keeping the Sabbath, from providing a religious upbringing for his children, or from participating in a religious ritual such as communion. Instead, plaintiffs remain free to exercise their religion, by not using contraceptives and by discouraging employees from using contraceptives. The burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [the company's] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiffs' religion. The Court rejects the proposition that requiring indirect financial support of a practice, from which plaintiff himself abstains

> according to his religious principles, constitutes a substantial burden on plaintiff's religious exercise.

Id. at *6; *see also Hobby Lobby*, 870 F. Supp. 2d at 1294; *Conestoga*, 2013 WL 140110, at *14; *Korte*, 2012 WL 6553996, at *10-*11; *Grote*, 2012 WL 6725905, at *5-*6; *Autocam*, 2012 WL 6845677, at *6-*7; *Grote*, 2013 WL 362725, at *9, *13-*14 (Rovner, J., dissenting). The court noted that the regulations no more impact the plaintiffs' religious beliefs than the company's payment of salaries to its employees, which those employees can also use to purchase contraceptives. *O'Brien*, 2012 WL 4481208, at *7; *see also Conestoga*, 2013 WL 140110, at *13 ("The fact that Conestoga's employees are free to look outside of their insurance coverage and pay for and use any contraception . . . through the salary they receive from Conestoga, amply illustrates this point."); *Grote*, 2013 WL 362725, at *9 (Rovner, J., dissenting) ("To the extent this burdens the Grotes' religious interests, it is worth considering whether the burden is different in kind from the burden of knowing that an employee might be using his or her Grote Industries paycheck (or money in a health care reimbursement account) to pay for contraception him or herself."); *Autocam*, 2012 WL 6845677, at *6. Indeed, "if the financial support of which plaintiffs complain was in fact substantially burdensome, secular companies owned by individuals objecting on religious grounds to all modern medical care could no longer be required to provide health care to employees." *O'Brien*, 2012 WL 4481208, at *6; *see also Conestoga*, 2013 WL 140110, at *13; *Grote*, 2012 WL 6725905, at *6.

The court also noted that adopting the plaintiffs' substantial burden argument would turn RFRA, which was meant as a shield, into a sword. *O'Brien*, 2012 WL 4481208, at *6. "[RFRA] is not a means to force one's religious practices upon others. RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *Id*.

Plaintiffs attempt to distinguish *O'Brien* – and all of the other cases to have agreed with the *O'Brien* court's reasoning – by defining their religious objection as an objection to "forced subsidization." Pls.' Br. at 13. But through this lens, the requirement to pay a salary could also

amount to "forced subsidization" if the corporations' employees choose to use their salary, rather than fringe benefits such as insurance, to pay for contraceptives. While defendants do not doubt the sincerity of their belief, plaintiffs cannot define their belief such that it reads the term "substantial" out of RFRA, as the court did in *Legatus*, 2012 WL 5359630, at *6 ("assum[ing]" that the regulations substantially burdened the owner's exercise of religion because the plaintiff "so claim[ed]"). *See Conestoga*, 2013 WL 140110, at *12 (rejecting the reasoning in *Legatus*); *Autocam*, 2012 WL 6845677, at *6 ("The Court does not doubt the sincerity of Plaintiff Kennedy's decision to draw the line he does, but the Court still has a duty to assess whether the claimed burden – no matter how sincerely felt – really amounts to a substantial burden on a person's exercise of religion."); *Grote*, 2012 WL 6725905, at *6 (rejecting identical argument). As the district court explained in *Conestoga*, "[i]f every plaintiff were permitted to unilaterally determine that a law burdened their religious beliefs, and courts were required to assume that such burden was substantial, simply because the plaintiff claimed that it was the case, then the standard expressed by Congress under the RFRA would convert to an 'any burden' standard." 2013 WL 140110, at *13; *see also Autocam*, 2012 WL 6845677, at *7; *Grote*, 2012 WL 6725905, at *6. RFRA's legislative history makes clear that Congress did not intend such a relaxed standard. The initial version of RFRA prohibited the government from imposing *any* "burden" on free exercise, substantial or otherwise. Congress amended the bill to add the word "substantially," "to make it clear that the compelling interest standards set forth in the act" applies "only to Government actions [that] place a substantial burden on the exercise of" religious liberty. 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *see also id*. (text of Amendment No. 1082).[17]

Finally, the fact that the Freshway companies' group health plans are self-insured, *see* Pls.' Br. at 8 – which the *Tyndale* court incorrectly found to be a "crucial distinction" from

[17] Plaintiffs cite *Thomas* for the proposition that even an "indirect" burden can be a substantial burden. *See* Pls.' Br. at 12 (quoting *Thomas*, 450 U.S. at 718). But "[p]laintiffs misunderstand the principle asserted in *Thomas*. While a *compulsion* may certainly be indirect and still constitute a substantial burden, such as the denial of a benefit found in *Thomas*," *Conestoga*, 2013 WL 140110, at *14 n.15, that is not so where the burden itself is indirect, as it is here.

O'Brien, *Tyndale*, 2012 WL 5817323, at *13 – is irrelevant. It is still the case that "[t]he burden of which plaintiffs complain" rests on "a series of independent decisions by health care providers and patients covered by [Tyndale's plan]." *O'Brien*, 2012 WL 4481208, at *6; *see also Grote*, 2013 WL 362725, at *6 (Rovner, J., dissenting) (rejecting the reasoning of *Tyndale*); *id.* at *9 (noting that whether a plan is self-insured or fully-insured, "the employee is making wholly independent decisions about how to use an element of her compensation"); *Grote*, 2012 WL 6725905, at *6-*7 (same). Furthermore, a group health plan is a separate legal entity from the sponsoring employer even if the plan is self-insured. *See* 29 U.S.C. § 1132(d); *Grote*, 2012 WL 6725905, at *7. Finally, "[i]f the Plaintiffs are more comfortable religiously and morally with more layers of insulation between the wages and benefits earned, on the one hand, and an employee's decision to acquire contraceptives with them, Plaintiffs have the option of restructuring from a self-insured plan to an insured plan." *Autocam*, 2012 WL 6845677, at *6 n.1; *see also Grote*, 2013 WL 362725, at *11 (Rovner, J., dissenting).[18]

In short, because the preventive services regulations "are several degrees removed from imposing a substantial burden on [the Freshway companies], and one further degree removed from imposing a substantial burden on [its owners]," *O'Brien*, 2012 WL 4481208, at *7, the

[18] Plaintiffs' attempt to distinguish *Mead* and *Seven-Sky*, *see* Pls.' Br. at 15 n.9, is also unavailing. In fact, those decisions further confirm that there is no substantial burden here. There, the plaintiffs brought a RFRA challenge to the minimum coverage provision of the ACA, which, starting in 2014, will require most Americans to obtain qualifying health coverage or pay a tax penalty. The plaintiffs alleged that they "believe[] in trusting in God to protect [them] from illness or injury" and that being required to purchase health care coverage violated that belief. *Mead*, 766 F. Supp. 2d at 42. In concluding that the minimum coverage provision does not substantially burden the plaintiffs' religious practice, the court reasoned, among other things, that "Plaintiffs routinely contribute to other forms of insurance, such as Medicare, Social Security, and unemployment taxes, which present the same conflict with their belief that God will provide for their medical and financial needs." *Id.*; *see also O'Brien*, 2012 WL 4481208, at *7; *Grote*, 2012 WL 6725905, at *6. The same is true in this case. Plaintiffs presumably "routinely contribute to other" schemes that present the same conflict with their religious beliefs alleged here. A portion of plaintiffs' taxes, for example, are used for Medicaid, a federal-state program that routinely pays for contraceptive services for the needy. *See* Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. II, 125 Stat. 786, 1075 (2012); 42 U.S.C. § 1396a(a)(10); id. § 1396d(a)(4)(C); *see also* Kaiser Family Found., State Medicaid Coverage of Family Planning Services, at 7, 9 (Nov. 2009), *available at* http://www.kff.org/womenshealth/upload/8015.pdf (last visited Feb. 25, 2013) (identifying contraceptive services covered under Illinois's Medicaid State Plan).

Court should dismiss plaintiffs' RFRA claim even assuming for-profit companies like the Freshway corporations can exercise religion.

4. 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 could demonstrate a substantial burden on their religious exercise, they would not prevail because the regulations are justified by two compelling governmental interests, and are the least restrictive means to achieve those interests. "[T]he Government clearly has a compelling interest in safeguarding the public health by regulating the health care and insurance markets." *Mead*, 766 F. Supp. 2d at 43; *see also Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir. 1998) (concluding that "public health is a compelling government interest"); *Dickerson v. Stuart*, 877 F. Supp. 1556, 1559 (M.D. Fla. 1995) ("The State . . . has a compelling interest in the health of expectant mothers and the safe delivery of newborn babies.") (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992)). 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. at 41,733; *see also* 77 Fed. Reg. at 8728. Indeed, "[b]y expanding coverage and eliminating cost sharing for recommended preventive services, these interim final regulations could be expected to increase access to and utilization of these services, which are not used at optimal levels today." 75 Fed. Reg. at 41,733. Increased access to FDA-approved contraceptive services is a key part of these predicted health outcomes, as a lack of contraceptive use has proven in many cases to have negative health consequences for both women and a developing fetus. As IOM concluded in identifying services recommended to "prevent conditions harmful to women's health and well-being," unintended pregnancy may delay "entry into prenatal care," prolong "behaviors that present risks for the developing fetus," and cause "depression, anxiety, or other conditions." IOM REP. at 20, 103.

Contraceptive coverage also helps to avoid "the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." *Id.* at 103. In fact, "pregnancy may be contraindicated for women with serious medical conditions such as pulmonary hypertension . . . and cyanotic heart disease, and for women with the Marfan Syndrome." *Id.* at 103-04.

Closely tied to this interest is a related, but separate, compelling interest that is furthered by the regulations. As the Supreme Court explained in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), there is a fundamental "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." *Id.* at 626. Thus, "[a]ssuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests." *Id.* By including in the ACA gender-specific preventive health services for women, Congress made clear that the goals and benefits of effective preventive health care apply equally to women, who might otherwise be excluded from such benefits if their unique health care needs were not taken into account in the ACA. As explained by members of Congress, "women have different health needs than men, and these needs often generate additional costs. Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009). These costs result in women often forgoing preventive care. *See, e.g.*, 155 Cong. Rec. S12265-02, S12274 (daily ed. Dec. 3, 2009). 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 intended to equalize health care for women and men in the area of preventive care, including the provision of family planning services for women. *See, e.g.*, 155 Cong. Rec. at S12271; *see also* 77 Fed. Reg. at 8728. Congress's attempt to equalize the provision of preventive health care services, with the resulting benefit of women being able to contribute to the same degree as men as healthy and productive members of society, furthers a compelling governmental interest. *Cf. Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67, 92-93 (Cal. 2004).

Of course, the government's interest in ensuring access to contraceptive services is *particularly* compelling for women employed by companies not currently offering such coverage, like the Freshway corporations. 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 the Freshway corporations and other similar companies from the obligation of their health plans to cover contraceptive services without cost-sharing would remove their 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."), *overruled in part on other grounds by Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1033 (9th Cir. 2007) (en banc). Women who work for the Freshway corporations 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 the Gilardis' religious beliefs. Plaintiffs' desire not to provide a health plan that permits such individuals to exercise their own choice must yield to the government's compelling interest in avoiding the adverse consequences that would result from the Gilardis' decision to impose their religious beliefs on the companies' employees. *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"); *S. Ridge Baptist Church v. Indus. Comm'n*, 911 F.2d 1203, 1209, 1211 n.6 (6th Cir. 1990).[19]

Plaintiffs' primary argument is that the interests underlying the regulations cannot be considered compelling when millions of people are not protected by the regulations at the moment. *See* Pl.'s Mem. at 19. But this is not a case where under-inclusive enforcement of a law suggests that the government's "supposedly vital interest" is not really compelling. *Lukumi*, 508 U.S. at 546-47. The two "exemptions" referred to by plaintiffs are not exemptions from the preventive services coverage regulations at all, but are instead provisions of the ACA that exclude individuals and entities from other requirements imposed by the ACA. They reflect the government's attempts to balance the compelling interests underlying the challenged regulations against other significant interests supporting the complex administrative scheme created by the ACA. *See Lee*, 455 U.S. at 259; *United States v. Winddancer*, 435 F. Supp. 2d 687, 695-98 (M.D. Tenn. 2006). And, unlike the exemption plaintiffs seek for all employers that object to the regulations on religious grounds, the existing exemptions do not undermine the government's

[19] In arguing that the government's interests are not in fact compelling, plaintiffs suggest that defendant must show a compelling interest as to the Freshway companies specifically, *see* Pls.' Br. at 18, as though the government must separately analyze the impact of and need for the regulations as to each and every employer and employee in America. But this level of specificity would rather obviously lead to an unworkable standard and would render this regulatory scheme – and potentially any regulatory scheme that is challenged due to religious objections – completely unworkable. *See Lee*, 455 U.S. at 259-60. 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., id.* at 260 (considering the impact on the tax system if all religious adherents – not just the plaintiff – could opt out); *United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001) (per curiam) ("Oliver has argued a one-man exemption should be made, however, there is nothing so peculiar or special with Oliver's situation which warrants an exception. There are no safeguards to prevent similarly situated individuals from asserting the same privilege and leading to uncontrolled eagle harvesting."); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990) ("There is no principled way of exempting the school without exempting all other sectarian schools and thereby the thousands of lay teachers and staff members on their payrolls."); *see also, e.g.*, *Graham*, 822 F.2d at 853; *United States v. Winddancer*, 435 F. Supp. 2d 687, 697 (M.D. Tenn. 2006). *O Centro* is not to the contrary. To be sure, the Court rejected "slippery-slope" arguments for refusing to accommodate a particular claimant. *See* 546 U.S. at 435-36. But it construed the scope of the requested exemption as encompassing *all* members of the plaintiff religious sect. *See id.* at 433. Similarly, the exemption in *Yoder*, 406 U.S. 205, encompassed *all* Amish children; and the exemption in *Sherbert*, 374 U.S. 398, encompassed *all* individuals who had a religious objection to working on Saturdays. *See O Centro*, 546 U.S. at 431. The Court's warning in *O Centro* 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.

interests in any significant way. *See Lukumi*, 508 U.S. at 547; *S. Ridge Baptist Church*, 911 F.2d at 1208-09.

First, the grandfathering of certain health plans with respect to certain provisions of the ACA is not specifically limited to the preventive services coverage regulations. *See* 42 U.S.C. § 18011; 45 C.F.R. § 147.140. In fact, the effect of grandfathering is not really a permanent "exemption," but rather, over the long term, a transition in the marketplace with respect to several provisions of the ACA, including the preventive services coverage provision. The grandfathering provision reflects Congress's attempts to balance competing interests – specifically, the interest in spreading the benefits of the ACA, including those provided by the preventive services coverage provision, and the interest in maintaining existing coverage and easing the transition into the new regulatory regime established by the ACA – in the context of a complex statutory scheme. *See* 75 Fed. Reg. at 34,540, 34,546 (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 challenged 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 the end of 2013. *See id.* at 34,552; *see also* Kaiser Family Foundation and Health Research & Educational Trust, Employer Health Benefits 2012 Annual Survey at 7-8, 190, *available at* http://ehbs.kff.org/pdf/2012/8345.pdf (last visited February 23, 2013) (indicating that 58 percent of firms had at least one grandfathered health plan in 2012, down from 72 percent in 2011, and that 48 percent of covered workers were in grandfathered health plans in 2012, down from 56 percent in 2011).[20] Thus, any purported damage to the compelling interests underlying the

[20] Plaintiffs grossly overstate the number of individuals in grandfathered plans. *See* Pls.' Br. at 19. Plaintiffs – as well as the *Newland* and *Tyndale* courts – appear to have drawn their "191 million" figure from estimates concerning the *total* number of health plans existing at the start of 2010, ignoring the fact that the number of grandfathered plans is significantly and steadily declining. By 2012, for example, the year in which the contraceptive coverage requirement was first imposed, the government's mid-range estimate is that 38 percent of employer plans will have lost grandfathered status, and by the end of 2013, this mid-range estimate increases to 51

(continued on next page…)

regulations will be quickly mitigated, which is in stark contrast to the *permanent* exemption 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 offer no support for such an untenable proposition. To the contrary, this approach is a perfectly reasonable balancing of competing interests. *See Legatus*, 2012 WL 5359630, at *9 ("[T]he grandfathering rule seems to be a reasonable plan for instituting an incredibly complex health care law while balancing competing interests. To find the Government's interests other than compelling only because of the grandfathering rule would perversely encourage Congress in the future to require immediate and draconian enforcement of all provisions of similar laws, without regard to pragmatic considerations, simply in order to preserve 'compelling interest' status."); *Korte*, 2012 WL 6553996, at *7 ("Like the district court in *Legatus*, this Court does not perceive how a gradual transition undercuts the neutral purpose or general applicability of the mandate.").

Second, 26 U.S.C. § 4980H9(c)(2) does *not*, as plaintiffs assert, *see* Pls.' Br. at 20, 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).[21] Employees of these small businesses can get health insurance through other ACA provisions, primarily premium tax credits and health insurance exchanges, and the coverage they receive will include all preventive services, including contraception. In addition, small businesses that offer non-grandfathered health coverage to their employees are required to

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percent. 75 Fed. Reg. at 34,553. Further, the government estimates that the percentage of individual market policies losing grandfather status in a given year exceeds the range of 40 to 67 percent. *Id*.; *see also Korte*, 2012 WL 6553996, at *7 n.12.

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

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.

If courts were to grant requests to extend the protections of RFRA to any employer whose owners or shareholders object to the regulations, it is difficult to see how the regulations could continue to function or be enforced in a rational manner. *See O Centro*, 546 U.S. at 435. Providing for voluntary participation among for-profit, secular employers would be "almost a contradiction in terms and difficult, if not impossible, to administer." *Lee*, 455 U.S. at 258. We are a "cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld*, 366 U.S. at 606; *see also S. Ridge Baptist Church*, 911 F.2d at 1211, and many people object to countless medical services. If any organization, no matter the high degree of attenuation between the mission of that organization and the exercise of religious belief, were able to seek an exemption from the operation of the preventive services coverage regulations, it is difficult to see how defendants could administer the regulations in a manner that would achieve Congress's goals of improving the health of women and children and equalizing the coverage of preventive services for women. *See United States v. Israel*, 317 F.3d 768, 772 (7th Cir. 2003) (recognizing that granting plaintiff's RFRA claim "would lead to significant administrative problems for the [government] and open the door to a . . . proliferation of claims").[22]

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 government's interests. When determining whether a particular regulatory scheme

[22] The court in *Tyndale* held that defendants had not shown that the challenged regulations advance compelling government interests. *See* 2012 WL 5817323 at *15-*18. For the reasons articulated above, defendants believe that the court's analysis was incorrect. But even if this Court were to agree with Judge Walton's compelling interest analysis, this case is distinguishable. The decision in *Tyndale* was based largely on the fact that the plaintiffs there objected only to the coverage of a small subset of contraceptive services – specifically Plan B, Ella, and intrauterine devices. *See id.* at *15-*16. Here, plaintiffs object to the coverage of *all* contraceptive services. *See, e.g.*, Pls.' Br. at 1.

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 Israel*, 317 F.3d at 772; *S. Ridge Baptist Church*, 911 F.2d at 1206; *United States v. Schmucker*, 815 F.2d 413, 417 (6th Cir. 1987); *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. Instead, the government need only "refute the alternative schemes offered by the challenger." *Id.*

Instead of explaining how the Freshway corporations and similarly situated secular companies could be exempted from the regulations without significant damage to the government's compelling interests in public health and gender equality, plaintiffs conjure up several new regulatory schemes – most of which would require the government to pay for contraceptive coverage – that they claim would be less restrictive. *See* Pl.'s Mem. at 18. 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 the Gilardis' 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 ("[A] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down.'" (quotations omitted)).

In effect, plaintiffs wants the government "to subsidize private religious practices," *Catholic Charities of Sacramento*, 85 P.3d at 94, by expending significant resources to adopt an entirely new legislative or administrative scheme. But a proposed alternative scheme is not an adequate alternative – and thus not a viable less restrictive means to achieve the compelling

interest – if it is not "feasible" or "plausible." *See, e.g.*, *New Life Baptist*, 885 F.2d at 947 (considering "in a practical way" whether proffered alternative would "threaten potential administrative difficulties, including those costs and complexities which . . . may significantly interfere with the state's ability to achieve its . . . objectives"); *Graham*, 822 F.2d at 852 ("To allow an exception for Scientologists is, we think, possible; but it is not feasible."). In determining whether a proposed alternative scheme is feasible, courts often consider the additional administrative and fiscal costs of the scheme. *See, e.g.*, *S. Ridge Baptist Church*, 911 F.2d at 1206; *Fegans v. Norris*, 537 F.3d 897, 905-06 (8th Cir. 2008); *United States v. Lafley*, 656 F.3d 936, 942 (9th Cir. 2011); *New Life Baptist*, 885 F.2d at 947. Plaintiff's alternatives would impose considerable new costs and burdens on the government and would otherwise be impractical. *See, e.g.*, *Lafley*, 656 F.3d at 942; *Gooden v. Crain*, 353 F. App'x 885, 888 (5th Cir. 2009); *Adams v. Comm'r of Internal Revenue*, 170 F.3d 173, 180 n.8 (3d Cir. 1999).[23]

Nor would the proposed alternatives be equally effective in advancing the government's compelling interests. *See, e.g.*, *Kaemmerling v. Lappin*, 553 F.3d 669, 684 (D.C. Cir. 2008) (finding that means was least restrictive where no alternative means would achieve compelling interests); *Murphy v. State of Ark.*, 852 F.2d 1039, 1042-43 (8th Cir. 1988) (same). As discussed above, Congress determined that the best way to achieve the goals of the ACA, including expanding preventive services coverage, was to utilize the existing employer-based system. The anticipated benefits of the preventive services coverage regulations are attributable not only to the fact that recommended contraceptive services will be available to women with no cost sharing, but also to the fact that these services will be available through the existing employer-based system of health coverage through which women will face minimal logistical and administrative obstacles to receiving coverage of their care. Plaintiffs' alternatives, by contrast,

[23] The costs and administrative burdens that plaintiffs' alternative schemes would impose on the government are not the only reason that they are infeasible. The ACA requires that recommended preventive services be covered without cost-sharing through the existing employer-based system. *See* H.R. Rep. No. 111-443, pt. II, at 984-86. Thus, even if defendants wanted to adopt one of plaintiffs' non-employer-based alternatives, they would be constrained by the statute from doing so.

have none of these advantages. They would require establishing entirely new government programs and infrastructures or fundamentally altering an existing one, and would almost certainly require women to take steps to find out about the availability of and sign up for the new benefit, thereby ensuring that fewer women would take advantage of it. Nor do plaintiffs offer any suggestion as to how these programs could be integrated with the employer-based system or how women would obtain government-provided preventive services in practice. Thus, plaintiffs' proposals – in addition to raising myriad administrative and logistical difficulties and being unauthorized by statute and not funded by appropriation – are less likely to achieve the compelling interests furthered by the regulations, and therefore do not represent reasonable less restrictive means.

IV. PLAINTIFFS CANNOT ESTABLISH IRREPARABLE HARM, AND ENTERING 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 RFRA rights, so there has been no such loss of freedoms for any period of time. In this respect, the merits and irreparable injury prongs of the analysis merge together, and plaintiffs cannot show irreparable injury without also showing a likelihood of success on the merits, which they cannot do. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012).

Plaintiffs' inexplicable delay in filing this suit further counsels against a finding of irreparable harm. The contraceptive coverage requirement was issued on August 1, 2011. Yet plaintiffs waited more than 18 months – until February 8, 2013 – to seek preliminary injunctive relief. Such a substantial and unexplained delay seriously undermines plaintiffs' claim of irreparable harm. In fact, the District Court for the Western District of Michigan held that plaintiffs very similarly situated to plaintiffs here had not shown a risk of irreparable harm absent a preliminary injunction because, *inter alia*, they waited nearly a year and a half after the challenged requirement was established before filing suit. *Autocam*, 2012 WL 6845677, at *9

("[T]he immediacy of the dilemma Plaintiffs face is in no small part of their own making . . . . Equity does not favor the dilatory."). This principle is well-established in this Circuit. *See, e.g.*, *NRDC v. Pena*, 147 F.3d 1012, 1026 (D.C. Cir. 1998) ("If the plaintiff has failed to prosecute its claim for injunctive relief promptly, and if it has no reasonable explanation for its delay, the district court should be reluctant to award relief."); *Independent Bankers Ass'n v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980) ("The venerable maxim *vigilantibus non dormientibus aequitas subvenit* (equity aids the vigilant, not those who slumber on their rights) requires that a suit in equity, though otherwise meritorious, be dismissed if two requirements are met: (1) unreasonable delay in bringing the claim for relief and (2) prejudice caused by the delay."); *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (denying preliminary injunctive relief and noting that a delay of forty-four days after final regulations were issued was "inexcusable"); *Newdow v. Bush*, 355 F. Supp. 2d 265, 292 (D.D.C. 2005) ("This delay in seeking a preliminary injunction has placed defendants and the federal courts in a difficult position. An unexcused delay in seeking extraordinary injunctive relief may be grounds for denial because such delay implies a lack of urgency and irreparable harm."); *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 43-44 (D.D.C. 2000) (noting that an over two-month delay "further militates against a finding of irreparable harm"); *see also, e.g.*, *Ty, Inc. v. Jones Grp.*, 237 F.3d 891, 903 (7th Cir. 2001); *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995); *Quince Orchard Valley Citizens' Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989); *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276-77 (2d Cir. 1985); *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *Gidatex, S.R.L. v. Campaniello Imps., Ltd.*, 13 F. Supp. 2d 417, 419 (S.D.N.Y. 1998). This delay alone is sufficient for the Court to conclude that plaintiffs have not met their burden to establish irreparable harm.[24]

[24] The court in *Tyndale* missed the point when it concluded that there was no delay where the plaintiffs filed their lawsuit one day after the challenged regulations became *applicable* to them. *See* 2012 WL 5817323, at *18 n.18. This argument incorrectly presumes that a plaintiff is entitled to wait until the effective date of a regulation to bring a suit, thereby creating its own purported emergency, and then be permitted to seek the "extraordinary and drastic remedy" of a preliminary injunction. *Munaf v. Green*, 553 U.S. 674, 689 (2008) (quotations omitted); *see also Quince Orchard Valley Citizens Ass'n*, 872 F.2d at 80. To the contrary, pre-enforcement challenges of regulations

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Moreover, preliminary injunctive relief would harm the government and the public. "[T]here is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008). Enjoining the regulations as to for-profit, secular corporations 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 so that women who choose to do so can be a part of the workforce on an equal playing field with men. It would also be contrary to the public interest to deny the employees of the Freshway companies the benefits of the preventive services coverage regulations. *See Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312-13 (1982) ("[C]ourts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."). Because the Freshway companies are for-profit, secular employers, many of their employees undoubtedly do not share the Gilardis' religious beliefs. Those employees should not be denied the benefits of receiving a health plan through their employer that covers contraceptive services. Enjoining the government from enforcing the regulations, the purpose of which is to eliminate these burdens, 75 Fed. Reg. at 41,733; *see also* 77 Fed. Reg. at 8728, as to plaintiffs would thus harm the public. *See, e.g.*, *Stormans*, 586 F.3d at 1139 (vacating preliminary injunction and noting that "[t]here is a general public interest in ensuring that all citizens have timely access to lawfully prescribed medications"). Any potential harm to plaintiffs resulting from their desire not to provide contraceptive coverage is thus outweighed by the significant harm an injunction would cause to the public.

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are the norm, and allow the court and the parties to proceed through the normal course of litigation without undue haste. Defendants have argued in other cases that there is no irreparable harm until the regulations apply to a plaintiff. *See Tyndale*, 2012 WL 5817323, at *18 n.18. But that is precisely the point. Had plaintiffs filed this suit shortly after it became apparent that the regulations would apply to them – more than a year and a half ago – there would be no need for a request for emergency relief. Plaintiffs' unexplained delay not only casts doubt on their claimed need for urgent relief, but it requires the Court (and defendants) to consider complex constitutional and statutory claims in rushed fashion, when there is every indication that the rush was entirely avoidable.

CONCLUSION

For the forgoing reasons, this Court should deny plaintiffs' motion for a preliminary injunction.

Respectfully submitted this 25th day of February, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Benjamin L. Berwick
BENJAMIN L. BERWICK