[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRANCIS A. GILARDI, JR.; PHILIP M. GILARDI; FRESH UNLIMITED, INC., d/b/a Freshway Foods; FRESHWAY LOGISTICS, INC., Plaintiffs-Appellants, v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., Defendants-Appellees	No. 13-5069

OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

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INTRODUCTION AND SUMMARY

The government respectfully submits this opposition to plaintiffs' motion for an injunction pending appeal. We do not oppose plaintiffs' request that the Court expedite briefing and hear argument before the summer recess. *See* Pl. Mot. 20.

Plaintiffs Fresh Unlimited, Inc., d/b/a Freshway Foods, and Freshway Logistics, Inc., (collectively, "Freshway Foods") are for-profit corporations that package and distribute fresh produce. The Freshway Foods corporations have

nearly 400 full-time employees, who are not hired on the basis of their religion. People employed by Freshway Foods receive health coverage through the Freshway Foods group health plan, as part of their compensation packages that include wages and non-wage benefits.

In this suit, plaintiffs demand that the Freshway Foods group health plan be exempted from the federal regulatory requirement to cover Food and Drug Administration ("FDA")-approved contraceptives, as prescribed by a health care provider. Plaintiffs contend that this exemption is mandated by the Religious Freedom Restoration Act ("RFRA") because the Gilardis, who are the corporations' controlling shareholders, have asserted a religious objection to the plan's coverage of contraceptives. Comparable claims have been asserted by for-profit corporations engaged in a wide variety of secular pursuits such as the manufacture and sale of vehicle safety systems, wood cabinets, fuel systems, arts and crafts supplies, and mineral and chemical products.[1] The plaintiffs' theory in these cases is that, by enacting RFRA, Congress gave for-profit, secular

[1] *See, e.g., Grote Industries, LLC v. Sebelius*, __ F. Supp. 2d __, 2012 WL 6725905 (S.D. Ind. Dec. 27, 2012), *appeal pending*, No. 13-1077 (7th Cir.) (vehicle safety systems); *Conestoga Wood Specialties Corp. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013), *appeal pending*, No. 13-1144 (3d Cir.) (wood cabinets); *Autocam Corp. v. Sebelius*, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012), *appeal pending*, No. 12-2673 (6th Cir.) (fuel systems); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012), *appeal pending*, No. 12-6294 (10th Cir.) (arts and crafts supplies); *O'Brien v. HHS*, __F. Supp. 2d __, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012), *appeal pending*, No. 12-3357 (8th Cir.) (mineral and chemical products).

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, which is "'the most demanding test known to constitutional law.'" R.21 at 15, 17 (plaintiffs' motion for a preliminary injunction) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)).

Congress was careful to avoid that result. By requiring a plaintiff to show that a regulation substantially burdens "a person's exercise of religion," 42 U.S.C. § 2000bb-1(a), RFRA carried forward the pre-existing federal law distinction between non-profit, religious organizations, which may engage in the exercise of religion, and for-profit, secular corporations, which may not. In a series of statutes that govern the employer-employee relationship, Congress has granted religious organizations alone the prerogative to discriminate on the basis of religion in setting the terms and conditions of employment, including wage and non-wage employee compensation. No court has ever found a for-profit company to be a religious organization for purposes of federal law. To the contrary, this Court has emphasized that an entity's for-profit status is an objective criterion that allows courts to distinguish a secular company from a potentially religious organization, without conducting an intrusive inquiry into the entity's religious beliefs. *See University of Great Falls v. NLRB*, 278 F.3d 1335, 1343-44 (D.C. Cir. 2002).

The Freshway Foods corporations are not religious organizations. They are for-profit corporations that package and distribute fresh produce. "[F]or-profit corporate entities, unlike religious non-profit organizations, do not—and cannot—legally claim a right to exercise or establish a 'corporate' religion under the First Amendment or the RFRA." *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, slip op. 6 (3d Cir. Feb. 7, 2013) (Garth, J., concurring) (emphases omitted). This distinction between non-profit, religious organizations and for-profit, secular companies is rooted in "the text of the First Amendment," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012), and embodied in federal law.

Plaintiffs cannot circumvent this distinction by asserting that the requirement that the Freshway Foods plan cover contraceptives is a substantial burden on the Gilardis' own exercise of religion. The challenged regulations do not "compel the [Gilardis] as individuals to do anything." *Autocam Corp. v. Sebelius*, 2012 WL 6845677, *7 (W.D. Mich. Dec. 24, 2012), *appeal pending*, No. 12-2673 (6th Cir.). "It is only the legally separate" entities in which they hold a controlling interest that have "any obligation under the mandate." *Ibid*. It is the corporations that act as the employing party; it is the corporations that sponsor the group health plan for Freshway Foods employees and their family members; and "it is that health plan which is now obligated by the Affordable Care Act and resulting regulations to

provide contraceptive coverage." *Grote v. Sebelius*, __ F.3d __, 2013 WL 362725, *6 (7th Cir. Jan. 30, 2013) (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, *Torco Oil Co. v. Innovative Thermal Corp.*, 763 F. Supp. 1445, 1451 (N.D. Ill. 1991) (Posner, J., sitting by designation)—neither are the business's expenditures the [Gilardis'] own expenditures." *Ibid*. The money used to pay for health coverage under the Freshway Foods plan "belongs to the company, not to the [Gilardis]." *Ibid*.

Moreover, even apart from this central flaw in plaintiffs' argument, their claim fails because an employee's decision to use her health coverage to pay for a particular item or service cannot properly be attributed to her employer, much less to the corporation's shareholders. In other First Amendment contexts, the Supreme Court has held that a person or entity that provides a source of funding may not be deemed responsible for the decisions that another person or entity makes in using those funds. The Freshway Foods corporations provide employees with a compensation package that includes both wages and non-wage benefits. Just as a Freshway Foods employee may choose to use her wages to pay for contraceptives, she also may choose to use her health coverage to pay for contraceptives. "To the extent the [Gilardis] themselves are funding anything at all—and . . . one must disregard the corporate form to say that they are—they are paying for a plan that

insures a comprehensive range of medical care that will be used in countless ways" by the participants in the Freshway Foods plan. *Id*. at *13. "No individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense the [Gilardis'] decision or action." *Ibid*. "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." *O'Brien v. HHS*, __F. Supp. 2d __, 2012 WL 4481208, *6 (E.D. Mo. Sept. 28, 2012), *appeal pending*, No. 12-3357 (8th Cir.).[2]

STATEMENT

A. Statutory and Regulatory Background

Congress has long regulated certain terms of group health plans, and the Patient Protection and Affordable Care Act establishes additional minimum

[2] *See also Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144 (3d Cir. Feb. 7, 2013); *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012); *Hobby Lobby Stores, Inc. v. Sebelius*, 2012 WL 6930302 (10th Cir. Dec. 20, 2012); *Conestoga Wood Specialties Corp. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013), *appeal pending*, No. 13-1144 (3d Cir.); *Autocam Corp. v. Sebelius*, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012), *appeal pending*, No. 12-2673 (6th Cir.); *Korte v. HHS*, __ F. Supp. 2d __, 2012 WL 6553996 (S.D. Ill. Dec. 14, 2012), *appeal pending*, No. 12-3841 (7th Cir.); *Grote Industries, LLC v. Sebelius*, __ F. Supp. 2d __, 2012 WL 6725905 (S.D. Ind. Dec. 27, 2012), *appeal pending*, No. 13-1077 (7th Cir.); *Annex Medical, Inc. v. Sebelius*, __ F. Supp. __, 2013 WL 101927, *5 (D. Minn. Jan. 8, 2013), *appeal pending*, No. 13-1118 (8th Cir.); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012), *appeal pending*, No. 12-6294 (10th Cir.); *Briscoe v. Sebelius*, No. 13-285 (D. Colo. Feb. 27, 2013).

standards for such plans. As a component of the Act's emphasis on cost-saving preventive care, Congress provided that a non-grandfathered plan must cover certain preventive health services without cost sharing, that is, without requiring plan participants to make co-payments or pay deductibles. These preventive health services include immunizations recommended by the Advisory Committee on Immunization Practices, *see* 42 U.S.C. § 300gg-13(a)(2); items or services that have an "A" or "B" rating from the U.S. Preventive Services Task Force, *see id*. § 300gg-13(a)(1); preventive care and screenings for infants, children, and adolescents as provided in guidelines of the Health Resources and Services Administration ("HSRA"), a component of the Department of Health and Human Services ("HHS"), *see id*. § 300gg-13(a)(3); and certain additional preventive services for women as provided in HRSA guidelines, *see id*. § 300gg-13(a)(4).

Collectively, these preventive health services provisions require coverage of an array of recommended services including immunizations, blood pressure screening, mammograms, cervical cancer screening, and cholesterol screening.[3] HRSA commissioned a study by the Institute of Medicine to help it develop the statutorily required preventive services guidelines for women. Consistent with the Institute's recommendations, the regulations require coverage for "[a]ll Food and

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

Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity, as prescribed by a provider." 77 Fed. Reg. 8725 (Feb. 15, 2012) (internal quotation marks omitted). FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, injections and implants, emergency contraceptive drugs, and intrauterine devices.[4]

The regulations authorize an exemption from the contraceptive-coverage requirement for the group health plan of any organization that qualifies as a religious employer. *See* 45 C.F.R. § 147.130(a)(1)(iv)(B). The Departments that issued the regulations have proposed to simplify this exemption and also have set out proposals to accommodate religious objections to the provision of contraceptive coverage raised by other non-profit, religious organizations. *See* 78 Fed. Reg. 8456, 8461-62 (Feb. 6, 2013) (notice of proposed rulemaking). The proposed accommodations do not extend to for-profit, secular corporations such as the plaintiff corporations in this case. *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

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

organizations." *Ibid*. Consistent with this longstanding federal law, the Departments proposed to limit the definition of organizations eligible for the accommodations "to include nonprofit religious organizations, but not to include for-profit secular organizations." *Ibid*.

B. Factual Background and District Court Proceedings

The Freshway Foods corporations are for-profit corporations that distribute fresh produce and other refrigerated products. *See* R.1 ¶¶ 16, 17. The corporations have nearly 400 full-time employees. *See ibid*.

The Gilardis are two individuals who each hold a 50% interest in the corporations. *See id*. ¶ 14. The Gilardis allege that they regard all forms of artificial contraception as contrary to their religious beliefs. *See id*. ¶ 26. The corporations, however, do not hire employees on the basis of their religion, and the employees therefore need not share the religious beliefs of the Gilardis.

The Freshway Foods group health plan provides health coverage as one of the "non-cash benefits" that employees receive as part of their compensation packages. *See id*. ¶¶ 29, 31. Plaintiffs contend that, under RFRA, the Freshway Foods plan must be exempted from the requirement that to cover FDA-approved contraceptives, as prescribed by a health care provider. The district court denied a preliminary injunction, concluding that plaintiffs failed to establish a likelihood of success on the merits of their RFRA claim. *See* R.34 at 8-24.

ARGUMENT

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id*. at 20.[5] The district court correctly held that plaintiffs are not likely to succeed on their RFRA claim.

A. Freshway Foods Is Not A Person Engaged In The Exercise Of Religion Within The Meaning Of RFRA.

RFRA requires a plaintiff to show, as a threshold matter, that a challenged regulation is a substantial burden on "a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). Plaintiffs cannot make that showing because Freshway Foods is not a "person" engaged in the "exercise of religion" within the meaning of RFRA or other federal statutes that provide accommodations for an organization's religious beliefs.

[5] Even assuming that the "sliding scale" approach to preliminary relief survives *Winter*, plaintiffs here must establish a likelihood of success because they seek "to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme," *Hobby Lobby Stores, Inc. v. Sebelius*, 2012 WL 6930302, *2 (10th Cir. Dec. 20, 2012), and because their asserted harm (a substantial burden on religious exercise) turns on a likelihood of success on the merits. *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 304 (D.C. Cir. 2006).

Congress has accommodated religious organizations through religious exemptions in statutes that regulate the employer-employee relationship. At the same time, however, Congress has not permitted for-profit, secular corporations to invoke religion as a basis to defeat the requirements of federal law. Under Title VII of the Civil Rights Act of 1964, an employer cannot discriminate on the basis of religion in the terms or conditions of employment, including employee compensation, unless the employer is "a religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1(a) (collectively, "religious organization"). Similarly, the Americans with Disabilities Act ("ADA"), which prohibits employment discrimination on the basis of disability, includes specific exemptions for religious organizations. *See* 42 U.S.C. § 12113(d)(1), (2). And the National Labor Relations Act ("NLRA"), which gives employees collective bargaining and other rights, has been interpreted to exempt church-operated educational institutions from the jurisdiction of the National Labor Relations Board. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

The organizations found to qualify for these religious exemptions all have been non-profit, religious organizations, as in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987). There, the Supreme Court held that a gymnasium run by the Mormon Church was free to discharge a building engineer who failed to observe the

Church's standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco. *See id*. at 330 & n.4. In so holding, the Court stressed that the Church did not operate the gym on a for-profit basis. *Id*. at 339.[6]

This Court has emphasized that for-profit status is an objective criterion that allows courts to distinguish a secular company from a potentially religious organization. "As the *Amos* Court noted, it is hard to draw a line between the secular and religious activities of a religious organization." *University of Great Falls v. NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002). By contrast, "it is relatively straight-forward to distinguish between a non-profit and a for-profit entity." *Ibid*. Thus, this Court held that an organization qualifies for the NLRA's religious exemption if, among other things, the organization is "organized as a 'nonprofit'" and holds itself out as religious. *Id*. at 1343 (quoting *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 400, 403 (1st Cir. 1985) (en banc) (opinion of then-Judge Breyer)). The Court explained that this bright-line distinction prevents courts from "'trolling through a person's or institution's religious beliefs,'" *id*. at

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

1341-42 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)), and noted that the "prohibition on such intrusive inquiries into religious beliefs underlay" the Supreme Court's interpretation of the Title VII religious exemption in *Amos*. *Id*. at 1342; *see also Spencer v. World Vision, Inc.*, 633 F.3d 723, 734 (9th Cir. 2011) (O'Scannlain, J., concurring) (similar).

Congress, in enacting RFRA, carried forward the background principles reflected in these pre-existing federal employment statutes, by requiring a plaintiff to demonstrate a substantial burden on "a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). Under RFRA, as under these pre-existing federal statutes, an entity's for-profit status is an objective criterion that allows a court to distinguish a secular company from a potentially religious organization. "[F]or-profit corporate entities, unlike religious non-profit organizations, do not—and cannot—legally claim a right to exercise or establish a 'corporate' religion under the First Amendment or the RFRA." *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, slip op. at 6 (3d Cir. Feb. 7, 2013) (Garth, J., concurring) (emphases omitted); *see also Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1288 (W.D. Okla. 2012) ("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."), *appeal pending*, No. 12-6294 (10th Cir.);

Briscoe v. Sebelius, No. 13-285, slip op. 8 (D. Colo. Feb. 27, 2013) ("Secular, for-profit corporations neither exercise nor practice religion.").

The Freshway Foods companies are for-profit corporations that distribute fresh produce. Plaintiffs do not claim that the corporations qualify for the religious exemptions in Title VII, the ADA, the NLRA, or any other federal statute that regulates the employment relationship. Likewise, RFRA provides no basis to exempt the corporation from the regulations that govern the health coverage under the Freshway Foods group health plan, which is a significant aspect of employee compensation. Freshway Foods is a for-profit, secular corporation, and it must provide its secular workforce the employee benefits required by federal law.

B. The Obligation To Cover Contraceptives Lies With The Freshway Foods Plan, Not With The Corporations' Shareholders.

1. Plaintiffs cannot circumvent the distinction between non-profit, religious organizations and for-profit, secular corporations by attempting to shift the focus of the RFRA inquiry from Freshway Foods to its shareholders. Federal law does not require the shareholders to provide health coverage to Freshway Food employees, or to satisfy the myriad other requirements that federal law places on Freshway Foods. These obligations lie with the corporations themselves.

Although plaintiffs would ignore this distinction, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who

own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). "So long as the business's liabilities are not the [Gilardis'] liabilities—which is the primary and 'invaluable privilege' conferred by the corporate form, *Torco Oil Co. v. Innovative Thermal Corp.*, 763 F. Supp. 1445, 1451 (N.D. Ill. 1991) (Posner, J., sitting by designation)—neither are the business's expenditures the [Gilardis'] own expenditures." *Ibid*. The money used to pay for health coverage under the Freshway Foods group health plan "belongs to the company, not to the [Gilardis]." *Ibid*.

"The Gilardis have chosen to conduct their business through corporations, with their accompanying rights and benefits and limited liability." R.34 at 10. "They cannot simply disregard that same corporate status when it is advantageous to do so." *Id*. at 10-11 (citing *Conestoga Wood Specialties Corp. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 140110, *8 (E.D. Pa. Jan. 11, 2013), *injunction pending appeal denied*, No. 13-1144 (3d Cir. Jan. 29, 2013)). "The law protects that separation between the corporation and its owners for many worthwhile purposes." *Autocam Corp. v. Sebelius*, 2012 WL 6845677, *7 (W.D. Mich. Dec. 24, 2012), *injunction pending appeal denied*, No. 12-2673 (6th Cir. Dec. 28, 2013). "Neither the law nor equity can ignore the separation when assessing claimed burdens on the individual owners' free exercise of religion caused by requirements imposed on the corporate entities they own." *Ibid*.

2. None of the Supreme Court cases that formed the background to RFRA held or even suggested that the regulation of a corporation is a substantial burden on the controlling shareholders' exercise of religion. Plaintiffs rely on *United States v. Lee*, 455 U.S. 252 (1982), *see* Pl. Mot. 12 & n.8, but *Lee* considered a free exercise claim raised by an individual Amish employer—not by a corporation or its shareholders. Moreover, even with respect to the individual employer, *Lee* rejected the free exercise claim, emphasizing that, "[w]hen followers of a particular sect enter into commercial activities as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261. The Court explained that "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees," *ibid.*, who would be denied their social security benefits if the employer did not pay the social security taxes.

The two cases cited in RFRA itself—*Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)—did not involve corporate regulation. In *Sherbert*, the Supreme Court held that a state government could not deny unemployment compensation to an individual who lost her job because her religious beliefs prevented her from working on a Saturday. And, in *Yoder*, the Court held that a state government could not compel Amish parents to send their

children to high school. Plaintiffs rely heavily on *Thomas v. Review Board*, 450 U.S. 707 (1981), but, there, the Supreme Court simply applied *Sherbert*'s reasoning to hold that a state government could not deny unemployment compensation to an individual who lost his job because of his religious beliefs.

Nor do the Ninth Circuit cases that plaintiffs cite (Pl. Mot. 12 n.8) support their position here. Those cases held only that corporations had "*standing* to assert the free exercise right of [their] owners." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009) (citing *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988)) (emphasis added). For standing purposes, an "injury need not be important or large; an 'identifiable trifle' can meet the constitutional minimum." *National Wildlife Federation v. Burford*, 878 F.2d 422, 430 (D.C. Cir. 1989) (citation omitted). RFRA, by contrast, requires a plaintiff to show that a regulation "*substantially* burden[s]" a person's exercise of religion. 42 U.S.C. § 2000bb-1(a) (emphasis added).

Plaintiffs also rely on *McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985), *see* Pl. Mot. 12 n.8, but, there, a state hearing examiner "pierced the 'corporate veil'" to make the individual owners of the stock and assets of a corporation "liable for the illegal actions of" the corporation. *McClure*, 370 N.W.2d at 850-51 & n.12. Moreover, the *McClure* court rejected the free exercise

claim because the corporate plaintiff was "not a religious corporation—it is a Minnesota business corporation engaged in business for profit." Id. at 853.[7]

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

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

[7] *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194 (2d Cir. 2012), cited at Pl. Mot. 12 n.8, rejected a free exercise challenge to a state law that regulated kosher food labels. *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994), cited at Pl. Mot. 12 n.8, did not involve a corporation. Plaintiffs also cite repeatedly to *Tyndale House Publishers, Inc. v. Sebelius*, __ F. Supp. 2d __, 2012 WL 5817323 (D.D.C. Nov. 16, 2012), *appeal pending*, No. 13-5018 (D.C. Cir.), but that court relied on the "unique corporate structure" of the plaintiff, which is 96.5% owned by a non-profit, religious entity. *Id*. at *7 & n.10.

A group health plan "covers many medical services, not just contraception." *Grote*, 2013 WL 362725, *13 (Rovner, J., dissenting). "To the extent the [Gilardis] themselves are funding anything at all—and . . . one must disregard the corporate form to say that they are—they are paying for a plan that insures a comprehensive range of medical care that will be used in countless ways" by the employees and their family members who participate in the Freshway Foods group health plan. *Ibid*. "No individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense the [Gilardis'] decision or action." *Ibid*.

In other First Amendment contexts, the Supreme Court has repeatedly held that a person or entity that provides a source of funding may not be deemed responsible for the decisions that another person or entity makes in using those funds. *See id*. at *10-13 (discussing *Zelman v. Simmons–Harris*, 536 U.S. 639 (2002), and *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000)). It would be equally inappropriate to attribute an employee's decision to use her comprehensive health coverage for a particular item or service to the corporation or to its shareholders. *See id*. at *13-14.

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

1. The contraceptive-coverage requirement is also narrowly tailored to advance compelling governmental interests in public health and gender equality.

Plaintiffs do not question the importance of these interests, but they assert that the interests cannot be compelling because grandfathered plans are not subject to the requirement to cover recommended preventive health services, including contraceptives, without cost sharing.

Plaintiffs incorrectly assume that all or most grandfathered plans exclude contraceptive coverage. *See* Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 108 (2011) ("[c]ontraceptive coverage has become standard practice for most private insurance"). In any event, the grandfathering provision is transitional in effect, and it is expected that a majority of plans will lose their grandfathered status by the end of 2013. *See* 75 Fed. Reg. 34,538, 34,552 (June 17, 2010).

2. Plaintiffs alternatively contend that, instead of regulating the terms of group health plans, the federal government could give all citizens access to free contraceptives. This argument reflects a fundamental misunderstanding of the "least restrictive means" test, which has never been held to require the government to "subsidize private religious practices." *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 94 (Cal. 2004) (rejecting challenge to a state-law requirement that certain health insurance plans cover prescription contraceptives).

CONCLUSION

Plaintiffs' motion for an injunction pending appeal should be denied.

Respectfully submitted,

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March 11, 2013

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2013, I filed and served the foregoing opposition on counsel of record through this Court's CM/ECF system.

/s Alisa B. Klein

Alisa B. Klein