IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

SHARPE HOLDINGS, INC., *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants.	)	Case No. 2:12-cv-00092-DDN

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs ask this Court at the eleventh hour to enter a temporary restraining order ("TRO") and to preliminarily enjoin a requirement that was established sixteen months ago and that is intended to help ensure that women have increased access to health coverage for certain preventive services that medical experts deem necessary for women's health and well-being. Because of plaintiffs' inexplicable and inexcusable delay, and because they cannot show a likelihood of success on the merits in any event, this Court should deny their motion. *See Triune Health Grp. v. U.S. Dep't of Health & Human Servs.*, No. 1:12-cv-06756 (N.D. Ill. Dec. 26, 2012), ECF No. 45 (minute order denying plaintiffs' December 21 motion for TRO because plaintiffs "have failed to offer any explanation for [their] delay" and because plaintiffs' dilatory conduct "undermines their argument they will suffer irreparable harm if the Court does not issue a TRO immediately") (Ex. 1); *Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, slip op. at 7 (W.D. Mich. Dec. 24, 2012) (Ex. 2), *motion for injunction pending appeal denied*, No. 12-2673, Order (6th Cir. Dec. 28, 2012) (Ex. 7) ["*Autocam Sixth Circuit Order*"]; *Autocam*, Ex. 2, at 15 ("[T]he immediacy of the dilemma Plaintiffs face is in no small part of their own making . . . . Equity does not favor the dilatory.").

The 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). 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 plaintiffs in this case are Sharpe Holdings, a for-profit corporation based in Missouri engaged in farming and cheese-making; the corporation's owner; and two of the corporation's employees. They claim their sincerely held religious beliefs prohibit them from funding or

subsidizing health coverage for certain contraceptive services. But their challenge rests largely on the theory that a for-profit, secular corporation engaged in farming and making cheese can exercise religion and thereby avoid the reach of laws designed to regulate commercial activity. This cannot be. Indeed, the Supreme Court has recognized that, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *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 corporate entity's employees. To hold otherwise would permit for-profit, secular companies and their owners to become laws unto themselves. Because there are an infinite variety of alleged religious beliefs, such companies and their owners could claim countless exemptions from an untold number of general commercial laws designed to protect against unfair discrimination in the workplace and to protect the health and well-being of individual employees and their families. Such a system would not only be unworkable, it would also cripple the government's ability to solve national problems through laws of general application. This Court, therefore, should reject plaintiffs' effort to bring about an unprecedented expansion of constitutional and statutory free exercise rights.

Plaintiffs' motion for a TRO and a preliminary injunction should be denied because plaintiffs are not likely to succeed on the merits of their claims. As an initial matter, plaintiffs' suit must be dismissed for lack of jurisdiction because plaintiffs have not satisfied their burden to allege an imminent injury from the operation of the challenged regulations. Plaintiffs allege their group health plan is not grandfathered and is thus subject to the regulations, but such a bare legal conclusion, without supporting factual allegations, is insufficient.

Furthermore, even if plaintiffs had met their burden to establishing Article III standing, with respect to plaintiffs' Religious Freedom Restoration Act ("RFRA") claim, none of the plaintiffs can show that the regulations impose a substantial burden on their religious exercise.

Sharpe Holdings is a for-profit, secular employer, and a secular entity – by definition – does not exercise religion. Indeed, the first court to directly address this question held – in the course of denying a similar request for preliminary injunctive relief – 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), *emergency motion for stay pending appeal denied*, No. 12-6294, Order (10th Cir. Dec. 20, 2012) (Ex. 3) ["*Hobby Lobby Tenth Circuit Order*"], *application for injunction pending appellate review denied*, No. 12A644, 568 U.S. ___ (Dec. 26, 2012) (Sotomayor, J., in chambers), *available at* http://www.supremecourt.gov/opinions/12pdf/12a644_k53l.pdf; *see also Autocam*, Ex. 2, at 7 ("Plaintiffs have not identified any authority, and the Court has not found authority independently, for the proposition that a secular, for-profit corporation has a First Amendment right of free exercise of religion."); *Korte v. U.S. Dep't of Health & Human Servs.*, No. 3:12-CV-01072-MJR, 2012 WL 6553996, at *6 (S.D. Ill. Dec. 14, 2012), *appeal docketed*, No. 12-3841 (7th Cir. Dec. 18, 2012) ("[T]he exercise of religion [i]s a purely personal guarantee that cannot be extended to corporations" (quotation omitted)).

The allegations of Charles N. Sharpe, Judi Diane Schaefer, and Rita Joanne Wilson of a substantial burden on their own individual religious exercise fare no better, as the regulations that purportedly impose such a burden apply only to certain group health plans and health insurance issuers. These individuals are neither. First, Ms. Schaefer and Ms. Wilson are simply employees of the entity to which the regulations apply; the regulations place no obligation on them and thus cannot be said to substantially burden their religious exercise. That they pay premiums for group health coverage under which their colleagues might choose to procure health care to which they personally object imposes no burden, let alone a substantial one, on their religious exercise. As to Mr. Sharpe, it is well established that a corporation and its owners are wholly separate entities, and the Court should not permit Mr. Sharpe to eliminate that legal separation to impose his personal religious beliefs on the corporate entity's group health plan or its over 300 employees. In part for that reason, the *Hobby Lobby*, *Korte*, *Autocam*, and *Grote* courts found the owners and officers of a corporation had not shown a substantial burden on their

individual religious exercise. *Hobby Lobby*, 870 F. Supp. 2d at 1294; *Korte*, 2012 WL 6553996, at *9-11; *Autocam*, Ex. 2, at 10-13; *Grote Indus. v. Sebelius*, No. 4:12-cv-00134-SEB-DML, slip op. at 8 (S.D. Ind. Dec. 27, 2012) (Ex. 4); *see also Autocam Sixth Circuit Order*, Ex. 7, at 2. Finally, any burden caused by the regulations is simply too attenuated to qualify as a *substantial* burden. *See Hobby Lobby Tenth Circuit Order*, Ex. 3, at 7; *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-CV-476(CEJ), 2012 WL 4481208, at *5-7 (E.D. Mo. Sept. 28, 2012) (dismissing identical claim for this reason), *appeal docketed*, No. 12-3357 (8th Cir. Oct. 4, 2012); *see also Hobby Lobby*, 870 F. Supp. 2d at 1293-96; *Korte*, 2012 WL 6553996, at *10-11, *Autocam*, Ex. 2, at 10-13; *Grote*, Ex. 4, at 8-13; *see also Autocam Sixth Circuit Order*, Ex. 7, at 2.[1] Just as Sharpe Holdings' employees have always been able to choose whether to procure contraceptive services with the salaries the corporation pays them, under the current regulations those employees retain the ability to choose what health services they wish to obtain according to their own beliefs and preferences. Plaintiffs remain free to advocate against the use of

[1] The Tenth and Sixth Circuits recently denied motions to enjoin the preventive services coverage regulations pending appeal case virtually identical to this one. The Tenth Circuit in *Hobby Lobby* found that the secular, for-profit corporation and its owners did not establish a likelihood of success on their RFRA claim. *See Hobby Lobby Tenth Circuit Order*, Ex. 3, at 2. The court agreed with the district court that "the particular 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 . . . subsidize someone else's participation in an activity that is condemned by plaintiff[s'] religion." *Id.* at 7 (quoting *Hobby Lobby*, 870 F. Supp. 2d at 1294). The court concluded that there was not a substantial likelihood that it would find such a burden to be "substantial," as to do so would "extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship." *Id.* Moreover, the court held that this was so as to both the corporate plaintiffs and the individual owner plaintiffs, finding that "their common failure to demonstrate a substantial likelihood of success on the RFRA prima fac[i]e case suffices to dispose of the motion." *Id.* at 6 n.4. Similarly, the Sixth Circuit in *Autocam* concluded that the secular, for-profit corporations and their owners did not establish a likelihood of success on the merits of their RFRA and Free Exercise Clause claims. *See Autocam Sixth Circuit Order*, Ex. 7, at 2 (citing the "reasoned" district court opinion in *Autocam*, Ex. 2, and "the Supreme Court's recent denial of an injunction pending appeal in *Hobby Lobby*").

Although a divided motions panel of the Eighth Circuit issued a stay pending appeal in *O'Brien*, the panel gave no explanation for its action. "Decisions by motions panels are summary in character, made often on a scanty record, and not entitled to the weight of a decision made after plenary submission." *In re Rodriquez*, 258 F.3d 757, 759 (8th Cir. 2001) (quotation omitted); *see also Gonzalez v. Arizona*, 485 F.3d 1041, 1046 (9th Cir. 2007) (noting the Supreme Court had vacated an emergency injunction "because the motions panel gave no reasons for its action"); *Lambert v. Blackwell*, 134 F.3d 506, 513 n.17 (3d Cir. 1997); *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"); *Grote*, Ex. 4, at 7 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.").

contraceptive services (or any other services), but ultimately, an employee's health care choices remain those of the employee, not Sharpe Holdings, not Mr. Sharpe, and not two of those employees' colleagues.

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' First Amendment claims are equally meritless. The Free Exercise Clause does not prohibit a law that is neutral and generally applicable, even if the law prescribes conduct that an individual's religion proscribes. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). The preventive services coverage regulations fall within this rubric because they do not target religiously motivated conduct but instead apply to all non-exempt, non-grandfathered plans. Indeed, all of the courts that have addressed Free Exercise challenges to these regulations – *Hobby Lobby*, 870 F. Supp. 2d at 1287-90; *O'Brien*, 2012 WL 4481208, at *7-9; *Korte*, 2012 WL 6553996, at *8; *Autocam*, Ex. 2, at 7-9, and *Grote*, Ex. 4, at 13-15 – concluded as much. Plaintiffs' Establishment Clause claim is similarly flawed. The religious employer exemption distinguishes between *organizations* based on their purpose and composition; it does not favor one *religion*, *denomination*, or *sect* over another. The distinctions drawn by the exemption, therefore, simply do not violate the constitutional prohibition against denominational preferences. Nor do the regulations violate plaintiffs' free speech rights. The regulations do not require plaintiffs to say anything; nor do they prohibit plaintiffs from expressing to company employees or the public their views in opposition to the use of contraceptive services. For these reasons, the *O'Brien* court dismissed free exercise, Establishment Clause, and free speech challenges identical to those raised here, 2012 WL 4481208, at *7-13; the *Autocam* court rejected identical free exercise and free speech challenges (where plaintiffs had not raised an Establishment Clause challenge), Ex. 2, at 7-9, 13-14; and the

Grote court rejected identical free exercise, Establishment Clause, and free speech challenges, Ex. 4, at 13-19. Moreover, the highest courts of both New York and California have upheld similar state laws against similar First Amendment challenges, *see Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 461 (N.Y. 2006); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 74 n.3 (Cal. 2004).

Plaintiffs also cannot satisfy the remaining requirements for obtaining temporary or preliminary injunctive relief. Absent a showing of likelihood of success on the merits (which plaintiffs cannot make), plaintiffs cannot establish that they will be irreparably harmed in the absence of preliminary relief. Independently, plaintiffs cannot show irreparable harm and are simply not entitled to emergency relief because they waited more than sixteen months after the contraception coverage requirement was established – and until nearly *ten days* before the requirement is to apply to their health plan – to file their complaint, let alone seek such relief. *See, e.g.*, *Triune Health Grp.*, Ex. 1; *Autocam*, Ex. 2, at 15. In contrast, a preliminary injunction would harm both the government and the public. The employees of Sharpe Holdings, who were hired without regard to their faith and may not share the individual plaintiffs' religious beliefs, would be deprived of the benefits of receiving a health plan through their employer that covers the full range of recommended services. This would perpetuate, rather than mitigate, the public health and gender equality problems the government tried to solve through the regulations.

BACKGROUND

Before the enactment of 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 in large part to cost, Americans used preventive services at about half the recommended rate. *See* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 19-20, 109 (2011) ("IOM REP."), *available at* http://www.nap.edu/catalog.php?record_id=13181. Section 1001 of the ACA – which includes the preventive services coverage provision that is relevant here – seeks to cure this problem by

making recommended preventive care affordable and accessible for many more Americans. It requires all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, "[for] women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [("HRSA")]." 42 U.S.C. § 300gg-13(a)(4).

Because there were no existing HRSA guidelines relating to preventive care and screening for women, HHS tasked the independent Institute of Medicine ("IOM") with "review[ing] what preventive services are necessary for women's health and well-being" and developing recommendations for comprehensive guidelines. IOM REP. at 2. After an extensive science-based review IOM recommended that HRSA guidelines include, among other things, well-woman visits; breastfeeding support; domestic violence screening; and, 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. IOM determined that coverage, without cost-sharing, for these contraceptive methods, sterilization procedures, and patient education and counseling is necessary to increase the use of these services, and thereby reduce unintended pregnancies (and the negative health outcomes that disproportionately accompany them) and promote healthy birth spacing. IOM REP. at 102-03.

On August 1, 2011, HRSA adopted IOM's recommendations, subject to an exemption relating to certain religious employers authorized by an amendment to the interim final regulations. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), *available at* http://www.hrsa.gov/womensguidelines/. The amendment, issued on 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). The religious employer exemption was modeled after the method of religious accommodation used in several states that already required health insurance issuers to provide coverage for contraception. 76 Fed. Reg. at 46,623.

In February 2012, defendants 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 plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage. 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012). During the safe harbor period, the government intends to amend the regulations to further accommodate non-grandfathered religious organizations' religious objections to covering contraceptive services. *Id*. at 8728.[2]

STANDARD OF REVIEW

A motion for a TRO is evaluated under the same standards as a motion for a preliminary injunction. *See S.B. McLaughlin & Co. v. Tudor Oaks Condo. Project*, 877 F.2d 707, 708 (8th Cir. 1989). 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.

ARGUMENT

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

A. Plaintiffs Lack Standing To Challenge The Regulations

As an initial matter, plaintiffs are not entitled to a preliminary injunction because this Court lacks jurisdiction to adjudicate their claims. *See Steel Co. v. Citizens for a Better Env't*,

[2] The accommodations defendants are considering are not constitutionally or statutorily required; rather, they stem from defendants' commitment to work with, and respond to, stakeholders' concerns. *See* 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012) (government's advance notice of proposed rulemaking).

523 U.S. 83, 94 (1998). "[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III," the "irreducible constitutional minimum" of which requires a plaintiff to demonstrate (1) it has suffered an injury in fact, (2) the existence of a causal connection between the alleged injury and conduct that is fairly traceable to the defendant, and (3) it is likely the requested relief will redress the alleged injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Here, plaintiffs have not shown any injury caused by the preventive services coverage regulations.

The challenged regulations do not apply to grandfathered plans – health plans in which at least one individual was enrolled on March 23, 2010 and that have continuously covered at least one individual since that date. *See* 42 U.S.C. § 18011(a)(2); 45 C.F.R. § 147.140. A grandfathered plan may lose its grandfathered status if, compared to its existence on March 23, 2010, it eliminates all or substantially all benefits to diagnose or treat a particular condition, increases a percentage cost-sharing requirement, significantly increases a fixed-amount cost-sharing requirement, significantly reduces the employer's contribution, or imposes or tightens an annual limit on the dollar value of any benefits. *See, e.g.*, 45 C.F.R. § 147.140(a), (g)(1).

Plaintiffs assert that "[n]one of the several exemptions from the law applies to any of the plaintiffs." Compl. ¶ 50, Dec. 20, 2012, ECF No. 1; *see* Pls.' Mem. in Supp. of Mot. for TRO and Prelim. Inj. ("Pls.' Mem.") at 16 n.17 (alluding to non-specific "plan changes"). But this bare legal conclusion, absent supporting factual allegations, does not provide the specificity required at the pleading stage to establish standing. *See Nebraska v. U.S. Dep't of Health & Human Servs.*, No. 4:12CV3035, 2012 WL 2913402, at *12 (D. Neb. July 17, 2012), *appeal docketed*, No. 12-3238 (8th Cir. Sept. 25, 2012) (dismissing case where "plaintiffs . . . failed to plead specific facts showing that [their plans] are not grandfathered."); *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12-cv-2542(BMC), 2012 WL 6042864, at *12 (E.D.N.Y. Dec. 4, 2012); *Zubik v. Sebelius*, No. 2:12-cv-00676, 2012 WL 5932977, at *11 (W.D. Pa. Nov. 27, 2012). Because plaintiffs have not shown Sharpe Holdings' plan is not grandfathered, they have not established standing to challenge the regulations.

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

1. The regulations do not substantially burden any exercise of religion by a for-profit secular company, its owners, or its employees

Under RFRA, 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,'" unless the burden furthers a compelling governmental interest and is the least restrictive means of doing so. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (quoting 42 U.S.C. § 2000bb-1(a)). Plaintiffs cannot show that the challenged regulations substantially burden any exercise of religion, and thus cannot succeed on their RFRA claim. First, Sharpe Holdings is not an individual or a "religious organization," and thus cannot "exercise religion," under RFRA. *See Hobby Lobby*, 870 F. Supp. 2d at 1287-88, 1291-92; *Korte*, 2012 WL 6553996, at *6. Second, because the regulations apply only to the company's health plan, and not to its owners or employees, the religious exercise of such individuals is not substantially burdened. *See Hobby Lobby*, 870 F. Supp. 2d at 1293-96; *Korte*, 2012 WL 6553996, at *9-11; *Autocam*, Ex. 2, at 11-14; *Grote*, Ex. 4, at 8. And third, any burden imposed by the regulations is attenuated and thus cannot be substantial. *See O'Brien*, 2012 WL 4481208, at *6; *Hobby Lobby*, 870 F. Supp. 2d at 1293-96; *Korte*, 2012 WL 6553996, at *10-11; *Autocam*, Ex. 2, at 10-14; *Grote*, Ex. 4, at 8-13.

a. There is no substantial burden on Sharpe Holdings because a secular, for-profit corporation does not exercise religion

Plaintiffs' claim that Sharpe Holdings "exercise[s] . . . religion" within the meaning of RFRA, 42 U.S.C. § 2000bb-1(b), cannot be reconciled with Sharpe Holdings' status as a secular company. The terms "religious" and "secular" are antonyms; a "secular" entity is defined as one "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."); *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) (rejecting RFRA claim where plaintiff did not contend it was a "religious organization").

Sharpe Holdings is plainly secular. Its products are not religious; it is a for-profit corporation engaged in "farming, dairy, creamery, and cheese-making," Compl. ¶ 2, and its Articles of Incorporation make no reference at all to any religious purpose, *see* Sharpe Holdings, Inc., Articles of Incorporation (Nov. 9, 2004) (Ex. 5). The company does not claim to be affiliated or managed by any formally religious entity, nor does it assert that it employs persons of a particular faith.

The government is aware of no case in which a secular, for-profit employer like Sharpe Holdings prevailed on a RFRA claim. Because Sharpe Holdings is a secular employer, it is not entitled to the protections of the Free Exercise Clause or RFRA, which incorporates Free Exercise jurisprudence. *Holy Land Found.*, 333 F.3d at 167; *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.").[3] 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) (noting precedent for "freedom for *religious* organizations") (emphasis

[3] *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. Similarly, the plaintiff in *Lee*, 455 U.S. 252, was an individual who employed several other people on his farm; the plaintiff was not a secular company, much less a separate, corporate entity. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119-22 (9th Cir. 2009), and *EEOC v. Townley Engineering and Manufacturing Co.*, 859 F.2d 610, 619-20 (9th Cir. 1988), both declined to decide whether "a for-profit corporation can assert its own rights under the Free Exercise Clause," and instead held only that the particular plaintiff corporation had standing to raise the rights of its owners. *Primera Iglesia Bautista Hispana v. Broward Cnty.*, 450 F.3d 1295, 1300 (11th Cir. 2006), involved a "religious organization."

added); *Werft v. Desert Sw. Annual Conference of the United Methodist Church*, 377 F.3d 1099, 1102 (9th Cir. 2004) (same); *Anselmo v. Cnty. of Shasta*, No. CIV. 2:12-361 WBS EFB, 2012 WL 2090437, at *12 (E.D. Cal. 2012) (same, in RLUIPA context); *Hobby Lobby*, 870 F. Supp. 2d at 1288 ("[S]ecular, for-profit corporations . . . do not have constitutional free exercise rights"); *Korte*, 2012 WL 6553996, at *6, *9-10; *see Grote*, Ex. 4, at 8 (declining to decide but expressing "doubts regarding whether a secular, for-profit corporation" has free exercise rights"). 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 like Sharpe Holdings may not discriminate on the basis of religion in hiring or firing employees or otherwise establishing the terms and conditions of employment. Title VII of the Civil Rights Act generally prohibits religious discrimination in the workplace. *See* 42 U.S.C. § 2000e-2(a). But that bar does not apply to "a religious corporation." *Id*. § 2000e-1(a). It is clear that Sharpe Holdings does not qualify as a "religious corporation"; it is for-profit, it is not affiliated with a formally religious entity such as a church or synagogue, and it makes secular products. *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007); *Spencer v. World Vision, Inc.*, 633 F.3d 723, 734, 748 (9th Cir. 2011) (explicitly holding that a for-profit entity can never qualify for the Title VII exemption); *cf. Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002) (holding that an organization can only be religious, and thus exempt from NLRB jurisdiction, if it is organized as a non-profit).[4]

It would be extraordinary to conclude that Sharpe Holdings is not a "religious corporation" under Title VII (and it clearly is not) and thus cannot discriminate in employment

[4] In this respect, Sharpe Holdings is distinguishable from the corporate plaintiff in *Tyndale House Publishers, Inc. v. Sebelius*, Civil Action No. 12-1635(RBW), 2012 WL 5817323 (D.D.C. Nov. 16, 2012), which the court suggested might, due to its "unique corporate structure" and characteristics, qualify as a "religious corporation" under Title VII. *Id.* at *7 n.10, *9 n.13; *see also id.* at *2, *6-7 (noting that 96.5 percent of Tyndale's shares are owned by, and the same percentage of its profits are donated to, a "non-profit religious entity," that the company publishes Bibles and Christian books, and that its Articles of Incorporation mention several religious purposes).

on the basis of religion, 42 U.S.C. § 2000e-1(a), but nonetheless "exercise[s] . . . religion" within the meaning of RFRA, *id.* § 2000bb-1(b).[5] Such a conclusion would allow a 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. 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.

Because Sharpe Holdings was organized as a secular, for-profit entity engaged in commercial activity, "the limits [its owners] accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261; *see also McClure v. Sports & Health Club*, 370 N.W.2d 844, 853 (Minn. 1985) ("By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs."). The company therefore may not impose its owners' personal religious beliefs on its employees (many of whom may not share the owners' beliefs) by refusing to cover certain contraceptive services. *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. In this respect, "[v]oluntary commercial activity does not receive the same status

[5] 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.*, *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (statutes should be read harmoniously).

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).[6]

b. The regulations do not substantially burden the religious exercise of Mr. Sharpe because the regulations apply only to Sharpe Holdings, a separate and distinct legal entity[7]

The regulations also do not substantially burden Mr. Sharpe's religious exercise. By their terms, the regulations apply to group health plans and health insurance issuers. *See, e.g.*, 42 U.S.C. § 300gg-91(a)(1); 45 C.F.R. § 147.130. Mr. Sharpe is neither. Nonetheless, he claims that the regulations substantially burden *his* religious exercise because the regulations require the group health plan sponsored by the for-profit secular *company* he owns to provide health insurance that includes certain contraceptive coverage. As the courts in *Hobby Lobby*, *Korte*, and *Autocam* explained in rejecting the claims of owners like Mr. Sharpe, a substantial burden on religious exercise cannot be shown by invoking this type of trickle-down theory; to constitute a substantial burden within the meaning of RFRA, the burden must be imposed on the plaintiff himself. *See Hobby Lobby,* 870 F. Supp. 2d at 1293-96; *Korte*, 2012 WL 6553996, *9-11, *Autocam*, Ex. 2, at 11-14. "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

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

[7] The Court need not specifically reach the burden alleged by Ms. Schaefer and Ms. Wilson because disposition of the claims of Sharpe Holdings and Mr. Sharpe will necessarily control their claims. If Sharpe Holdings and/or Mr. Sharpe prevail on their RFRA challenge (which they should not), Ms. Schaefer and Ms. Wilson will have received the relief they seek. If Sharpe Holdings and Mr. Sharpe do not prevail under RFRA, then it will be because any burden on the corporation or its owner is not a substantial burden on religious exercise, so *a fortiori*, Ms. Schaefer's and Ms. Wilson's far more removed claims of burden must fail as well.

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) ("Application 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 F. App'x 729, 734 (6th Cir. 2007) ("[T]he 'substantial burden' hurdle is high.").

Here, any burden on Mr. Sharpe's religious exercise results from obligations the regulations impose on a legally separate, secular corporation.[8] This type of attenuated burden is not cognizable under RFRA. Indeed, cases that find a substantial burden uniformly involve a direct burden on the plaintiff rather than a burden imposed on another entity. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. U.S. 520, 524 (1993). Not so here, where the regulations apply to the group health plan sponsored by Sharpe Holdings, not to Mr. Sharpe himself. *See Hobby Lobby*, 870 F. Supp. 2d at 1294; *Korte*, 2012 WL 6553996, at *9, *Autocam*, Ex. 2, at 11-14; *Grote*, Ex. 4, at 8-13.

Mr. Sharpe's theory boils down to the claim that what is done to the corporation (or group health plan sponsored by the corporation) is also done to its owner.[9] But, as a legal matter, that is simply not so. Mr. Sharpe has voluntarily chosen to enter into commerce and elected to do so by establishing a for-profit, secular corporation, which is "a wholly and separate legal entity, distinct from the persons who compose it." *Fleming Cos. v. Rich*, 978 F. Supp. 1281, 1302 (E.D. Mo. 1997). 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.

[8] 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). And, as explained below, Sharpe Holdings is a legally separate entity from Mr. Sharpe. *See Grote*, Ex. 4, at 13.

[9] As to Ms. Schaefer and Ms. Wilson, it is certainly not the case that what is done to the corporation is done to its employees, and plaintiffs offer no support for the notion that it is.

158, 163 (2001); *see* Mo. Rev. Stat. § 351.385. The company's owners and officers in turn are generally not liable for the corporation's debts since "the corporation laws are designed to provide investors with protection from personal liability upon compliance with specific statutory provisions." *Jackson v. O'Dell*, 851 S.W.2d 535, 537 (Mo. Ct. App. 1993). 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. Mr. Sharpe "should not be able to choose when [the corporate] form is disregarded and when it is not" so as to impose his personal religious beliefs on the corporate entity's group health plan or its over 300 employees. *A&E Enters., Inc. v. Clairsin, Inc.*, 169 S.W.3d 884, 887 (Mo. Ct. App. 2005).

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; *Autocam*, Ex. 2, at 12-14. 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 its owner's or shareholder's beliefs on the company's employees in a way that deprives those employees of legal rights they would otherwise have, such as by discriminating against the company's employees on the basis of religion in establishing the terms and conditions of employment notwithstanding the limited religious exemption that Congress established under Title VII. This result would constitute a wholesale evasion of the rule that a company must be a "religious organization[]" to assert free exercise rights, *Hosanna-Tabor*, 132

S. Ct. at 706, or a "religious corporation" to permissibly discriminate on the basis of religion in employment, 42 U.S.C. § 2000e-1(a).[10]

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

Although the regulations do not require Sharpe Holdings or its owner or its employees to provide contraceptive services directly, plaintiffs' complain that, through the company's group health plan and the benefits it provides to employees, plaintiffs will subsidize conduct (the use of

[10] The court in *Tyndale* did not address this argument, but rather, erroneously equated the analysis of standing under Article III with RFRA's substantial burden requirement. 2012 WL 5817323, at *7-8. This case does not present the standing issue addressed in *Tyndale* since, unlike the individual owners of the company plaintiffs in that case, Mr. Sharpe is a plaintiff here. Therefore, the Court need not decide whether Sharpe Holdings would have standing to assert the Mr. Sharpe's rights if he were not a plaintiff. *See Hobby Lobby*, 870 F. Supp. 2d at 1288 n.10 (expressing "considerable doubt" about corporation's standing to assert owners' claims, but declining to decide issue because owners were parties). On that score, though, 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"). 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), *aff'd*, 661 F.3d 1, 5 n.4 (D.C. Cir. 2011), *cert. denied*, 133 S. Ct. 63 (2012) (concluding plaintiff had standing to challenge statute but that statute nonetheless did not impose a substantial burden on any exercise of religion). For similar reasons, *Stormans*, 586 F.3d 1109, and *Townley*, 859 F.2d 610 – on which the *Tyndale* court relied – are not persuasive. Both cases addressed standing; neither had anything to say about whether an alleged burden on a corporation could also be a *substantial* burden on its owners. 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.

Newland v. Sebelius, Civil Action No. 1:12-cv-1123-JLK, 2012 WL 3069154 (D. Colo. July 27, 2012), *appeal docketed*, No. 12-1380 (10th Cir. Sept. 26, 2012), on which plaintiffs also rely, and *Am. Pulverizer v. U.S. Dep't of Health and Human Servs.*, No. 12-3459, slip op. (W.D. Mo. Dec. 20, 2012) (Ex. 6), *both* did not decide whether a for-profit, secular company can exercise religion, or whether the regulations impose a substantial burden on the exercise of religion; these courts recognized only that these are "difficult questions of first impression." *Newland*, 2012 WL 3069154, at *6; *see Am. Pulverizer*, Ex. 6, at 8. Moreover, both courts applied a relaxed preliminary injunction standard, under which they did not require the plaintiffs to show a likelihood of success on the merits. *See Newland*, 2012 WL 3069154, at *3; *Am. Pulverizer*, Ex. 6, at 4, 8. That relaxed standard does not apply in this Circuit, and it was, respectfully, error for the court to employ it in *American Pulverizer*. *See Planned Parenthood v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008) (requiring "a showing that the movant is likely to prevail on the merits") (quotation omitted); *id.* at 733 (demanding that courts "make a threshold finding that a party is likely to prevail on the merits" so as to "ensure that preliminary injunctions that thwart [the government's] presumptively reasonable democratic processes are pronounced only after an appropriately deferential analysis"); *see also Hobby Lobby*, 870 F. Supp. 2d at 1285-87; *Korte*, 2012 WL 6553996, at *11. Similarly, in *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *5 (E.D. Mich. Oct. 31, 2012), the court declined to decide whether a for-profit, secular corporation can assert RFRA rights. Further, the court "assume[d]" that the regulations substantially burdened the owner's exercise of religion merely because the plaintiff "so claim[ed]." *Id.*at *6. But this approach reads the substantial burden requirement right out of RFRA, which a court may not do. *See Autocam*, Ex. 2, at 12-13. In any event, the court in *Legatus* concluded that the plaintiffs had not shown a likelihood of success on the merits. 2012 WL 5359630, at *13.

certain contraceptives) that they find objectionable. But this complaint has no limits. A company provides numerous benefits, including a salary, to its employees and by doing so in some sense facilitates whatever use its employees make of those benefits. But no one – not the owner, and not another employee[11] – has any right to control the choices company employees, who may not share a particular set of religious beliefs, make when using their benefits.

Indeed, the Tenth Circuit in *Hobby Lobby*, *Hobby Lobby Tenth Circuit Order*, Ex. 3, at 7, and the district courts in *O'Brien*, 2012 WL 4481208, at *5-7, *Hobby Lobby*, 870 F. Supp. 2d at 1294, *Korte*, 2012 WL 6553996, at *10-11, *Autocam*, Ex. 2, at 10-14, and *Grote*, Ex. 4, at 8-13, all concluded as much. 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 Tenth Circuit Order*, Ex. 3, at 7; *Hobby Lobby*, 870 F. Supp. 2d at 1294; *Korte*, 2012 WL 6553996, at *9-11; *Grote*, Ex. 4, at 8-13. Similarly, the court in *Autocam* urged that "careful judicial attention to the 'substantial burden' gateway of [RFRA] is critical." Ex. 2, at 13; *see also Autocam Sixth Circuit Order*, Ex. 7, at 2. It therefore rejected the plaintiffs' argument that a court "cannot look beyond their sincerely held assertion of a religiously based objection" to the law being challenged "to assess whether it actually functions as a substantial burden on the exercise of religion." *Id.* at 12; *see Grote*, Ex. 4, at 9 ("[T]he sincerity of one's beliefs and whether those beliefs have been substantially burdened are two

[11] Ms. Schaefer and Ms. Wilson ultimately claim their religious exercise is substantially burdened because the group health plan, with respect to which they pay a premium, funds health care coverage that may be used by one of their colleagues to receive health care to which Ms. Schaefer and/or Ms. Wilson object. But this claim is even more attenuated than Mr. Sharpe's, and it is ultimately no different than a claim that paying taxes could be a substantial burden because those tax dollars may fund some government program that may at some point provide someone else with the means to engage in behavior that is contrary to one's religious beliefs. This cannot be. *See Mead*, 766 F. Supp. 2d at 42 (finding no substantial burden in the ACA's minimum coverage requirement because the plaintiffs "routinely contribute to other forms of insurance, such as Medicare"); *cf. Autocam*, Ex. 2, at 11; *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 599-600 (2007) (finding that plaintiffs do not even have any legal interest in simply ensuring that their taxes are not used in a way that violates the Constitution).

separate inquiries."). Indeed, it found "troubling" the implication that "every government regulation" could be subject to RFRA "based simply on an asserted religious basis for objection," given that such a rule would subject all laws "to a potential private veto" based on the articulation of any objection somehow tied to a religious belief. *Id.* at 12-13. This would "paralyze the normal process of governing" by replacing ordinary laws and regulations with "a patchwork array of theocratic fiefdoms." *Id.* at 13; *see O'Brien*, 2012 WL 4481208, at *6 ("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."); *Grote*, Ex. 4, at 12 (same).

Both the courts in *O'Brien* and *Autocam* noted that the regulations have virtually no more of an impact on the plaintiffs' beliefs than the companies' payment of salaries to their employees, which those employees can also use to obtain contraceptives. *O'Brien*, 2012 WL 4481208, at *7; *Autocam*, Ex. 2, at 10-11; *see also Autocam Sixth Circuit Order*, Ex. 7, at 2. The *Autocam* court further explained that any burden on the individual owners is likely not substantial because the regulations "do[] not compel the [individual owners] to do anything." Ex. 2, at 12. In short, because the regulations "are several degrees removed from imposing a substantial burden on [Sharpe Holdings], and one further degree removed from imposing a substantial burden on [Mr. Sharpe]," 2012 WL 4481208, at *7, and many more degrees removed from imposing any substantial burden on Ms. Schaefer and Ms. Wilson, plaintiffs are not likely to succeed on the merits of their RFRA claim, even assuming a for-profit, secular company like Sharpe Holdings can exercise religion.

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

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

"[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, e.g.*,

Crow v. Gullet, 706 F.2d 856, 858 (8th Cir. 1983). And the challenged regulations further this compelling interest. The primary predicted benefit of the regulations is that "individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of disease." 75 Fed. Reg. 41,726, 41,733 (July 19, 2010); *see also* 77 Fed. Reg. at 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. *See* IOM REP. at 20, 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. United States Jaycees*, 468 U.S. 609, 626 (1984), there is a fundamental "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." Thus, "[a]ssuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests." *Id.* By including in the ACA gender-specific preventive health services for women, Congress made clear that the goals and benefits of effective preventive health care apply equally to women, who might otherwise be excluded from such benefits if their unique health care needs were not taken into account in the ACA. *See, e.g.*, 155 Cong. Rec. S12265-02, S12274 (daily ed. Dec. 3, 2009); 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009); IOM REP. at 20. 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*, 85 P.3d at 92-93.

The government's interests in promoting the health of women and newborn children and furthering gender equality are compelling not just in the abstract but also when applied to Sharpe

Holdings and any other for-profit, secular companies that object to the regulations on religious grounds.[12] Exempting Sharpe Holdings 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.[13] *See 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). Plaintiffs' desire not to provide or pay into a health plan that permits such individuals to exercise their own choice must yield to the government's compelling interest in avoiding the adverse and unfair consequences that such individuals would suffer as a result of the company's decision to impose the company's owners' and just two of its employees'

[12] Contrary to plaintiffs' suggestion, *see* Pls.' Mem. at 16, the government need not separately analyze the need for the regulations as to each and every employer and employee in America. Nor, as the *Tyndale* court erroneously concluded, must the government demonstrate a compelling interest with respect to each of the specific contraceptive services to which a particular plaintiff objects. 2012 WL 5817323, at *16. This level of specificity would be nearly impossible to establish 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 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," but "[t]here are no safeguards to prevent similarly situated individuals from asserting the same privilege and leading to uncontrolled eagle harvesting."). As explained above, this impossible standard is not supported by the case law. Moreover, the IOM Report supports the government's compelling interest in providing "the *full range* of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." IOM REP. at 10-12 (emphasis added). It is for a woman and her health care provider – not employers or courts – to determine which of those services best promote her health and well-being.

[13] Similarly, permitting employees like Ms. Schaefer and Ms. Wilson to pick and choose what services they would like their premiums to cover would be an impossible administrative undertaking. *See Lee*, 455 U.S. at 258 ("The design of the [social security] system requires support by mandatory contributions from covered employers and employees. This mandatory participation is indispensable to the fiscal vitality of the social security system. [W]idespread individual voluntary coverage under social security . . . would undermine the soundness of the social security program. Moreover, a comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer.") (internal quotations and citation omitted). Moreover, it would all but lead to the end of group health coverage, which relies on common coverage for a set of insured individuals. Ms. Schaefer and Ms. Wilson are free not to participate in their employer's health plan and to attempt to procure health coverage elsewhere; what they may not do is control what health care their colleagues may have covered by their group health plan.

religious beliefs on them. *See Lee*, 455 U.S. at 261 (noting that a religious exemption is improper where it "operates to impose the employer's religious faith on the employees").

Plaintiffs maintain that the interests underlying the regulations cannot be considered compelling because many health plans are exempted from the regulations. Pls.' Mem. at 15-16. But this is not a case where underinclusive enforcement of a law suggests that the government's "supposedly vital interest" is not really compelling. *Lukumi*, 508 U.S. at 546-47. For example, the grandfathering of certain health plans with respect to certain provisions of the ACA is not specifically limited to the preventive services coverage regulations. *See* 42 U.S.C. § 18011; 45 C.F.R. § 147.140. In fact, the effect of grandfathering is not really a permanent "exemption," but rather, over the long term, a transition in the marketplace with respect to several provisions of the ACA, including the preventive services coverage provision. The grandfathering provision reflects Congress's attempts to balance competing interests in the context of a complex statutory scheme. *See* 75 Fed. Reg. 34,538, 34,540, 34,546 (June 17, 2010).

The incremental transition of the marketplace into the ACA administrative scheme does nothing to call into question the compelling interests furthered by the regulations. Even under the grandfathering provision, it is projected that more group health plans will transition to the requirements under the regulations as time goes on. Defendants estimate that, as a practical matter, a majority of group health plans will lose their grandfather status by 2013. *See* 75 Fed. Reg. at 34,552. Thus, any purported damage to the compelling interests underlying the regulations will be quickly mitigated, which is in stark contrast to the *permanent* exemption from the regulations that plaintiffs seek. Plaintiffs would have this Court believe that an interest cannot truly be "compelling" unless Congress is willing to impose it on everyone all at once despite competing interests, but they offer no support for such an untenable proposition. *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 (same).[14]

Further, 26 U.S.C. § 4980H(c)(2) does *not* exempt small employers from the preventive services coverage regulations. *See* 42 U.S.C. § 300gg-13(a); 76 Fed. Reg. at 46,622 n.1. Instead, it excludes employers with fewer than fifty full-time equivalent employees from the employer responsibility provision, meaning that, starting in 2014, such employers are not subject to assessable payments if they do not provide health coverage to their full-time employees and certain other criteria are met. *See* 26 U.S.C. § 4980H(c)(2). Employees of these small businesses can get their health insurance through other ACA provisions, primarily premium tax credits and health insurance exchanges, and the coverage they receive will include all preventive services, including contraception. In addition, small businesses that choose to offer non-grandfathered health coverage to their employees are required to provide coverage for recommended preventive services, including contraceptive services, without cost-sharing. And there is reason to believe that many small employers will continue to offer health coverage to their employees, because the ACA, among other things, provides for tax incentives for small businesses to encourage the purchase of health insurance. *See id*. § 45R.[15]

[14] Plaintiffs overstate the number of individuals in grandfathered plans. *See e.g.*, Pls.' Mem. at 16. 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 2013, this mid-range estimate increases to 51 percent. 75 Fed. Reg. at 34,552. 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*. at 34,552-53; *see Korte*, 2012 WL 6553996, at *7 n.12.

[15] Plaintiffs also allude to "waiver practices," Compl. ¶ 55, but there are no "waivers" of the requirement to cover recommended preventive services.

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

When determining whether a particular regulatory scheme is "least restrictive," the appropriate inquiry is whether the individual or organization with religious objections, and those similarly situated, can be exempted from the scheme – or whether the scheme can otherwise be modified – without undermining the government's compelling interest. *See, e.g.*, *Quaring v. Peterson*, 728 F.2d 1121, 1126 (8th Cir. 1984). Instead of explaining how Sharpe Holdings and similarly situated secular companies could be exempted from the regulations without significant damage to the government's compelling interests, plaintiffs conjure up several new regulatory schemes they claim would be less restrictive. *See* Pls.' Mem. at 17. 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 these individual plaintiffs' 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. *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.).

In effect, plaintiffs want the government "to subsidize private religious practices," *Catholic Charities of Sacramento*, 85 P.3d at 94, by expending significant resources to adopt an entirely new legislative or administrative scheme. 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

(rejecting alternative as "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.*, *Fegans v. Norris*, 537 F.3d 897, 905-06 (8th Cir. 2008); *United States v. Lafley*, 656 F.3d 936, 942 (9th Cir. 2011) (rejecting proffered alternative because it "would place an unreasonable burden" on the government); *New Life Baptist*, 885 F.2d at 947. Plaintiffs' alternatives would impose considerable new costs and other burdens on the government and would otherwise be impractical. *See Lafley*, 656 F.3d at 942; *New Life Baptist*, 885 F.2d at 947.[16]

Nor would the proposed alternatives be equally effective in advancing the government's compelling interests. *See Murphy v. State of Ark.*, 852 F.2d 1039, 1042-43 (8th Cir. 1988); *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 491 (8th Cir. 1987). 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 challenged regulations are attributable not only to the fact that recommended contraceptive services will be available to women with no cost sharing – an attribute that some of plaintiffs' alternatives admittedly share – 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, on the other hand, have none of these advantages. They would require establishing entirely new government programs and infrastructures, 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.

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

C. Plaintiffs' First Amendment Claims Are Without Merit

1. The regulations do not violate the Free Exercise Clause

Plaintiffs' Free Exercise claim fails at the outset because, as explained above, *see supra* pp. 10-14, for-profit, secular employers like Sharpe Holdings do not engage in any exercise of religion protected by the First Amendment. But even if they did, the regulations are neutral laws of general applicability and therefore do not violate the Free Exercise Clause. That was precisely the holding in *O'Brien*, *Hobby Lobby*, *Korte*, *Autocam*, *Grote*, as well as the highest courts of two states that addressed nearly identical free exercise challenges to similar state laws. *See O'Brien*, 2012 WL 4481208, at *7-9; *Hobby Lobby*, 870 F. Supp. 2d at 1287-90; *Korte*, 2012 WL 6553996, at *6-8; *Autocam*, Ex. 2, at 7-9; *Grote*, Ex. 4, at 13-15; *Diocese of Albany*, 859 N.E.2d at 468-69; *Catholic Charities of Sacramento*, 85 P.3d at 81-87.

A law does not violate the Free Exercise Clause even if it prescribes conduct that an individual's religion proscribes or has the incidental effect of burdening a particular religious practice, so long as it is neutral and generally applicable. *Smith*, 494 U.S. at 879. A law is neutral if it does not target religiously motivated conduct but rather has as its purpose something other than the disapproval of a particular religion, or of religion in general. *Lukumi*, 508 U.S. at 533, 545-46. A law is generally applicable if it does not selectively impose burdens only on conduct motivated by religious belief. *Id*. at 535-37, 545.

The preventive services coverage regulations are neutral. They do not target religiously motivated conduct; their purpose is to promote public health and gender equality by increasing access to and utilization of recommended preventive services, including those for women. *See Hobby Lobby*, 870 F. Supp. 2d at 1289-90; *O'Brien*, 2012 WL 4481208, at *7; *Korte*, 2012 WL 6553996, at *7-8; *Autocam*, Ex. 2, at 8-9; *Grote*, Ex. 4, at 14-15. They reflect expert recommendations made without regard to any religious motivations or considerations. As the IOM Report shows, this purpose is entirely secular in nature. IOM REP. at 2-4, 7-8; *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 275 (3d Cir. 2007) (concluding

law was neutral where there was no evidence "it was developed with the aim of infringing on religious practices").[17]

The regulations are generally applicable because they do not pursue their purpose "only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545. They apply to all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage and do not qualify for the religious employer exemption. *O'Brien*, 2012 WL 4481208, at *8; *Autocam*, Ex. 2, at 8-9; *Grote*, Ex. 4, at 15. Thus, "it is just not true . . . that the burdens of the [regulations] fall on religious organizations 'but almost no others.'" *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (quoting *Lukumi*, 508 U.S. at 536); *see also United States v. Amer*, 110 F.3d 873, 879 (2d Cir. 1997) (concluding that law that "punishe[d] conduct within its reach without regard to whether the conduct was religiously motivated" was generally applicable).

Plaintiffs maintain that the regulations are not generally applicable because they contain certain categorical exceptions. *See* Pls.' Mem. at 20-22. But the existence of "express exceptions for objectively defined categories of [entities]," like the ones plaintiffs reference, does not negate a law's general applicability. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004); *see also Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008). The exception for grandfathered plans is available on equal terms to all employers, whether religious or secular. And the religious employer exemption serves to accommodate religion, not to disfavor it. Such categorical exceptions do not trigger strict scrutiny. *See O'Brien*, 2012 WL 4481208, at *8 (rejecting

[17] Plaintiffs' characterization of the regulations as an intentional attempt to target non-"institutional" religious objectors, *see* Pls.' Mem. at 19-20 (citing *Frazee v. Emp't Security Dep't*, 489 U.S. 829 (1989)) is mere rhetorical bluster. Plaintiffs provide no evidence to show that the regulations were designed as an assault on some religious objectors, as opposed to an effort to increase women's access to and utilization of recommended preventive services. And defendants have made efforts to accommodate religion in ways that will not undermine the goal of ensuring that women have access to coverage for recommended preventive services without cost-sharing. *See supra* pp. 7-8. This case is simply a far cry from *Lukumi*, 508 U.S. 520, in which the legislature specifically targeted the religious exercise of members of a single church. *Id*. at 533-36. There is simply no evidence of a similar targeting of religious practice here. *See Korte*, 2012 WL 6553996, at *8; *Grote*, Ex. 4, at 14-15

identical argument); *Hobby Lobby*, 870 F. Supp. 2d at 1290; *Autocam*, Ex. 2, at 9; *Grote*, Ex. 4, at 14-15; *see also Ungar v. New York City Hous. Auth.*, 363 F. App'x 53, 56 (2d Cir. 2010).[18]

For these reasons, plaintiffs' Free Exercise claim is without merit.[19]

2. The regulations do not violate the Establishment Clause

Plaintiffs claim the regulations violate the Establishment Clause because the religious employer exemption amounts to a denominational preference forbidden by *Larson v. Valente*, 456 U.S. 228 (1982), and requires the government to unlawfully scrutinize an organization's religious tenets. *See* Pls.' Mem. at 22-25. Plaintiffs are wrong on both counts. Indeed, four courts have already rejected an identical challenge. *See O'Brien*, 2012 WL 4481208, at *9-11; *Grote*, Ex. 4, at 15-17; *Diocese of Albany*, 859 N.E.2d at 468-69; *Catholic Charities of Sacramento*, 85 P.3d at 83-87.

"The clearest command of the Establishment Clause is that one religious *denomination* cannot be officially preferred over another." *Larson*, 456 U.S. at 244 (emphasis added); *see Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1090-92 (8th Cir. 2000). A law that discriminates among religions by "aid[ing] one religion" or "prefer[ring] one religion over another" is subject to strict scrutiny. *Larson*, 456 U.S. at 246. The Supreme Court has thus struck down a state statute that was "drafted with the explicit intention" of requiring only "particular religious denominations" to comply with certain requirements. *Id*. at 254; *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703-07 (1994) (striking down statute that "single[d] out a particular religious sect for special treatment"). The Court, on

[18] Plaintiffs' reliance on *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), *see* Pls.' Mem. at 21, is misplaced. That case addressed policies that created a secular exemption but refused all religious exemptions. *See Fraternal Order of Police*, 170 F.3d at 365. The preventive services coverage regulations, in contrast, contain both secular and religious exemptions. Thus, there is simply no basis in this case to infer "discriminatory intent" on the part of the government. *See id.* By contrast, the regulations here are no different than other neutral and generally applicable laws governing employers that have been upheld. *See United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 629 (7th Cir. 2000) (upholding federal employment tax laws); *Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 959-60 (9th Cir. 1991) (upholding law that required employers to verify the immigration status of their employees); *Intercommunity Ctr. for Justice & Peace v. INS*, 910 F.2d 42, 44 (2d Cir. 1990) (same).

[19] Even if the regulations were not neutral and generally applicable, they would not violate the Free Exercise Clause because they satisfy strict scrutiny. *See supra* pp. 19-25.

the other hand, has upheld a statute that provided an exemption from military service for persons who had a conscientious objection to all wars, but not those who objected to only a particular war. *Gillette v. United States*, 401 U.S. 437 (1971). Because "no particular sectarian affiliation" was required to qualify for conscientious objector status, the statute did not discriminate among religions. *Id*. at 450-51; *see also Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (upholding RLUIPA because it does not "confer[] . . . privileged status on any particular religious sect" or "single[] out [any] bona fide faith for disadvantageous treatment").

Like the statutes at issue in *Gillette* and *Cutter*, the regulations here do not grant any denominational preference or otherwise discriminate among religions. It is of no moment that the religious employer exemption applies to some religious employers but not others. *See Droz v. Comm'r of IRS*, 48 F.3d 1120, 1124 (9th Cir. 1995) (concluding religious exemption from self-employment Social Security taxes did not violate the Establishment Clause even though "some individuals receive exemptions, and other individuals with identical beliefs do not"); *Diocese of Albany*, 859 N.E.2d at 468-69 (rejecting challenge to similar religious employer exemption under New York law; "this kind of distinction – not between denominations, but between religious organizations based on the nature of their activities – is not what *Larson* condemns"). The relevant inquiry is whether the distinction drawn by the regulations between exempt and non-exempt entities is based on religious affiliation. Here, it is not. *Grote*, Ex. 4, at 16.

The regulations' definition of "religious employer" does not refer to any particular denomination. The criteria for the exemption focus on the purpose and composition of the organization, not on its sectarian affiliation. The exemption is available on an equal basis to organizations affiliated with any and all religions. The regulations, therefore, do not promote some religions over others. Indeed, the Supreme Court upheld a similar statutory exemption for houses of worship in *Walz v. Tax Commission of New York*, 397 U.S. 664, 672-73 (1970) (upholding tax exemption for all realty owned by an association organized and used exclusively for religious purposes because statute did not "single[] out one particular church or religious group"). The same result should obtain here. Nothing in the Establishment Clause, or the cases

interpreting it, requires the government to create an exemption for for-profit, secular companies whenever it creates an exemption for religious organizations. *See, e.g.*, *Amos*, 483 U.S. at 334 (upholding Title VII's exemption for *religious* organizations); *O'Brien*, 2012 WL 4481208, at *10 ("Accommodations of religion are possible because the legislative line-drawing to which the plaintiffs object, between the religious and the secular, is constitutionally permissible."); *Hobby Lobby*, 870 F. Supp. 2d at 1289-90; *Korte*, 2012 WL 6553996, at *8.

The religious employer exemption also does not foster excessive government entanglement with religion. Sharpe Holdings does not qualify for the religious employer exemption since it fails to satisfy even the fourth criterion – the requirement that it be a nonprofit organization as described in section 6033 of the Internal Revenue Code. *Id*. *7-8; 45 C.F.R. § 147.130(a)(1)(iv)(B)(4). Plaintiffs cannot credibly claim that this criterion requires any inquiry that would pose a potential entanglement issue. Accordingly, any entanglement that might result from the religious employer exemption would not exist with respect to these plaintiffs. *See O'Brien*, 2012 WL 4481208, at *11; *Grote*, Ex. 4, at 17.[20]

For these reasons, plaintiffs' Establishment Clause claim fails.[21]

[20] Any interaction between the government and religious organizations that may be necessary to administer or enforce the religious employer exemption is not so "comprehensive," *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971), or "pervasive," *Agostini v. Felton*, 521 U.S. 203, 233 (1997), as to result in excessive entanglement. *See O'Brien*, 2012 WL 4481208, at *11. Indeed, the Supreme Court has upheld laws that require government monitoring far more onerous than any monitoring that may be required to enforce the religious employer exemption. *See Bowen v. Kendrick*, 487 U.S. 589, 615-17 (1988) (no excessive entanglement where government reviewed counseling programs set up by the religious institution grantees, reviewed the materials used by such grantees, and monitored the programs via periodic visits); *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 764-65 (1976) (no excessive entanglement where State conducted annual audits to ensure that grants to religious colleges were not used to teach religion); *Lemon*, 403 U.S. at 614 (noting Supreme Court upheld tax exemption in *Walz*, 397 U.S. 664, even though "the State had a continuing burden to ascertain that the exempt property was in fact being used for religious worship"); *see also Agostini*, 521 U.S. at 212 (indicating unannounced monthly visits by a public employee to religious schools to prevent and detect inculcation of religion by public employees is not excessive entanglement); *United States v. Corum*, 362 F.3d 489, 496 (8th Cir. 2004).

[21] Even if the regulations discriminate among religions (and they do not), they are valid under the Establishment Clause because they satisfy strict scrutiny. *See supra* at 19-25; *Larson*, 456 U.S. at 251-52.

3. The regulations do not violate the Free Speech Clause

Plaintiffs' free speech claim fares no better. The right to freedom of speech "prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 61 (2006). But the preventive services coverage regulations do not require plaintiffs – or any other person or entity – to say anything. Plaintiffs' assertion that the regulations require Sharpe Holdings to provide coverage of education and counseling "in favor" of certain contraceptive services, Pls.' Mem. at 26, betrays a fundamental misunderstanding of the regulations. The regulations require that employers offer to their employees a health plan that includes coverage for "patient education and counseling for all women with reproductive capacity," as prescribed by a health care provider. *See* HRSA Guidelines, *supra*. The regulations do not purport to regulate the content of that education or counseling – that is between the patient and her health care provider. *See O'Brien*, 2012 WL 4481208, at *12 (noting that the regulations "do not require funding of one defined viewpoint"); *Autocam*, Ex. 2, at 14-15; *Grote*, Ex. 4, at 18. Taken to its logical conclusion, plaintiffs' theory would preclude virtually all government efforts to regulate health coverage, as a medical visit almost invariably involves some communication between the patient and a health care provider, and there may be many instances in which the entity providing the coverage disagrees with the content of that communication.

The regulations also do not limit what plaintiffs may say. Plaintiffs remain free under the regulations to express whatever views they may have on the use of contraceptive services (or any other health care services) as well as their views on the regulations' requirement that certain group health plans and health insurance issuers cover certain contraceptive services. Indeed, plaintiffs may encourage Sharpe Holdings' employees not to use contraceptive services. The regulations thus regulate conduct, not speech. *See FAIR*, 547 U.S. at 60-62.

Moreover, the conduct required by the regulations is not "inherently expressive," such that it is entitled to First Amendment protection. *Id*. at 66. An employer that provides a health plan that covers contraceptive services, along with numerous other medical items and services,

because it is required by law to do so is not engaged in the sort of conduct the Supreme Court has recognized as inherently expressive. *Compare id.* at 65-66 (making space for military recruiters is not conduct that indicates colleges' support for recruiters' message), *with Texas v. Johnson*, 491 U.S. 397, 406 (1989) (flag burning is expressive conduct); *see also Catholic Charities of Sacramento*, 85 P.3d at 89 ("a law regulating health care benefits is not speech"); *Diocese of Albany*, 859 N.E.2d at 465. Because the regulations do not compel any speech or expressive conduct, they do not violate the Free Speech Clause. *See O'Brien*, 2012 WL 4481208, at *11-13; *Autocam*, Ex. 2, at 14-15; *Grote*, Ex. 4, at 18-19.

II. 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 First Amendment or RFRA rights, so there has been no "loss of First Amendment freedoms" for any period of time, *id.* The merits and irreparable injury prongs of the preliminary injunction analysis thus merge, and plaintiffs' failure to show a likelihood of success on the merits amounts to a failure to show irreparable injury. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012).

As explained above, though the challenged requirement was established sixteen months ago, plaintiffs waited until nearly ten days before the requirement will apply to Sharpe Holdings' health plans – until December 20, 2012 – to even bring suit and seek emergency relief. This inexplicable and egregious delay further cuts against a finding of irreparable harm. *See Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 603 (8th Cir. 1999); *see also Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995); *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *Independent Bankers Ass'n v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980) ("[E]quity aids the vigilant, not those who slumber on their rights[.]"); *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (denying preliminary injunction and noting that delay of forty-four days after final regulations were issued

was "inexcusable"); *Autocam*, Ex. 2, at 15 ("[T]he immediacy of the dilemma Plaintiffs face is in no small part of their own making . . . . Equity does not favor the dilatory."). Indeed, this delay alone shows that plaintiffs have not shown irreparable harm. *Triune Health Grp.*, Ex. 1 (denying TRO because plaintiffs "have failed to offer any explanation for [their] delay" and because plaintiffs' dilatory conduct "undermines their argument that they will suffer irreparable harm").

In contrast, granting plaintiffs' request for a preliminary injunction would harm both 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 companies would undermine the government's ability to achieve Congress's goals of improving the health of women and children and equalizing the coverage of preventive services for women and men. It would also be contrary to the public interest to deny the over 300 employees of Sharpe Holdings (and their families), some of whom may not share Mr. Sharpe's religious beliefs, the benefits of the preventive services coverage regulations. Those employees should not be deprived of the benefits of obtaining a health plan through their employer that covers the full range of recommended contraceptive services. *See* IOM REP. at 20, 102-04; 77 Fed. Reg. at 8728; *see also 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 coverage for certain contraceptive services is thus outweighed by the harm an injunction would cause to the public and the government.

CONCLUSION

For the foregoing reasons, this Court should deny plaintiffs' motion for a TRO.

Respectfully submitted this 28th day of December, 2012,

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CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2012, 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/ Jacek Pruski
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