IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TYNDALE HOUSE PUBLISHERS, INC.; MARK D. TAYLOR,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:12-cv-1635-RBW**
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF
CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In their brief in support of their motion for summary judgment and in opposition to plaintiffs' motion for summary judgment, *see* Defs.' Mem. in Support of Cross-Mot. for Summ. J. & Opp'n to Pls.' Mot. for Summ. J. ("Defs.' Mem."), ECF No. 42-2, defendants explained at some length (1) why plaintiff Tyndale House Publishers, Inc. ("Tyndale"), as a for-profit corporation, is not engaged in the "exercise of religion" within the meaning of the Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-1), and the Free Exercise Clause; (2) why, because of the legal separation between the corporation and its owners, Tyndale has no standing to assert the free exercise rights of its owners in this case, which, in any event, are not substantially burdened by the challenged preventive services coverage regulations; (3) why even if the regulations imposed some burden on Tyndale or its owners – and they do not – any such alleged burden is far too attenuated and indirect to amount to a *substantial* burden under RFRA; and (4) why the challenged regulations are the least restrictive means of advancing a compelling government interest.

Plaintiffs do not effectively refute any of these arguments. First, in arguing that Tyndale can "exercise religion" under RFRA, plaintiffs rely primarily on a highly fractured ruling of the en banc Tenth Circuit, *see Hobby Lobby Stores, Inc. v. Sebelius*, __ F.3d __, 2013 WL 3216103 (10th Cir. June 27, 2013), which was fundamentally wrong for reasons explained below and in Chief Judge Briscoe's dissent (and, of course, is not binding on this Court). In fact, in a recent ruling, the Third Circuit explicitly rejected the Tenth Circuit's holding. *See Conestoga Wood Specialties Corp. v. Sebelius*, __ F.3d __, 2013 WL 3845365 (3d Cir. July 26, 2013). Second, as to the standing and merits of the claims of Tyndale's institutional owners/shareholders – which are not plaintiffs here – plaintiffs continue to completely and erroneously disregard the legal

separation between the corporation and its owners, without providing any coherent legal explanation as to *why* the corporate form should be ignored only when it is to the benefit of Tyndale's owners (and the detriment of Tyndale's employees). In *Conestoga*, the Third Circuit rejected the position that plaintiffs assert here, and concluded that courts "simply cannot ignore the distinction between [the corporation] and [its owners]." 2013 WL 3845365, at *6-*8. Third, plaintiffs' response to defendants' attenuation argument mischaracterizes the government's position and is based on a flawed understanding of RFRA, and in particular, what makes a burden "substantial." And fourth, plaintiffs' compelling interest and least restrictive means arguments rest on evidence that is not properly before this Court and on plaintiffs' inappropriate flyspecking of the administrative record (in addition to erroneous legal arguments that the government has rebutted in its prior briefs).

Finally, plaintiffs continue to assert inaccurately that the rulings of other courts and events in this case weigh in their favor. The government did not "surrender on appeal," as plaintiffs contend, *see* Pls.' Resp./Reply in Support of Mot. for Summ. J. & Opp'n to Defs.' Cross-Mot. for Summ. J. ("Pls.' Mem.") at 1, ECF No. 43. Defendants have made it quite clear that they firmly believe that this Court's preliminary injunction ruling was incorrect, and have explained in detail why it was incorrect. The government decided not to pursue an appeal of that ruling only because it concluded that certain outstanding issues would be best resolved by this Court prior to any appeal. *See United States v. Mendoza*, 464 U.S. 154, 160-61 (1984) (explaining that the government's non-appeal of a decision does not necessarily imply that the government has conceded that the decision was correct). Furthermore, plaintiffs' statement that this Court's prior ruling is "consistent with the vast majority of cases challenging" the preventive services coverage regulations, Pls.' Mem. at 3, is just plain wrong. In truth, the majority of

courts that have considered the question of whether a for-profit corporate plaintiff is entitled to relief over the opposition of the government have ruled in the government's favor. *See* Defs.' Mem. at 5 & n.5.[1] For the reasons articulated by those courts, in the government's prior briefs, and throughout this brief, this Court should deny plaintiffs' motion for summary judgment, and grant summary judgment to defendants on all of plaintiffs' claims.

ARGUMENT

I. PLAINTIFFS' RFRA CLAIM IS WITHOUT MERIT

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

1. There is no substantial burden on Tyndale because a for-profit corporation does not engage in the exercise of religion

As defendants explained in their initial brief, because Tyndale is a for-profit corporation, it is not engaged in the "exercise of religion" within the meaning of RFRA and the Free Exercise Clause. *See* Defs.' Mem. at 12-20. In responding to this argument, plaintiffs rely primarily on the holding of a majority of the en banc Tenth Circuit, which recently accepted the argument that RFRA allows for-profit corporations to deny employee benefits on the basis of religion. *See Hobby Lobby*, 2013 WL 3216103. That decision is incorrect for the reasons set out in Chief Judge Briscoe's dissent, *see id.* at *41-*55 (Briscoe, C.J., dissenting in relevant part), and by the Third Circuit in *Conestoga*, 2013 WL 3845365. In particular, the Tenth Circuit incorrectly

[1] Plaintiffs criticize the government for counting district court rulings in cases where appellate courts have since issued injunctions pending appeal. *See* Pls.' Mem. at 3 n.2. But as plaintiffs surely know, those rulings are still good law and this Court is free to rely on them to the extent it finds them persuasive. *See* Defs.' Mem. at 3 n.3. Similarly, this Court is not bound by the unexplained ruling of a motions panel of the D.C. Circuit in *Gilardi v. HHS*, No. 13-5069 (D.C. Cir. Mar. 29, 2013). It is plaintiffs that engage in "fuzzy" math, Defs.' Mem. at 3 n.3, when they include cases in which defendants did not oppose the entry of preliminary injunctive relief – not because they believed that such relief was warranted, but because, as a practical matter, the government realized that even were the district court to deny such relief, it would most likely be granted by a motions panel of the appellate court, and thus the government simply sought to preserve judicial resources and the resources of the parties. Finally, defendants note that since they filed their initial brief, the Third Circuit in *Conestoga*, 2013 WL 3845365, and one more district court, *see Mersino Mgmt. Co. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 3546702 (E.D. Mich. July 11, 2013), have ruled in the government's favor.

interpreted RFRA to depart from the centuries of jurisprudence that pre-dated RFRA's enactment, which Congress cannot have intended.

RFRA does not apply unless the federal government substantially burdens "a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). The majority in *Hobby Lobby* – and plaintiffs here – focused on the question of whether, in enacting RFRA, Congress intended corporations to be encompassed under the definition of "person." *See* Pls.' Mem. at 14-16. In answering in the affirmative, the majority relied on the Dictionary Act, which states that the term "person" includes corporations unless the context of a federal statute indicates otherwise, *see* 1 U.S.C. § 1. But this focus on the definition of "person" is misplaced. The government does not dispute that some corporations – such as churches – can bring suit under RFRA. The question presented here and in *Hobby Lobby* is not whether corporations are "persons," but whether for-profit corporations can engage in the "exercise of religion" within the meaning of RFRA and the Free Exercise Clause. The Dictionary Act cannot answer this question.

As Chief Judge Briscoe eloquently explained in her dissent in *Hobby Lobby*, in enacting RFRA, Congress would not have understood or intended the statute's protections to extend to for-profit corporations. *See Hobby Lobby*, 2013 WL 3216103, at *45-*46 (Briscoe, C.J., dissenting in relevant part). It is clear that Congress did not intend to expand the scope of the Free Exercise Clause when it adopted RFRA. *See id.* at *45 (Briscoe, C.J., dissenting in relevant part) ("[T]he purpose of RFRA was restoration of pre-*Smith* free exercise jurisprudence, not expansion of the scope of the Free Exercise Clause."); *Vill. of Bensenville v. Fed. Aviation Admin.*, 457 F.3d 52, 62 (D.C.Cir.2006) ("[W]ith RFRA Congress intended to 'restore' the standard by which federal government actions burdening religion were to be judged, . . . not to expand the class of actions to which the standard would be applied." (internal citations omitted));

see also S. Rep. No. 111, 103d Cong., 1st Sess. 12 (1993) ("To be absolutely clear, [RFRA] does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Court's free exercise jurisprudence under the compelling government interest test prior to *Smith*."). "[D]uring the 200-year span between the adoption of the First Amendment and RFRA's passage, the Supreme Court consistently treated free exercise rights as confined to individuals and non-profit religious organizations." *Hobby Lobby*, 2013 WL 3216103, at *45 (Briscoe, C.J., dissenting in relevant part). Thus, "there is no plausible basis for inferring that Congress intended or could have anticipated that for-profit corporations would be covered by RFRA." *Id*. at *47 (quotation omitted); *accord Mersino Mgmt. Co. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 3546702 (E.D. Mich. July 11, 2013) (rejecting the Tenth Circuit's reasoning in *Hobby Lobby*). By recognizing an entirely "new class of corporations" as eligible for RFRA's protections, the majority in *Hobby Lobby* subverted congressional intent. *See Hobby Lobby*, 2013 WL 3216103, at *41 (Briscoe, C.J., dissenting in relevant part).

Plaintiffs are wrong when they suggest that the Tenth Circuit's holding "is hardly a bolt from the blue." *See* Pls.' Mem. at 18. In fact, it is absolutely unprecedented. The extent of the Tenth Circuit's error is evident when one considers that, prior to the ongoing litigation challenging the contraceptive coverage regulations, no court had *ever* concluded that a for-profit corporation has free exercise rights under RFRA or the First Amendment. *See Hobby Lobby*, 2013 WL 3216103, at *46 (Briscoe, C.J., dissenting in relevant part) ("[N]ot a single case, until now, has extended RFRA's protections to for-profit corporations."); *id.* at *49 (finding "literally no support for the proposition that for-profit corporations enjoy free exercise rights"); *Conestoga*, 2013 WL 3845365, at *5 ("[W]e are not aware of any case preceding the commencement of litigation about the Mandate, in which a for-profit, secular corporation was

itself found to have free exercise rights."). It therefore strains credulity to suggest that when Congress enacted RFRA, it intended to "restore" a vision of the law that had *never before* existed. None of the cases cited by plaintiffs, *see* Pls.' Mem. at 17-18, are to the contrary. In fact, if anything, they emphasize the Tenth Circuit's position as an outlier, as they all involved individual plaintiffs or non-profit religious organizations. As the Third Circuit recently explained:

> We will not draw the conclusion that, just because courts have recognized the free exercise rights of churches and other religious entities, it necessarily follows that for-profit, secular corporations can exercise religion. As the Supreme Court recently noted, "the text of the First Amendment . . . gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. V. EEOC*, 132 S. Ct. 694, 706 (2012). That churches – as means by which individuals practice religion – have long enjoyed the protections of the Free Exercise Clause is not determinative of the question of whether for-profit, secular corporations should be granted these same protections.

Conestoga, 2013 WL 3845365, at *5.[2]

[2] As the defendants noted in their initial brief, *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981); and *United States v. Lee*, 455 U.S. 252 (1982), all involved *individual* plaintiffs, not companies. *See* Defs.' Mem. at 18. As for the other cases cited by plaintiffs, *see* Pls.' Mem. at 18, the court in *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 800 F. Supp. 2d 405 (E.D.N.Y. 2011), held that the challenged law "does not restrict any religious practice" and therefore had no reason to reach the question of whether a for-profit corporation can exercise religion. *Id.* at 416. Moreover, nothing in the opinion discussed the secular or religious characteristics of the plaintiffs. *McClure v. Sports & Health Club Inc.*, 370 N.W. 2d 844 (Minn. 1985), expressly declined to decide whether the corporation could assert a right to free exercise of religion; the court assumed for purposes of the case that the owners and the corporation were "one and the same" and thus considered only the free exercise rights of the owners. *Id.* at 850-51 & n.12. What relevant language there is in *McClure* supports defendants, not plaintiffs. *See id.* at 853 ("Sports and Health, however, is not a religious corporation – it is a Minnesota business corporation engaged in business for profit. By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs . . . . [W]hen appellants entered into the economic arena and began trafficking in the market place, they have subjected themselves to the standards the legislature has prescribed not only for the benefit of prospective and existing employees, but also for the benefit of the citizens of the state as a whole in an effort to eliminate pernicious discrimination."); *see also Maruani v. AER Servs., Inc.*, No. 06-176, 2006 WL 2666302, at * 6 (D. Minn. Sept. 18, 2006) ("AER is a secular employer under any standard. It is a for profit business, not owned or operated by any church . . . . Accordingly, AER, as a secular employer is not entitled to First Amendment protections for religious institutions"). *Jasniowski v. Rushing*, 678 N.E.2d 743 (Ill. App. Dist. 1, 1997), relied on the standing analysis in *Townley* to allow the plaintiff corporation to assert the Free Exercise rights of it owner. *See id.* at 749. The court in *Jasniowski* also emphasized that its decision was based on the "limited context" where the owner is the "president, sole officer, and sole shareholder" of the corporation, and thus "its alter ego." *Id.* The court in *Morr-Fitz, Inc. v. Blagojevich*, No. 2005-CH-000495, 2011 WL 1338081 (Ill. Cir. Ct. 7th, Apr. 5, 2011), had no need to, and did not, address the question of whether a for-profit corporation can exercise religion. *See id.* Finally, there is no indication that the religiously-affiliated hospital in *Roberts v. Bradfield*, 12 App. D.C. 453 (D.C. Cir. 1898), was a for-profit

The consequences of the Tenth Circuit's decision are troubling. The Supreme Court has made clear that while the First Amendment freedoms of speech and association are "right[s] enjoyed by religious and secular groups alike," the Free Exercise Clause (and by extension, RFRA) "gives special solicitude to the rights of *religious* organizations." *Hosanna-Tabor*, 132 S. Ct. at 706 (emphasis added); *see also, e.g.*, *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (stating that the Supreme Court's precedent "radiates . . . a spirit of freedom for *religious* organizations, an independence from secular control or manipulation") (emphasis added); *Hosanna-Tabor*, 132 S. Ct. at 706 (Free Exercise Clause "protects a *religious* group's right to shape its own faith and mission") (emphasis added); *Werft v. Desert Sw. Annual Conference of the United Methodist Church*, 377 F.3d 1099, 1102 (9th Cir. 2004) ("The Free Exercise Clause protects . . . *religious* organizations . . . .") (citations and quotation marks omitted) (emphasis added); *Anselmo v. Cnty. of Shasta*, 873 F. Supp. 2d 1247, 1264 (E.D. Cal. 2012) ("Although corporations and limited partnerships have broad rights, the court has been unable to find a single [Religious Land Use and Institutionalized Persons Act] case protecting the religious exercise rights of a non-religious organization such as Seven Hills."); *Conestoga Wood Specialties Corp. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 140110, at *6-*7 (E.D. Pa. Jan. 11, 2013); *affirmed*, 2013 WL 3845365; *Korte v. U.S. Dep't of Health & Human Servs.*, __ F. Supp. 2d __, 2012 WL 6553996, at *6, *9-*10 (S.D. Ill. Dec. 14, 2012), *appeal pending*, No. 12-3841 (7th Cir.). The government does not understand the Tenth Circuit decision to suggest that *all* for-profit corporations can "exercise religion" under RFRA – nor does the government understand plaintiffs to be making such an argument here. Thus, according

corporation. Furthermore, *Roberts* was decided more than a century ago, and therefore pre-dates the cases cited by defendants confirming that only religious organizations can exercise religion.

to plaintiffs and the Tenth Circuit, it must be that only those for-profit corporations that are sufficiently "religious" have free exercise rights.

But how is a court to determine which for-profit corporations are sufficiently religious? Or, to put it in terms used by the Tenth Circuit, how is a court to identify those companies that are "faith-based" or have a "religious mission"? *See Hobby Lobby*, 2013 WL 3216103, at *44 (Briscoe, C.J., dissenting in relevant part). The majority in *Hobby Lobby* pulled from thin air a four-factor test, *see id.* at *49 (Briscoe, C.J., dissenting in relevant part) (describing the factors), but said nothing about "whether the four factors it mentions are intended to be exclusive, or even controlling," *see id.* at *51 (Briscoe, C.J., dissenting in relevant part). More problematically, "the majority's holding threatens to entangle the government in the impermissible business of determining whether for-profit corporations are sufficiently 'religious' to be entitled to protection under RFRA from a vast array of federal legislation." *Id.* (Briscoe, C.J., dissenting in relevant part).

It is for precisely this reason that the D.C. Circuit, in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002) – as well as the Ninth Circuit in *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011) – reached the conclusion that a for-profit entity cannot obtain a religious exemption from regulations. *See Great Falls*, 278 F.3d at 1343. For-profit status is an objective criterion that allows courts to distinguish a secular company from a potentially religious organization, without making intrusive inquiries into an entity's religious beliefs. *See id.* at 1341-45. "As the *Amos* Court noted, it is hard to draw a line between the secular and religious activities of a religious organization." *Id.* at 1344 (citing *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987)). By contrast, "it is relatively straight-forward to distinguish between a non-profit and a for-profit entity." *Id.*

Thus, the D.C. Circuit held that an organization qualifies for the religious exemption in the NLRA if, among other things, the organization is "organized as a 'nonprofit'" and holds itself out as religious. *Id*. at 1343 (quoting *Universidad Cent. de Bayamon v. NLRB,* 793 F.2d 383, 400, 403 (1st Cir. 1985) (en banc) (opinion of then-Judge Breyer)). The D.C. Circuit explained that this bright-line distinction prevents courts from "'trolling through a person's or institution's religious beliefs,'" *id*. at 1341-42 (quoting *Mitchell v. Helms,* 530 U.S. 793, 828 (2000) (plurality opinion)), and stressed 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. Of course, *Great Falls* is binding on this Court and should be dispositive in this case. Thus, it is striking that, despite defendants' relatively lengthy discussion of *Great Falls* in their initial brief, *see* Defs.' Mem. at 16-17, plaintiffs never once mention it in their brief.

Contrary to plaintiffs' dramatic assertion, the government does not believe "that religion and business are incompatible." Pls.' Mem. at 17. Tyndale remains free to pursue a religious mission, and may even advocate against their employees' (or their employees' spouses or dependents) use of contraceptive services (or any other services). But plaintiffs cannot contend that their choice to incorporate as a for-profit entity has no significance and that, as a for-profit business, they can selectively pick and choose the benefits and burdens of incorporation at will. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261. Having chosen this path, the corporation may not impose its owners' personal religious beliefs on its employees (many of whom may not share the owners' beliefs) by refusing to cover contraception. *See Lee*, 455 U.S. at 261 ("Granting an exemption from social security

taxes to an employer operates to impose the employer's religious faith on the employees."); *Conestoga*, 2013 WL 140110, at *10. In this respect, "[v]oluntary commercial activity does not receive the same status accorded to directly religious activity." *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) (interpreting the Free Exercise Clause of the Alaska Constitution). For-profit employers like Tyndale therefore stand in a fundamentally different position from a church or a religiously-affiliated non-profit organization.

2. The regulations do not substantially burden the religious exercise of Tyndale's owners because the regulations apply only to the corporation, which is a separate and distinct legal entity

Because Tyndale itself is not engaged in the "exercise of religion" within the meaning of RFRA, plaintiffs can only prevail on their RFRA claim if they can show that the religious exercise of Tyndale's institutional owners – which are not plaintiffs here – is substantially burdened by the challenged regulations. But as described in the government's initial brief, *see* Defs.' Mem. at 20-30, plaintiffs cannot make such a showing for two reasons. First, Tyndale does not have standing to assert the religious exercise rights of its shareholders; nor would the corporation's owners have standing even if they were plaintiffs here. And second, even if Tyndale did have *standing* to assert its owners' rights, because of the legal separation between a corporation and its owners, the fact that the challenged regulation imposes requirements on the corporation does not mean that it imposes a *substantial burden* on the corporation's owners.

Both of these issues – standing and substantial burden – turn on the same question; that is, whether the legal separation between a corporation and its owners – what the Supreme Court has called "[a] basic tenet of American corporate law," *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003) – can be disregarded for the limited purpose of asserting a religious exercise claim. This is the crux of defendants' disagreement with this Court's ruling at the preliminary

injunction stage. Plaintiffs' arguments also turn almost entirely on a rejection of the corporate form. *See* Pls.' Mem. at 6. But for all of their discussion of this issue – which is full of conclusory statements such as "[l]egal liability and religious liability are not coextensive," *id.* at 7 – plaintiffs offer no coherent reason *why* the corporate form should be disregarded here; nor do they cite to any cases that provide either support for that proposition or a satisfactory explanation for its propriety.

The Supreme Court has emphasized that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). "One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public." *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946). Plaintiffs argue that this fundamental legal distinction should be ignored in this case. Similarly, this Court previously held that, "when the beliefs of a closely-held corporation and its owners are inseparable, the corporation should be deemed the *alter-ego* of its owners for religious purposes." Mem. Op. at 14, ECF No. 27 (emphasis added). But as the government explained in its initial brief, *see* Defs.' Mem. at 11-12, 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 Gilardi v. Sebelius*, __ F. Supp. 2d __, 2013 WL 781150, at *4 (D.D.C. Mar. 3, 2013) ("[Plaintiffs] have chosen to conduct their business through corporations, with their accompanying rights and benefits and limited liability. They cannot simply disregard that same corporate status when it is advantageous to do so."), *appeal pending sub nom. Gilardi*

v. HHS, No. 13-5069 (D.C. Cir.); *see also, e.g.*, *Nautilus Ins. Co. v. Reuter*, 537 F.3d 733, 738 (7th Cir. 2008); *Korte*, 2012 WL 6553996, at *11; *Autocam Corp. v. Sebelius*, No. 1:12-cv-1096, 2012 WL 6845677, at *7 (W.D. Mich. Dec. 24, 2012) ("Whatever the ultimate limits of this principle may be, at a minimum it means the corporation is not the *alter ego* of its owners for purposes of religious belief and exercise."), *appeal pending*, No. 12-2673 (6th Cir.); *Conestoga*, 2013 WL 140110, at *8 ("It would be entirely inconsistent to allow the [corporation's owners] to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations."); *Grote v. Sebelius*, 708 F.3d 850, 858 (7th Cir. 2013) (Rovner, J., dissenting) ("To suggest, for purposes of the RFRA, that monies used to fund the Grote Industries health plan – including, in particular, any monies spent paying for employee contraceptive care – ought to be treated as monies from the Grotes' own pockets would be to make an argument for piercing the corporate veil. I do not understand the Grotes to be making such an argument.").

Because of this legal separation, the challenged regulations cannot possibly be said to impose a substantial burden on the religious exercise of Tyndale's owners. By their terms, the regulations apply to group health plans and health insurance issuers. 42 U.S.C. § 300gg-91(a)(1); 26 C.F.R. § 54.9815-2713T; 29 C.F.R. § 2590.715-2713; 45 C.F.R. § 147.130. The contraceptive-coverage requirement "does not compel [Tyndale's owners] . . . to do anything." *Autocam*, 2012 WL 6845677, at *7. "It is only the legally separate entit[y] they currently own that ha[s] any obligation under the mandate." *Id.* It is Tyndale that acts as the employing party; it is Tyndale that sponsors the group health plan for 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*, 708 F.3d at 857 (Rovner, J., dissenting); *see also*

Hobby Lobby, 2013 WL 3216103, at *41 (Bacharach, J., concurring) ("In my view, the Greens' injury stemming from the Affordable Care Act is purely derivative of the corporations' injury. The mandate does not require anything of the Greens; the obligation falls solely on the corporations.").

The Third Circuit recently adopted this view. As the *Conestoga* court explained, "by incorporating their business, the [corporation's owners] themselves created a distinct legal entity that has legally distinct rights and responsibilities from . . . the owners of the corporation." 2013 WL 3845365, at *7. "Since [the corporation] is distinct from [its owners], the Mandate does not actually require the [owners] to do anything. All responsibility for complying with the Mandate falls on [the corporation]." *Id.* at *8. "The [owners] chose to incorporate and conduct business through [the corporation], thereby obtaining both the advantages and disadvantages of the corporate form. We simply cannot ignore the distinction between [the corporation] and the [owners]. We hold . . . that the free exercise claims of a company's owners cannot 'pass through' to the corporation." *Id*.

Plaintiffs' response to this irrefutable point is to vaguely assert "a direct moral and religious harm to Tyndale's religiously-unified owners, directors, and operators" if the corporation is required to comply with the regulations. Pls.' Mem. at 6. But while Tyndale's owners may be sincerely and deeply offended by the thought of a corporation they own providing a health plan that an employee can use to obtain contraception, this is not a justification for ignoring the corporate form. To the extent that plaintiffs suggest that the challenged regulations impose a substantial burden on the individual officers and directors of the corporation – including plaintiff Mark Taylor, who is an officer and director of Tyndale, as well as an officer and director of the Foundation that owns the majority of Tyndale, and a trustee of

the trusts that own the remainder, but is not an owner of Tyndale in his own right – this argument ignores the fact that when individuals act in their capacities as officers and directors, they are *not* acting in their personal capacities. *See Hobby Lobby*, 2013 WL 3216103, at *41 (Bacharach, J., concurring) ("In oral argument, the Greens argue that they incurred a direct injury from their duty to implement the contraceptive mandate for Hobby Lobby and Mardel. But the Greens are implementing these decisions as officers and directors of the corporations, not as individuals acting in their personal capacities."); *see also, e.g.*, *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006). If any corporate officer, director, or shareholder could bring a RFRA claim asserting his or her own rights to religious freedom based on a burden on a corporation, RFRA would cease to have any limits.

The legal separation between the corporation and its owners also underpins defendants' argument that Tyndale lacks standing to assert the claims of its owners. *See* Defs.' Mem. at 21-24. There is no dispute that Tyndale's owners are not plaintiffs in this case. Therefore, in order for any alleged injuries to the corporation's owners to be cognizable in this case, Tyndale must have standing to assert the rights of its owners. But it is well settled that, as a general rule, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)); *see also Tileston v. Ullman*, 318 U.S. 44, 46 (1943). And in the context of corporate entities, the mere existence of a parent-subsidiary relationship is, by itself, insufficient to confer standing for one to bring suit on behalf of the other. *See Schenley Distillers Corp.*, 326 U.S. at 435; *EMI Ltd. v. Bennett*, 738 F.2d 994, 997 (9th Cir. 1984). Furthermore, even if Tyndale's owners were plaintiffs here, they would not have standing to

assert their own claims. *See* Defs.' Mem. at 23-24. It defies logic to suggest that Tyndale could assert claims on behalf of parties that would have no standing to assert such claims themselves.

In fact, there is no rule of standing that allows a corporation to assert its owners' claims in this situation. At the preliminary injunction stage, this Court – adopting the reasoning of the Ninth Circuit in *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), and *EEOC v. Townley Eng'g and Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988) – held that Tyndale could assert the rights of its owners by conflating the two and disregarding the corporate form. For the reasons explained above and in defendants' opening brief, this was incorrect. *See* Defs.' Mem. at 11-12, 21; *see also Conestoga*, 2013 WL 3845365, at *7 (explicitly rejecting the reasoning of *Stormans* and *Townley*, and noting that "the Ninth Circuit did not mention certain basic legal principles governing the status of a corporation and its relationship with the individuals who create and own the entity"). Nor does the doctrine of third-party standing permit Tyndale to assert a RFRA claim on its shareholders' behalf. *See* Defs.' Mem. at 23-24. And although plaintiffs attack the government's invocation of shareholder standing, they also fail to identify a basis for the owners' standing in this case. *See* Pls.' Mem. at 12-14.[3] In short, because Tyndale and its owners are separate legal entities and, thus, the regulations impose no burden on the corporation's owners,

[3] Plaintiffs misunderstand the government's shareholder standing argument. Defendants agree that, because Tyndale's owners are not plaintiffs in this action, it does not involve a direct application of the shareholder standing doctrine, which states that "an action to redress injuries to a corporation . . . cannot be maintained by a stockholder in his own name." *Canderm Pharmacal, Ltd. v. Elder Pharm., Inc.*, 862 F.2d 597, 602-03 (6th Cir. 1988); *see also* Defs.' Mem. at 21-23 (discussing the shareholder standing doctrine at some length). Plaintiffs are also correct that this doctrine exists to ensure that the correct plaintiff – the corporation – sues when its own interests are at stake. *See* Pls.' Mem. at 12. Thus, the parties appear to agree that Tyndale is the appropriate plaintiff in this case. *See id.* ("If the shareholder standing doctrine is at all relevant to this case, it would reinforce Tyndale as the plaintiff."). But plaintiffs miss the logical implication of this chain of reasoning. While Tyndale has standing to assert its own claims, the corporation *lacks* standing to assert the rights of its owners. Even if those owners were plaintiffs here, under the doctrine of shareholder standing they would not have standing to assert their own claims. Thus, the corporation cannot possibly assert the owners/shareholders claims in their place. This suit challenges a regulation that is applicable only to the corporation, and the proper plaintiff is the corporation itself asserting its own rights, rather than the rights of its shareholders. *See Hobby Lobby*, 2013 WL 3216103, at *40 (Bacharach, J., concurring). Finally, plaintiffs' contention that "prudential standing does not apply to a RFRA claim," Pls.' Mem. at 14, is simply wrong as a matter of law in this Circuit. *See Jackson v. Dist. of Columbia*, 254 F.3d 262, 267 (D.C. Cir. 2001); *Hobby Lobby*, 2013 WL 3216103, at *40 (Bacharach, J., concurring) (relying on *Jackson*).

those owners would lack standing to challenge the regulations on their own behalf, and the corporation certainly cannot bring such claims in their place.

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

As explained above, the challenged regulations cannot substantially burden Tyndale's religious exercise rights because a for-profit corporation has no such rights under RFRA, and cannot substantially burden the religious exercise of Tyndale's owners/shareholders and directors because the regulations apply only to the corporation, which is a separate and distinct legal entity. But even if this Court were to disagree with either or both of these arguments, plaintiffs' RFRA claim would still fail because any alleged burden imposed on Tyndale or its owners is far too attenuated to amount to a *substantial* burden. *See* Defs.' Mem. at 30-34. Plaintiffs' response to this argument is rooted in a fundamental misunderstanding of defendants' position and RFRA. The government does not dispute that Tyndale's owners object to providing health coverage that includes certain contraceptive services, *see* Pls.' Mem. at 23, and does not ask this Court to undertake "a theological inquiry," *id.* at 22. According to plaintiffs, this is the end of the matter: Tyndale's owners object to providing a group health plan that includes coverage of certain contraceptive services; the regulations require such coverage and are enforced by monetary penalties; and, in plaintiffs' view, these two facts, in conjunction, are sufficient to amount to a substantial burden.

Not so. Under RFRA, individuals are entitled to their sincere religious beliefs, but they are not entitled to decide what does and does not impose a "substantial burden" on such beliefs. Although "[c]ourts are not arbiters of scriptural interpretation," *Thomas*, 450 U.S. at 716, "RFRA still requires the court to determine whether the burden a law imposes on a plaintiff's stated religious belief is 'substantial.'" *Conestoga*, 2013 WL 140110, at *12. Plaintiffs cannot evade

RFRA's threshold by simply invoking the word "substantial," because permitting them to do so would read the term "substantial" out of RFRA. *See Gilardi*, 2013 WL 781150, at *8 ("[T]he Court declines to follow several recent cases suggesting that a plaintiff can meet his burden of establishing that a law creates a 'substantial burden' upon his exercise of religion simply because he claims it to be so."); *Autocam*, 2012 WL 6845677, at *6 ("The Court does not doubt the sincerity of Plaintiff Kennedy's decision to draw the line he does, but the Court still has a duty to assess whether the claimed burden—no matter how sincerely felt—really amounts to a substantial burden on a person's exercise of religion."); *see also Grote Indus., LLC v. Sebelius*, __ F. Supp. 2d __, 2012 WL 6725905, at *6 (S.D. Ind. Dec. 27, 2012), *appeal pending* No. 13-1077 (7th Cir.). "If every plaintiff were permitted to unilaterally determine that a law burdened their religious beliefs, and courts were required to assume that such burden was substantial, simply because the plaintiff claimed that it was the case, then the standard expressed by Congress under the RFRA would convert to an 'any burden' standard." *Conestoga*, 2013 WL 140110, at *13; *see also Autocam*, 2012 WL 6845677, at *7; *Grote*, 2012 WL 6725905, at *6; *Mersino Mgmt.*, 2013 WL 3546702, at *15-*16.

Plaintiffs never come to grips with the troubling implications of their argument. *Autocam*, 2012 WL 6845677, at *7. "Plaintiffs argue, in essence, that the Court cannot look beyond their sincerely held assertion of a religiously based objection to the mandate to assess whether it actually functions as a substantial burden on the exercise of religion." *Id.* "But if accepted, this theory would mean that every government regulation could be subject to the compelling interest and narrowest possible means test of RFRA based simply on an asserted religious basis for objection." *Id.* "This would subject virtually every government action to a potential private veto based on a person's ability to articulate a sincerely held objection tied in

some rational way to a particular religious belief." *Id.*

Thus, while this Court should certainly credit plaintiffs' articulation of the religious beliefs of Tyndale's owners, it still must determine whether the alleged burden on those beliefs is "substantial." The alleged burden in this case does not cross that threshold because it is too indirect and attenuated. Cases that find a substantial burden uniformly involves a *direct* burden on the plaintiff – that is "it involves . . . action or forbearance on [the plaintiff's] part, [or] otherwise interfere[s] with any religious act in which [the plaintiff] engages." *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008); *see also, e.g.*, *Potter v. Dist. of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009); *Grote*, 2012 WL 6725905, at *5; *Conestoga*, 2013 WL 140110, at *8, *14; *Korte v. U.S. Dep't of Health & Human Servs.*, __ F Supp. 2d __, 2012 WL 6553996, at *9-*11 (S.D. Ill. Dec. 14, 2012), *appeal pending*, No. 12-3841 (7th Cir.); *Autocam*, 2012 WL 6845677, at *7.[4] Plaintiffs are, "'in both law and fact, separated by multiple steps from both the coverage that the company health plan provides and from the decisions that individual employees make in consultation with their physicians as to what covered services they will use.'" *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, slip op. at 3 (3d Cir. Feb. 7, 2013) (Garth, J., concurring) (quoting *Grote*, 708 F.3d at 858 (Rovner, J., dissenting)). To hold that "a company shareholder's religious beliefs and practices are implicated by the autonomous health care decisions of company employees, such that the obligation to insure those decisions,

[4] As previously explained, *see* Defs.' Mem. at 26 n.17, *Thomas*, 450 U.S. 707, is not to the contrary. In *Thomas*, the Supreme Court recognized that "a *compulsion* may certainly be indirect and still constitute a substantial burden, such as the denial of a benefit found in *Thomas*." *Conestoga*, 2013 WL 140110, at *14 n.15. But that is not so where the *burden* itself is indirect, as it is here. *See id.*; *Gilardi*, 2013 WL 781150, at *9. Defendants also note that, in *Hobby Lobby*, a bare majority of the en banc Tenth Circuit recently concluded that the word "substantial" in RFRA refers to the "intensity of coercion" rather than to the directness or indirectness of the burden, if any, on a plaintiff's religious exercise. 2013 WL 3216103 at *17-*20. The Tenth Circuit's conclusion that the substantial burden requirement relates only to the intensity the coercion, however, is inconsistent with *Kaemmerling*, discussed above, as well as other decisions that have analyzed "substantial burden" in terms of the degree to which the challenged law directly imposes a requirement or prohibition on religious practice. *See* 553 F.3d at 678-79; *Living Water Church of God v. Charter Twp. of Meridian*, 258 Fed. App'x 729, 734 (6th Cir. 2007); *McEachin v. McGuinnis*, 357 F.3d 197, 203 n.6 (2d Cir. 2004); *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003).

when objected to by a shareholder, represents a substantial burden on that shareholder's religious liberties" would be "an unusually expansive understanding of what acts in the commercial sphere meaningfully interfere with an individual's religious beliefs and practices." *Grote*, 708 F.3d at 866 (Rovner, J., dissenting). "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*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012).

Furthermore, the regulations no more impact religious exercise than the payment of salaries to employees, which those employees can also use to purchase contraceptives. *See id.* at 1160; *see also Conestoga*, 2013 WL 140110, at *13 ("The fact that Conestoga's employees are free to look outside of their insurance coverage and pay for and use any contraception . . . through the salary they receive from Conestoga, amply illustrates this point."); *Grote*, 708 F.3d at 861 (Rovner, J., dissenting) ("To the extent this burdens the Grotes' religious interests, it is worth considering whether the burden is different in kind from the burden of knowing that an employee might be using his or her Grote Industries paycheck (or money in a health care reimbursement account) to pay for contraception him or herself."); *Autocam*, 2012 WL 6845677, at *6. Of course, any alleged burden on Tyndale's owners is even further attenuated because it is the corporation, not its owners, that is required to provide the coverage to which they object.

Plaintiffs remain free to voice their disapproval of contraception and to encourage their employees to refrain from using contraceptive services. The challenged regulations therefore affect religious practice, if at all, in a highly attenuated way. In short, because the preventive services regulations "are several degrees removed from imposing a substantial burden on [plaintiffs]," *O'Brien*, 894 F. Supp. 2d at 1160, the Court should reject plaintiffs' RFRA claim

even if it finds – contrary to the government's argument – that the challenged regulations impose some burden on religious exercise.[5]

B. 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

Because plaintiffs cannot establish a prima facie case under RFRA, there is no reason to consider whether the contraceptive-coverage requirement is the least restrictive means to advance compelling governmental interests. *See* 42 U.S.C. § 2000bb-1(b). Contrary to plaintiffs' premise, Congress did not make regulations that are applicable only to corporations subject to strict scrutiny at the behest of a corporation's controlling shareholder. Nevertheless, plaintiffs spend a significant portion of their brief on the argument that the challenged regulations cannot satisfy strict scrutiny. *See* Pls.' Mem. at 24-40. Plaintiffs' argument breaks no new ground, and defendants have already explained at some length why plaintiffs are wrong and why this Court erred in its preliminary injunction ruling when it concluded that the government had not shown that the challenged regulations advance compelling governmental interests. *See* Defs.' Mem. at 34-41.

Rather than rehashing its prior arguments – with which this Court is already quite familiar – defendants take this opportunity to take issue with the "evidence" relied on by plaintiffs in their brief and their Responsive Statement of Facts, ECF No. 43-1. In general, plaintiffs do not dispute that equalizing the provision of preventive care so as to level the playing field between women and men is a compelling governmental interest or that it is furthered by the

[5] Plaintiffs are wrong when they suggest that the religious employer exemption somehow amounts to an admission by the government that the challenged regulations impose a substantial burden on religious exercise. To the contrary, the government does not believe that the religious employer exemption is required by RFRA, but adopted the exemption "to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). It is well-established that the government may accommodate religious exercise even when not required by law to do so. *See, e.g.*, *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 669 (1970).

preventive services coverage regulations. Nor do plaintiffs dispute that improving the health of women and newborn children is a compelling governmental interest. Plaintiffs question only whether the regulations will actually further the government's public health goals, and they flyspeck the IOM Report to suggest that the regulations will not do so. *See* Pls.' Mem. at 30-34. But the IOM Report and its recommendations are the work of independent experts in the field of public health. After undertaking an extensive science-based review of the available evidence, IOM determined that coverage, without cost-sharing, for the full range of FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity is necessary for women's health and well-being. The HRSA Guidelines adopting the IOM's expert, scientific recommendations are entitled to deference. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *see also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376-77 (1989) (emphasizing that deference is particularly appropriate when an interpretation implicates scientific and technical judgments within the scope of agency expertise).

Furthermore, in addition to flyspecking the IOM Report, plaintiffs introduce their own evidence – largely in the form of studies that they claim undermine the government's compelling interest – that was not part of the administrative record. This introduction of extra-record evidence is inappropriate. Plaintiffs are challenging agency regulations, which means that this Court's review is limited to the administrative record. *See, e.g.*, *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963). Plaintiffs had ample opportunity to submit this extra-record material to the agency for consideration prior to the promulgation of the challenged rules, but

there is no indication that they did so. Therefore, any such material should be disregarded by this Court.[6]

Finally, the government did not fail to consider viable less restrictive means of advancing its compelling interests, as plaintiffs claim, *see* Pls.' Mem. at 39-40, and certainly did not "admit[] . . . that it gave little or no consideration to basic alternatives," *id.* at 40. The deposition relied on by plaintiffs does not support their dubious contention.[7] The deponent simply testified that, as far as he was aware, defendant U.S. Department of Health and Human Services did not consider expanding Medicaid's income limits to provide contraceptive services to women who are not currently eligible for the Medicaid program. *With good reason*. Plaintiffs fail to recognize that this proposal is not feasible – not least because defendants have absolutely no statutory authority to expand Medicaid as suggested. In fact, all of plaintiffs' proposed alternative schemes suffer from this same fatal flaw – they would be incompatible with the ACA, which plaintiffs do not challenge in this lawsuit, and which 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 (2010). They are also otherwise well outside of defendants' statutory authority. Thus, even if defendants wanted to adopt one of plaintiffs' non-employer-based alternatives, they would be prohibited by law from doing so. 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 "workable." *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2420 (2013); *see also, e.g.*, *New Life Baptist Church Acad. v. Town of E. Longmeadow*, 885 F.2d

[6] Plaintiffs' Responsive Statement of Fact is also not in compliance with the Local Rules for several other reasons. Much of the statement reads like a legal brief rather than a collection of concise facts with citations to the record for each fact, as require by Local Rule 7(h). The statement is also replete with legal arguments and opinion couched as fact. Suffice it to say that defendants dispute many of the "facts" contained in plaintiffs' statement, and do not believe that any of those facts change the outcome of this case.

[7] The excerpts of the deposition submitted by plaintiffs are also not part of the administrative record and thus, for the reasons already discussed, are not properly before this Court.

940, 947 (1st Cir. 1989) (Breyer, J.); *Graham v. Comm'r*, 822 F.2d 844, 852 (9th Cir. 1987); *S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1206 (6th Cir. 1990); *Fegans v. Norris*, 537 F.3d 897, 905-06 (8th Cir. 2008); *United States v. Lafley*, 656 F.3d 936, 942 (9th Cir. 2011); *Gooden v. Crain*, 353 F. App'x 885, 888 (5th Cir. 2009); *Adams v. C.I.R.*, 170 F.3d 173, 180 n.8 (3d Cir. 1999).[8]

II. PLAINTIFFS' NON-RFRA CLAIMS ARE ALSO WITHOUT MERIT

In support of their motion for summary judgment on plaintiffs' non-RFRA claims, defendants continue to rely on their briefing at the preliminary injunction stage, *see* Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. at 31-42, ECF No. 16, as well as the decisions of the overwhelming majority of courts to have considered – and thoroughly rejected – such claims. *See Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, 2013 WL 1277419, at *2 (3d Cir. Feb. 8, 2013) (rejecting Free Exercise Clause and Establishment Clause claims); *Eden Foods, Inc. v. Sebelius*, No. 13-cv-11229, 2013 WL 1190001, at *4-*5 (E.D. Mich. Mar. 22, 2013) (Free Exercise); *Briscoe v. Sebelius*, __ F. Supp. 2d __, 2013 WL 755413, at *6-*8 (D. Colo. Feb. 27, 2013) (Free Exercise, Establishment, and Free Speech); *Conestoga*, 2013 WL 140110, at *8-*9, *15-*17 (Free Exercise, Establishment, and Free Speech); *Grote*, 2012 WL 6725905, at *7-*11 (Free Exercise, Establishment, Free Speech, Due Process, and APA); *Autocam*, 2012 WL 6845677, at *4-*5, *8 (Free Exercise and Free Speech); *Korte*, 2012 WL 6553996, at *6-*8 (Free Exercise).

The government does, however, wish to respond to one particular assertion made by plaintiffs in their Responsive Statement of Facts. Plaintiffs state, with absolutely no support, that

[8] The challenged regulations are also the least restrictive means of advancing the government's compelling interests for all of the reasons discussed in defendant' opening brief, as well as their brief in opposition to plaintiffs' motion for a preliminary injunction, *see* Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. at 28-30, ECF No. 16, which is incorporated here by reference.

"it is undisputed that the Mandate does include coverage of education and counseling in support of IUDs and emergency contraception." *See* Pls.' Responsive Statement of Facts at 2-3, ECF No. 43-1. Plaintiffs are wrong. The regulations simply require coverage of "education and counseling for women with reproductive capacity," *see* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines, available at http://www.hrsa.gov/womensguidelines/ (last visited Oct. 22, 2012) – there is absolutely no requirement that such education and counseling be "in support of" any particular contraceptive service (such as IUDs or emergency contraception), or even in support of contraception in general. Nor do the regulations require that the education and counseling take place in conjunction with the prescription of contraceptives, as plaintiffs seem to suggest. The conversations that may take place between a patient and her doctor or counselor cannot be known or screened in advance and may cover any number of options. To the extent that plaintiffs intend to argue that the covered education and counseling is objectionable because *some* of the conversations between a doctor and one of plaintiffs' employees *might* be supportive of IUDs and emergency contraceptives, accepting this theory would mean that the First Amendment is violated by the mere possibility of an employer's disagreement with a potential subject of discussion between an employee and her doctor, and would extend to all such interactions, not just those that are the subject of the challenged regulations. The First Amendment does not require such a drastic result. *See, e.g.*, *Conestoga*, 2013 WL 140110, at *17.

CONCLUSION

For the foregoing reasons, this Court should deny plaintiffs' motion for summary judgment on their RFRA claim, and grant defendants' motion for summary judgment on all of plaintiffs' claims.

Respectfully submitted this 7th day of August, 2013,

STUART F. DELERY
Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney

JENNIFER RICKETTS
Director

SHEILA M. LIEBER
Deputy Director

/s/ Benjamin L. Berwick
BENJAMIN L. BERWICK (MA Bar No. 679207)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W., Room 7306
Washington, D.C. 20530
Tel: (202) 305-8573
Fax: (202) 616-8470
Email: Benjamin.L.Berwick@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Benjamin L. Berwick
BENJAMIN L. BERWICK