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' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

It is a bedrock principle of corporate law that corporations and their owners/shareholders[1] are separate legal entities. In granting plaintiffs' motion for a preliminary injunction in this case, *see* Mem. Op., ECF No. 27, this Court ignored that principle and improperly conflated the plaintiff corporation, Tyndale House Publishers, Inc. ("Tyndale"), with its owners. As a result, the Court erroneously concluded that a requirement imposed solely on a corporation – as to which the corporation's owners are not asked to comply – can nonetheless impose a substantial burden on the religious exercise of the owners themselves, thereby dramatically expanding the scope of the Religious Freedom Restoration Act (RFRA) in a manner that Congress could not have intended. The court also incorrectly held that the challenged regulations substantially burden the plaintiffs' religious exercise even though any burden is highly attenuated and depends on the choices of individual employees.

Plaintiffs now ask this Court for summary judgment permanently enjoining regulations that are intended to ensure that women have access to health coverage, without cost-sharing, for certain preventive services that medical experts deem necessary for women's health and well-being. *See* Pls.' Mot. for Summ. J. ("Pls.' Mot."), ECF No. 36. The preventive services coverage regulations that plaintiffs challenge require all group health plans and health insurance issuers offering non-grandfathered group or individual health coverage to provide coverage for certain recommended preventive services without cost-sharing (such as a copayment, coinsurance, or a deductible).[2] As relevant here, except as to group health plans of certain non-profit religious employers (and group health insurance coverage sold in connection with those plans), the

[1] Throughout this brief, defendants use the terms "owners" and "shareholders" interchangeably.

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

preventive services that must be covered include all Food and Drug Administration (FDA)-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider. The contraceptive coverage requirement is intended to improve the health of women and newborns, ensure that women have equal access to preventive care, and level the playing field for women in the workplace.

For several reasons, this Court should reconsider the reasoning of its prior ruling, deny plaintiffs' motion for summary judgment on their RFRA claim, and grant summary judgment to defendants on all of plaintiffs' claims. First, the Court should reject plaintiffs' argument that a for-profit corporation can "exercise religion" under the meaning of RFRA and the Free Exercise Clause, and therefore that Congress, in enacting RFRA, gave for-profit corporations the right to demand religion-based exemptions from regulation. Indeed, every court to have directly addressed this question in cases similar to this one has held that for-profit corporations do not have free exercise rights. *See Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1296 (W.D. Okla. 2012), *appeal pending*, No. 12-6294 (10th Cir.); *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, slip op. at 6 (3d Cir. Feb. 7, 2013) (Garth, J., concurring) ("As the District Court properly recognized, . . . *for-profit corporate entities*, unlike religious *non-profit corporations or organizations*, do not – and cannot – legally claim a right to exercise or establish a "corporate" religion under the First Amendment or the RFRA."); *Korte v. U.S. Dep't of Health & Human Servs.*, __ F Supp. 2d __, 2012 WL 6553996, at *6 (S.D. Ill. Dec. 14, 2012) ("[T]he exercise of religion [i]s a purely personal guarantee that cannot be extended to corporations" (quotation omitted)), *appeal pending*, No. 12-3841 (7th Cir.). In fact, as far as the government is aware, no court has ever held that a for-profit corporation is "religious" for purposes of federal

law. And in a related context, the D.C. Circuit reached the conclusion that a for-profit entity cannot be a religious organization. *See Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002).

Second, the Court should not allow the owners of a for-profit corporation to eliminate the legal separation provided by the corporate form, which the owners have chosen because it benefits them, to impose their personal religious beliefs on the corporation's employees. *See, e.g.*, *Gilardi v. Sebelius*, __ F. Supp. 2d __, 2013 WL 781150 (D.D.C. Mar. 3, 2013), *appeal pending sub nom. Gilardi v. HHS*, No. 13-5069 (D.C. Cir.).[3] In fact, Tyndale does not even have standing to assert the claims of its shareholder entities, which are not plaintiffs in this case. To hold otherwise, would permit for-profit corporations and their owners to become laws unto themselves. Plaintiffs' theory of this case is that, by enacting RFRA, Congress gave for-profit corporations the right to ignore an untold number of general laws in the name of religious freedom, unless these requirements survive strict scrutiny, which is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). This cannot be. Because there are an infinite variety of alleged religious beliefs, such corporations could claim exemptions from 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

[3] The fact that a motions panel of the D.C. Circuit issued an injunction pending appeal in *Gilardi*, *see* No. 13-5069 (D.C. Cir. Mar. 29, 2013), has little relevance to this Court's resolution of the pending motions. The motions panel's ruling is not binding on the merits panel of the D.C. Circuit or this Court. "Often a motions panel must decide an issue 'on a scanty record,' and its ruling is 'not entitled to the weight of a decision made after plenary submission.'" *United States v. Henderson*, 536 F.3d 776, 778 (7th Cir. 2008); *see also In re Rodriquez*, 258 F.3d 757, 759 (8th Cir. 2001); *Lambert v. Blackwell*, 134 F.3d 506, 512 n.17 (3d Cir. 1997); *Homans v. City of Albuquerque*, 366 F.3d 900, 904-05 (10th Cir. 2004). That is particularly so where, as in *Gilardi*, a motions panel gives no reasons for its action. *See, e.g., Gonzalez v. Arizona*, 485 F.3d 1041, 1046 (9th Cir. 2007) (noting Supreme Court vacated an injunction "because the motions panel gave no reasons for its action"); *Grote Indus., LLC v. Sebelius*, __ F. Supp. 2d __, 2012 WL 6725905, at *3 n.3 ("Plaintiffs apparently believe that the Eighth Circuit's one sentence order constitutes a holding that a substantial burden and successful RFRA claim had been found, which, of course it does not."); *Korte*, 2012 WL 6553996, at *11 n.16 (noting that a "one-sentence order" of a motions panel of the Eighth Circuit is not "tantamount to a holding that a substantial burden and successful RFRA claim had been found").

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 should reject plaintiffs' effort to bring about an unprecedented expansion of constitutional and statutory free exercise rights that would allow individuals to ignore the line between owners/shareholders and corporations whenever it is to their advantage.

Third, even if a for-profit corporation could exercise religion or the Court were to disregard the corporate form, the regulations would still not substantially burden the religious exercise of the corporation or its owners because any burden caused by the regulations is simply too attenuated to qualify as a *substantial* burden. *See, e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012); *Hobby Lobby*, 870 F. Supp. 2d at 1294; *Conestoga Wood Specialties Corp. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 140110, at *12-*14 (E.D. Pa. Jan. 11, 2013), *appeal pending*, No. 13-1144 (3d Cir.); *Autocam Corp. v. Sebelius*, No. 1:12-cv-1096, 2012 WL 6845677, at *6-*7 (W.D. Mich. Dec. 24, 2012), *appeal pending*, No. 12-2673 (6th Cir.). Just as employees of Tyndale have always retained the ability to choose whether to procure the full range of FDA-approved contraceptive services by using the salaries the company pays them, under the current regulations, those employees retain the ability to choose what health services they wish to obtain according to their own beliefs and preferences. Plaintiffs remain free to advocate against their employees' (or their employees' spouses' or dependents') use of contraceptive services (or any other services). But ultimately, an employee's health care choices remain those of the employee and his or her family, in consultation with their health care provider, not of plaintiffs.

Fourth and finally, 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.[4]

Before proceeding, defendants note that plaintiffs dramatically overstate the extent to which their arguments are supported by other decisions in cases similar to this one. *See* Pls.' Mot. at 2 n.2. In fact, the majority of courts that have considered the question of whether a for-profit plaintiff is entitled to relief over the opposition of the government have ruled in the government's favor.[5] For the reasons articulated above and throughout this brief, the Court should follow the rulings of the majority of courts, deny plaintiffs' motion for summary judgment, and grant summary judgment to defendants on all of plaintiffs' claims.

[4] Plaintiffs' non-RFRA claims are equally meritless. Because those claims were previously briefed by the parties and have not been addressed by this Court, defendants hereby incorporate their prior briefing by reference and will not reiterate those arguments here. *See* Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. ("Defs.' PI Opp'n") at 31-42, ECF No. 16.

[5] *See Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641 (2012) (Sotomayor, J., in chambers) (denying application for injunction pending appellate review); *Conestoga Wood Specialities Corp. v. HHS*, No. 13-1144, 2013 WL 1277419 (3d Cir. Feb. 8, 2013); *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012); *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012); *Armstrong v. Sebelius*, Minute Entry, No. 13-cv-563, ECF No. 38 (D. Colo. May 10, 2012) (oral decision read into record); *M.K. Chambers Co. v. Dep't of Health & Human Servs.*, No. 13-cv-11379, 2013 WL 1340719 (E.D. Mich. Apr. 3, 2013); *Eden Foods, Inc. v. Sebelius*, No. 13-cv-11229, 2013 WL 1190001 (E.D. Mich. Mar. 22, 2013); *Gilardi*, 2013 WL 781150; *Briscoe v. Sebelius*, __ F. Supp. 2d __, 2013 WL 755413 (D. Colo. Feb. 27, 2013); *Conestoga*, 2013 WL 140110; *Annex Medical, Inc. v. Sebelius*, No. 12-cv-2804, 2013 WL 101927 (D. Minn. Jan. 8, 2013), *appeal pending*, No. 13-1118 (8th Cir.); *Grote Indus., LLC v. Sebelius*, __ F. Supp. 2d __, 2012 WL 6725905, at *5-*7 (S.D. Ind. Dec. 27, 2012), *appeal pending* No. 13-1077 (7th Cir.); *Autocam*, 2012 WL 6845677; *Korte*, 2012 WL 6553996; *Hobby Lobby*, 870 F. Supp. 2d 1278; *O'Brien v. HHS*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012), *appeal pending*, No. 12-3357 (8th Cir.). *But see Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013); *Gilardi v. HHS*, No. 13-5069 (D.C. Cir. Mar. 29, 2013); *Annex Medical v. Sebelius*, No. 13-1118 (8th Cir. Feb. 1, 2013); *Korte v. Sebelius*, No. 12-3841 (7th Cir. Dec. 28, 2012); *O'Brien v. HHS*, No. 12-3357 (8th Cir. Nov. 28, 2012); *Geneva Coll v. Sebelius*, __ F. Supp. 2d __, 2013 WL 1703871 (W.D. Pa. Apr. 19, 2013); *Monaghan v. Sebelius*, __ F. Supp. 2d __, 2013 WL 1014026 (E.D. Mich. Mar. 14, 2013); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs.*, Minute Entry, No. 1:12-cv-06756 (N.D. Ill. Jan 3, 2013), ECF No. 49; *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs.*, No. 2:12-cv-92, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012); *Monaghan v. Sebelius*, __ F. Supp. 2d __, 2012 WL 6738476 (E.D. Mich. Dec. 30, 2012); *American Pulverizer v. U.S. Dep't of Health and Human Servs.*, No. 12-cv-3459, slip op. (W.D. Mo. Dec. 20, 2012), ECF No. 38; *Tyndale House Publishers, Inc. v. Sebelius*, __ F. Supp. 2d __, 2012 WL 5817323 (D.D.C. Nov. 16, 2012); *Legatus v. Sebelius*, 901 F. Supp. 2d 980 (E.D. Mich. 2012), *appeals pending*, Nos. 13-1092 & 13-1093 (6th Cir.); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012), *appeal pending*, No. 12-1380 (10th Cir.). In the other cases cited by plaintiffs, the government did not oppose the entry of preliminary injunctions in light of circuit decisions granting injunctions pending appeal.

BACKGROUND

Before the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), many Americans did not receive the preventive health care they needed to stay healthy, avoid or delay the onset of disease, lead productive lives, and reduce health care costs. Due largely to cost, Americans used preventive services at about half the recommended rate. *See* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 19-20, 109 (2011) ("IOM REP."), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited June 17, 2013). Section 1001 of the ACA – which includes the preventive services coverage provision relevant here – seeks to cure this problem by making preventive care affordable and accessible for many more Americans. Specifically, the provision requires all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, "[for] women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]." 42 U.S.C. § 300gg-13(a)(4).

The government issued interim final regulations implementing the preventive services coverage provision on July 19, 2010. 75 Fed. Reg. 41,726. Those regulations provide, among other things, that a group health plan or health insurance issuer offering non-grandfathered health coverage must provide coverage for newly recommended preventive services, without cost-sharing, for plan years that begin on or after the date that is one year after the date on which the new recommendation is issued. 26 C.F.R. § 54.9815-2713T(b)(1); 29 C.F.R. § 2590.715-2713(b)(1); 45 C.F.R. § 147.130(b)(1). Because there were no existing HRSA guidelines relating to preventive care and screening for women, HHS tasked the Institute of Medicine (IOM) with

developing recommendations to implement the requirement to provide preventive services for women. IOM REP. at 2.[6] After an extensive science-based review, IOM recommended that HRSA guidelines include, as relevant here, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id.* at 10-12. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices (IUDs). FDA, Birth Control Guide, *available at* http://www.fda.gov/forconsumers/byaudience/forwomen/ucm118465.htm (last visited June 17, 2013). IOM determined that coverage, without cost-sharing, for these services is necessary to increase access, and thereby reduce unintended pregnancies (and the negative health outcomes that disproportionately accompany unintended pregnancies) and promote healthy birth spacing. *See* 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/ (last visited June 17, 2013). The amendment, issued the same day, authorized HRSA to exempt group health plans established or maintained by certain religious employers (and associated group health insurance coverage) from any requirement to cover contraceptive services under HRSA's guidelines. 76 Fed. Reg. 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A).[7] The religious

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

[7] To qualify, an employer must meet all of the following criteria: (1) The inculcation of religious values is the purpose of the organization; (2) the organization primarily employs persons who share the religious tenets of the organization; (3) the organization serves primarily persons who share the religious tenets of the organization, and (4) the organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of

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employer exemption was modeled after the religious accommodation used in multiple states that already required health insurance issuers to cover contraception. 76 Fed. Reg. at 46,623.[8]

In February 2012, the government adopted in final regulations the definition of "religious employer" contained in the amended interim final regulations while also creating a temporary enforcement safe harbor for non-grandfathered group health plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage (and any associated group health insurance coverage). 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012). During the safe harbor, the government intends to amend the preventive services coverage regulations to further accommodate non-exempt, non-grandfathered religious organizations' religious objections to covering contraceptive services. *Id.* at 8728. The government began the process of further amending the regulations on March 21, 2012, when it published an Advance Notice of Proposed Rulemaking ("ANPRM") in the Federal Register, 77 Fed. Reg. 16,501 (Mar. 21, 2012), and took the next step in that process with the recent publication of a Notice of Proposed Rulemaking (NPRM), 78 Fed. Reg. 8456 (Feb. 6, 2013). The proposed accommodations do not extend to for-profit corporations such as Tyndale. *See id.* at 8462. The Departments explained that "[r]eligious accommodations in related areas of federal law, such as the exemption for religious organizations under Title VII of the Civil Rights Act of 1964, are available to nonprofit religious organizations but not to for-profit secular organizations." *Id.* Consistent with these longstanding provisions, the Departments proposed to limit the definition of organizations eligible for the

the Internal Revenue Code of 1986, as amended. 45 C.F.R. § 147.130(a)(1)(iv)(B). However, a recently published Notice of Proposed Rulemaking (NPRM) would eliminate the first three criteria and modify the fourth criterion, thereby ensuring "that an otherwise exempt employer plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths." 78 Fed. Reg. 8456, 8459 (Feb. 6, 2013); *see also id.* at 8474.

[8] At least 28 states have laws requiring health insurance policies that cover prescription drugs to also provide coverage for FDA-approved contraceptives. *See* Guttmacher Institute, State Policies in Brief: Insurance Coverage of Contraceptives (June 1, 2013), *available at* http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf (last visited June 17, 2013).

accommodation "to include nonprofit religious organizations, but not to include for-profit secular organizations." *Id.*

ARGUMENT

I. PLAINTIFFS' RFRA CLAIM IS WITHOUT MERIT

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

For several reasons, plaintiffs cannot show that the challenged regulations substantially burden any exercise of religion, and thus cannot succeed on their RFRA claim. First, in enacting RFRA, Congress did not intend to give for-profit corporations the right to demand religious exemptions from federal law. Tyndale is not an individual or "religious organizations," and thus cannot "exercise religion," under RFRA. *See, e.g.*, *Conestoga*, slip op. at 6 (Garth, J., concurring); *Conestoga*, 2013 WL 140110, at *6-*7; *Hobby Lobby*, 870 F. Supp. 2d at 1287-88, 1291-92; *Korte*, 2012 WL 6553996, at *6. Second, because the challenged regulations apply only to the corporations, and not to their owners, the religious exercise of the owners is not substantially burdened. *See Hobby Lobby*, 870 F. Supp. 2d at 1293-96; *Korte*, 2012 WL 6553996, at *9-*11; *Autocam*, 2012 WL 6845677, at *7; *Conestoga*, 2013 WL 140110, at *8; *Conestoga*, No. 13-1144, slip op. at 7 (Garth, J., concurring); *Grote v. Sebelius*, 708 F.3d 850,

857-58 (7th Cir. 2013) (Rovner, J., dissenting). And third, any burden imposed by the regulations is attenuated and thus cannot be substantial. *See Hobby Lobby*, 2012 WL 6930302, at *3; *Hobby Lobby*, 870 F. Supp. 2d at 1294; *Conestoga*, 2013 WL 140110, at *12-*14; *Autocam*, 2012 WL 6845677, at *6-*7; *Grote*, 708 F.3d at 860-61, 865-66 (Rovner, J., dissenting); *Grote Indus., LLC v. Sebelius*, __ F. Supp. 2d __, 2012 WL 6725905, at *5-*7 (S.D. Ind. Dec. 27, 2012), *appeal pending* No. 13-1077 (7th Cir.); *Korte*, 2012 WL 6553996, at *10; *Annex Medical, Inc. v. Sebelius*, No. 12-cv-2804, 2013 WL 101927, at *4-*5 (D. Minn. Jan. 8, 2013), *appeal pending*, No. 13-1118 (8th Cir.); *O'Brien v. HHS*, 894 F. Supp. 2d 1149, 1158-60 (E.D. Mo. 2012), *appeal pending*, No. 12-3357 (8th Cir.).

Finally, even if plaintiffs could demonstrate a substantial burden on their religious exercise, they cannot prevail because the regulations are justified by two compelling governmental interests and are the least restrictive means to achieve those interests.

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

1. Tyndale and its owners are separate and distinct legal entities, and thus their claims must be analyzed separately

Tyndale's owners have chosen to enter into commerce and elected to do so by establishing a for-profit Delaware corporation. It is black letter law that a corporation is a legal entity separate and distinct from its shareholders and officers. *Cargill, Inc. v. JWH Special Circumstance LLC*, 959 A.2d 1096, 1109 (Del. Ch. 2008); *see also, e.g., Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003) ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities."); *In re EToys, Inc.*, 234 Fed. App'x 24, 25 (3d Cir. 2007). Indeed, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals

who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). As a Delaware domestic corporation with a "perpetual" term of existence, Tyndale has broad powers – it may, for example, conduct business, sue and be sued, and appoint or employ agents. *See generally* 8 Del. C. §§ 101-114. The company's officers have a duty to act "in the best interests of the corporation," *see, e.g.*, *Ad Hoc Comm. of Equity Holders of Tectonic Network, Inc. v. Wolford*, 554 F. Supp. 2d 538, 558 (D. Del. 2008),[9] and they in turn are generally not liable for the corporation's actions, *see, e.g.*, 8 Del. C. § 102(b)(7). 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, Ltd.*, 533 U.S. at 163; *see also BASF Corp. v. POSM II Props. P'ship, L.P.*, No. 3608-VCS, 2009 WL 522721, at *8 n.50 (Del. Ch. Mar. 3, 2009) ("Delaware public policy does not lightly disregard the separate legal existence of corporations. . . . The reason for that is that the use of corporations is seen as wealth-creating for society as it allows investors to cabin their risk and therefore encourages the investment of capital in new enterprises." (internal citations omitted)).

In granting plaintiffs' motion for a preliminary injunction, this Court disregarded this fundamental legal distinction. Instead, the Court 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." *See* Mem. Op. at 14 (emphasis added). Respectfully, the Court erred in so holding. 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*, 2013 WL 781150, at *4 ("[Plaintiffs] have chosen to conduct their business through corporations, with

[9] Similarly, an employer-sponsored group health plan must be administered "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1).

their accompanying rights and benefits and limited liability. They cannot simply disregard that same corporate status when it is advantageous to do so."); *see also, e.g.*, *Nautilus Ins. Co. v. Reuter*, 537 F.3d 733, 738 (7th Cir. 2008); *Korte*, 2012 WL 6553996, at *11; *Autocam*, 2012 WL 6845677, at *7 ("Whatever the ultimate limits of this principle may be, at a minimum it means the corporation is not the *alter ego* of its owners for purposes of religious belief and exercise."); *Conestoga*, 2013 WL 140110, at *8 ("It would be entirely inconsistent to allow the [corporation's owners] to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations."); *Grote*, 708 F.3d at 858 (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 the corporation and its owners are distinct legal entities, their claims must be analyzed separately. *See Gilardi*, 2013 WL 781150, at *5. In other words, this Court must determine whether the challenged regulations impose a substantial burden on the religious exercise of the plaintiff corporation and, *separately*, whether the regulations impose a substantial burden on the religious beliefs of the corporation's owners, who are not plaintiffs in this action. For the reasons articulated below, neither Tyndale nor its owners can show that any religious beliefs are substantially burdened.

2. There is no substantial burden on Tyndale because a for-profit corporation does not exercise religion

In opposing plaintiffs' motion for a preliminary injunction, the government argued that as a for-profit corporation, Tyndale cannot "exercise . . . religion" within the meaning of RFRA, 42

U.S.C. § 2000bb-1(b), and the Free Exercise Clause. *See* Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. ("Defs.' PI Opp'n") at 8-13, ECF No. 16. The Court declined to address this question at the preliminary injunction stage, *see* Mem. Op. at 9,[10] and defendants raise it again here. Every court to have directly addressed this question in cases similar to this one has held that "secular, for-profit corporations . . . do not have free exercise rights." *Hobby Lobby*, 870 F. Supp. 2d at 1296; *see also, e.g.*, *Conestoga*, No. 13-1144, slip op. at 6 (Garth, J., concurring) ("As the District Court properly recognized, . . . *for-profit corporate entities*, unlike religious *non-profit corporations or organizations*, do not – and cannot – legally claim a right to exercise or establish a 'corporate' religion under the First Amendment or the RFRA."); *Korte*, 2012 WL 6553996, at *6 ("[T]he exercise of religion [i]s a purely personal guarantee that cannot be extended to corporations" (quotation omitted)); *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."); *Briscoe v. Sebelius*, __ F. Supp. 2d __, 2013 WL 755413, at *5 (D. Colo. Feb. 27, 2013) ("Secular, for-profit corporations neither exercise nor practice religion.").

Plaintiffs' contention that Tyndale "exercises religion" with the meaning of RFRA and the Free Exercise Clause cannot be reconciled with the corporation's status as a for-profit company. The government is aware of no case in which a for-profit employer like Tyndale prevailed on a RFRA or free exercise claim. 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*

[10] In its prior ruling, the Court described this issue as a question of standing. *See* Mem. Op. at 9. That is a misunderstanding of defendants' argument. Defendants do not dispute that Tyndale has *standing* to raise RFRA and Free Exercise claims on its *own* behalf. But Tyndale cannot succeed on the *merits* of those claims because it does not "exercise religion."

Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) (emphasis added). The cases are replete with statements like this. *See, e.g.*, *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (stating that the Supreme Court's precedent "radiates . . . a spirit of freedom for *religious* organizations, an independence from secular control or manipulation") (emphasis added); *Hosanna-Tabor*, 132 S. Ct. at 706 (Free Exercise Clause "protects a *religious* group's right to shape its own faith and mission") (emphasis added); *Werft v. Desert Sw. Annual Conference of the United Methodist Church*, 377 F.3d 1099, 1102 (9th Cir. 2004) ("The Free Exercise Clause protects . . . *religious* organizations . . . .") (citations and quotation marks omitted) (emphasis added); *Anselmo v. Cnty. of Shasta*, No. 2:12–cv-361, 2012 WL 2090437, at *13 (E.D. Cal. 2012) ("Although corporations and limited partnerships have broad rights, the court has been unable to find a single [Religious Land Use and Institutionalized Persons Act] case protecting the religious exercise rights of a non-religious organization such as Seven Hills."); *Hobby Lobby*, 870 F. Supp. 2d at 1288 (holding "secular, for-profit corporations . . . do not have constitutional free exercise rights"); *Conestoga*, 2013 WL 140110, at *6-*7; *Korte*, 2012 WL 6553996, at *6, *9-*10. Because RFRA incorporates Free Exercise jurisprudence, the same logic applies. *See Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003). In short, only a religious organization can "exercise religion" under RFRA.

Indeed, no court has ever held that a for-profit corporation is a "religious corporation" for purposes of federal law. For this reason, for-profit companies such as Tyndale cannot permissibly discriminate on the basis of religion in hiring or firing employees, or otherwise establishing the terms and conditions of employment. Title VII of the Civil Rights Act generally prohibits religious discrimination in the workplace. *See* 42 U.S.C. § 2000e-2(a). But that bar

does not apply to "a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [a corporation] of its activities." *Id*. § 2000e-1(a). Tyndale does not qualify as a "religious corporation" under Title VII: it is for-profit; plaintiffs do not allege that it is affiliated with a formally religious entity, nor that a formally religious entity participates in its management; and plaintiffs also do not claim that Tyndale's "membership" – in this case its employees – is made up only of individuals who share its religious beliefs. *See LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217 (3d Cir. 2007). In fact, the Ninth Circuit has suggested that even a non-profit religious organization might not qualify for the Title VII religious exemption if it "engage[s] primarily or substantially in the exchange of goods or services for money beyond nominal amounts." *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) (per curiam opinion of Judges O'Scannlain and Kleinfeld). And in a related context, the D.C. Circuit also reached the conclusion that a for-profit entity cannot be a religious organization. *See Univ. of Great Falls*, 278 F.3d at 1343 (holding that an organization can only be religious, and thus exempt from NLRB jurisdiction, if it is organized as a non-profit).[11]

The government does not dispute that, in some respects, "Tyndale's unique corporate structure serves to distinguish this case from other" cases involving similar challenges to the contraceptive coverage regulations. Mem. Op. at 14 n.10; *see also id.* at 11-13 (describing the corporation's structure in some detail). In particular, the facts that Tyndale is engaged in the business of publishing Christian books, *see id.* at 12, and that 96.5% of the company's profits go

[11] The Americans with Disabilities Act, which prohibits employment discrimination on the basis of disability, also includes specific exemptions for religious organizations. *See* 42 U.S.C. § 12113(d)(1), (2); *Hosanna-Tabor*, 132 S. Ct. at 701 n.1 (discussing these exemptions). Similarly, the National Labor Relations Act has been interpreted to exempt church-operated educational institutions from the jurisdiction of the National Labor Relations Board. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Defendants are unaware of any decision finding a for-profit entity to fall within the religious exemptions of any of these federal statutes or any other federal law.

to a "non-profit religious entity," *see id.*, make this case, at first glance, seem like a closer call than those involving for-profit corporations engaged in obviously secular pursuits, such as the processing, packaging, and shipping of produce and other refrigerated products (*Gilardi*), and the manufacture and sale of vehicle safety systems (*Grote*), wood cabinets (*Conestoga*), fuel systems (*Autocam*), arts and crafts supplies (*Hobby Lobby*), and mineral and chemical products (*O'Brien*).

But in reality and despite these differences, the fact that Tyndale is a for-profit corporation is dispositive of its religious exercise claims. On this point, the D.C. Circuit's decision in *University of Great Falls* is highly instructive, if not controlling. *See* 278 F.3d 1335. There, the court emphasized that 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.[12]

Under the reasoning of *Great Falls* – as well as *Amos* and *Spencer* – Tyndale cannot qualify as a religious corporation under Title VII, and cannot "exercise religion" under RFRA or the Free Exercise Clause. A contrary 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. *See Autocam*, 2012 WL 6845677, at *7. Moreover, any secular company would have precisely the same right as a religious organization to, for example, require that its employees "observe the [company owner's] standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco." *Amos*, 483 U.S. at 330 n.4. These consequences underscore why the Free Exercise Clause, RFRA, Title VII, and other federal statutes distinguish between secular and religious organizations, with only the latter receiving special protection.[13]

[12] Similarly, in *Spencer*, Judge O'Scannlain explained that the Title VII religious exemption must "center[] on neutral factors (i.e., whether an entity is a nonprofit and whether it holds itself out as religious)," "[r]ather than forcing courts to 'troll[ ] through the beliefs of [an organization], making determinations about its religious mission.'" 633 F.3d at 734 (O'Scannlain, J., concurring) (quoting *Great Falls*, 278 F.3d at 1342).

[13] For these reasons, the government respectfully disagrees with this Court's speculation that Tyndale might qualify as a religious corporation under Title VII. *See* Mem. Op. at 18 n.13. As previously explained, such a conclusion would undermine Congress's decision to limit the exemption in Title VII to religious organizations; any company that does not qualify for Title VII's exemption could simply sue under RFRA for an exemption from Title VII's prohibition against discrimination in employment. *See, e.g.*, *Franklin v. United States*, 992 F.2d 1492, 1502 (10th Cir. 1993) ("[E]ven where two statutes are not entirely harmonious, courts must, if possible, give effect to both, unless Congress clearly intended to repeal the earlier statute.") (citation omitted)). The Court downplayed this concern in its prior opinion, suggesting that subjecting Title VII to strict scrutiny would not have drastic consequences. *See* Mem. Op. at 18 n.13. But as the district court recognized in *Autocam*, "this theory would mean that every government regulation could be subject to the compelling interest and narrowest possible means test of RFRA based simply on an asserted religious basis for objection," which would "paralyze the normal process of governing." 2012 WL 6845677, at *7. For example, an employer with a religious objection to any other type of medical treatment – or to health insurance as a whole – might be able to refuse to provide coverage for such treatment. *See Grote*, 708 F.3d at 866 (Rovner, J., dissenting). The owner of a corporation who has a religious objection to women in the workplace might be able to discriminate in hiring or salary. At the very least, federal laws

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Supreme Court precedent is not to the contrary, as the Court had never held that a for-profit corporation may exercise religion. For example, *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981), all involved *individual* plaintiffs, not companies. Sherbert was an employee discharged for refusing to work on Saturdays; Yoder was a member of the Old Order Amish religion who objected to a compulsory school attendance law; and Thomas was a Jehovah's Witness seeking unemployment benefits. Similarly, the plaintiff in *United States v. Lee*, 455 U.S. 252 (1982), was an Amish individual who employed several other people on his farm; the plaintiff was not a secular company, much less a corporation with layers of legal separation from its owner. Nor are plaintiffs helped by *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), or *EEOC v. Townley Eng'g and Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988). Both cases expressly declined to decide whether "a for-profit corporation can assert its own rights under the Free Exercise Clause." *Stormans*, 586 F.3d at 1119; *see also Townley*, 859 F.2d at 619-20. Instead, they held that the particular plaintiff corporations had standing to raise the rights of their owners. *Stormans*, 586 F.3d at 1119-22; *Townley*, 859 F.2d at 619-20 & n.15.[14] In fact, the government is not aware of a single case that held that a for-profit corporation can exercise religion under RFRA and the Free Exercise Clause. *See Hobby Lobby*, 870 F. Supp. 2d at 1288 ("Plaintiffs have not cited, and the court has not found, any case concluding that secular, for-profit corporations . . . have a constitutional right to the free exercise of religion.").

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that protect employees from such treatment would be subject to strict scrutiny – "the most demanding test known to constitutional law," *City of Boerne*, 521 U.S. at 534.

[14] As explained in more detail shortly, defendants believe that *Stormans* and *Townley* – and this Court, given that its prior opinion relied on those cases – was wrong on the question of standing. But even if this Court were to find that the Ninth Circuit was right about standing, neither *Stormans* nor *Townley* has anything to say about whether a burden on a corporation is also a substantial burden on its owners.

Congress enacted RFRA against this background, and thus there is no reason to believe that Congress understood or intended RFRA's protections to apply to for-profit corporations. In enacting RFRA, Congress carried forward the pre-existing distinction between religious organizations, which can seek religious exemptions from generally applicable laws, and secular corporations, which cannot. That distinction is rooted in "the text of the First Amendment," *Hosanna-Tabor*, 132 S. Ct. at 706, and it avoids the Establishment Clause problems that would arise if religious exemptions were extended to entities that operate in the "commercial, profit-making world." *Amos*, 483 U.S. at 337.[15] Under RFRA, as under pre-existing federal statutes such as Title VII, an entity's for-profit status is an objective criterion that allows courts to distinguish a secular company from a potentially religious organization, without engaging in an intrusive inquiry into the entity's religious beliefs. *See Great Falls*, 278 F.3d at 1343-44.

It is significant that the Tyndale's owners elected to organize the corporation as a for-profit entity. "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

[15] The Supreme Court in *Amos* rejected the claim that Title VII's religious employer exemption impermissibly advances religion in violation of the Establishment Clause. The Court recognized that, "[a]t some point, accommodation may devolve into an unlawful fostering of religion," but concluded that *Amos* was not such a case. *Id.* at 334-35 (quotation marks and citation omitted). The Court emphasized that the case involved only nonprofit activity. *See id.* at 337. Thus, the case did not implicate the concern that "sustaining the exemption would permit churches with financial resources impermissibly to extend their influence and propagate their faith by entering the commercial, profit-making world." *Id.* The concurring opinions in *Amos* likewise emphasized that only nonprofit activity was at issue. *See* 483 U.S. at 340 (Brennan, J., concurring) ("I write separately to emphasize that my concurrence in the judgment rests on the fact that these cases involve a challenge to the application of § 702's categorical exemption to the activities of a *nonprofit* organization."); *id*. at 349 (O'Connor, J., concurring) ("Because there is a probability that a nonprofit activity of a religious organization will itself be involved in the organization's religious mission, in my view the objective observer should perceive the Government action as an accommodation of the exercise of religion rather than as a Government endorsement of religion."). The Supreme Court subsequently reiterated that the Establishment Clause permits the federal government to "exempt secular nonprofit activities of religious organizations from Title VII's prohibition on religious discrimination in employment." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (citing *Amos*, 483 U.S. at 329-330).

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

3. 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

In its previous opinion, the Court declined to decide whether the plaintiff corporation itself could "exercise religion" under RFRA and the Free Exercise Clause, and instead determined that Tyndale has standing to assert the religious exercise rights of its owners, *see* Mem. Op. at 8-18, and thus that Tyndale's owners could show that their religious exercise is substantially burdened by the challenged regulations, *see id.* at 19-28. The Court's reasoning is flawed 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, 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. To hold otherwise is to improperly ignore the corporate form.

a. Tyndale does not have standing to assert the religious exercise rights of its owners

As previously explained, "[a] basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food*, 538 U.S. at 474. 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*, 533 U.S. at 163. Nonetheless, this Court, relying primarily on *Stormans* and *Townley* disregarded the corporate form and concluded that, because of Tyndale's corporate structure, the corporation has standing to assert the religious exercise rights of its owners. *See* Mem. Op. at 13-15.

This holding – and the similar holdings of the Ninth Circuit in *Stormans* and *Townley* – cannot be reconciled with basic principles of corporate law and the doctrine of shareholder standing. The "circuits are consistent in holding that 'an action to redress injuries to a corporation . . . cannot be maintained by a stockholder in his own name.'" *Canderm Pharmacal, Ltd. v. Elder Pharm., Inc.*, 862 F.2d 597, 602-03 (6th Cir. 1988) (citing cases). This shareholder standing rule "remains fully applicable even where . . . the individual who seeks redress for corporate injuries is the corporation's sole shareholder." *B&V Distrib. Co., Inc. v. Dottore Companies, LLC*, 278 Fed. App'x 480, 485 (6th Cir. 2008) (unpub.) (citing *Canderm Pharmacal*, 862 F.2d at 603); *see also Kush v. Am. States Ins. Co.*, 853 F.2d 1380, 1384 (7th Cir. 1988).[16]

[16] *Accord, e.g., Diva's Inc. v. City of Bangor*, 411 F.3d 30, 42 (1st Cir. 2005); *In re Kaplan*, 143 F.3d 807, 811-12 (3d Cir. 1998) (Alito, J.); *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311, *(continued on next page…)*

"The derivative injury rule holds that a shareholder (even a shareholder in a closely-held corporation) may not sue for personal injuries that result directly from injuries to the corporation." *In re Kaplan*, 143 F.3d 807, 811-812 (3d Cir. 1998) (Alito, J.).

"While this rule, which recognizes that corporations are entities separate from their shareholders in contradistinction with partnerships or other unincorporated associations, is regularly encountered in traditional business litigation, it also has been uniformly applied on the infrequent occasions it has arisen in suits against the state for statutory or constitutional violations." *Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel*, 20 F.3d 1311, 1317 (4th Cir. 1994). For example, in *Diva's Inc. v. City of Bangor*, 411 F.3d 30, 35, 42 (1st Cir. 2005), the First Circuit held that the sole shareholder of a corporation that operated an adult entertainment bar lacked standing to claim that local officials had denied the corporation a special amusement permit in violation of her rights under the First and Fourteenth Amendments. In *Potthoff v. Morin*, 245 F.3d 710, 717-18 (8th Cir. 2001), the Eighth Circuit dismissed a sole shareholder's First Amendment claim on standing grounds because the termination of the corporation's leasing agreement did not cause the shareholder any "cognizable injury" that was "distinct from the harm" to the corporation rather than derivative of that harm. In *The Guides, Ltd. v. Yarmouth Group Property Management, Inc.*, 295 F.3d 1065, 1070, 1071-73 (10th Cir. 2002), the Tenth Circuit held that a sole shareholder lacked standing to assert a race discrimination claim that derived from the defendants' failure to contract with the corporation. And in *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311 (4th Cir. 1994), the Fourth Circuit dismissed a sole shareholder's claim under the Privileges and

1318 (4th Cir. 1994); *Schaffer, et al. v. Universal Rundle Corp.*, 397 F.2d 893, 896 (5th Cir. 1968); *Potthoff v. Morin*, 245 F.3d 710, 716 (8th Cir. 2001); *Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969); *The Guides, Ltd. v. Yarmouth Grp. Prop. Mgmt., Inc.*, 295 F.3d 1065, 1070, 1071-73 (10th Cir. 2002).

Immunities Clause because the shareholder did "not show the type of individualized harm that is necessary to support such a claim." *Id.* at 1317. "Instead, all injury is merely 'derivative' of the injury to the corporation, which is not constitutionally cognizable under the Privileges and Immunities Clause." *Id*. The Fourth Circuit emphasized that, although the shareholder wished "to discard the separate entity doctrine in this instance, such an action would vitiate the established rule against corporate standing in its entirety, while disregarding settled theory of corporate law." *Id*. at 1317-1318 (followed in *Chance Mgmt., Inc. v. South Dakota*, 97 F.3d 1107, 1115 (8th Cir. 1996)).

These tenets of corporate law foreclose the contention that Tyndale has standing to assert the rights of its owners because, 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 corporate regulation, and the proper plaintiff is the corporation itself asserting its own rights, rather than the rights of its shareholders.

Nor does the doctrine of third-party standing permit Tyndale to assert a RFRA claim on its shareholders' behalf. As an initial matter, because the derivative injury rule would bar Tyndale's shareholders from brining claims on their own behalf, it would make no sense to allow plaintiffs to sidestep this rule by allowing third-party standing. Moreover, 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). In order to overcome this rule, a plaintiff must show a "close relationship" with the person or entity that possesses the right and that there is a "hindrance" to the possessor's

ability to protect his own interests. *Kowalski*, 543 U.S. at 129-30 (citing *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). 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. v. United States*, 326 U.S. 432, 435 (1946); *EMI Ltd. v. Bennett*, 738 F.2d 994, 997 (9th Cir. 1984).

In rejecting the government's third-party standing argument in its prior ruling, the Court held that the "lack of a direct injury-in-fact" to Tyndale's owners was sufficient to satisfy the "hindrance" prong of the third-party standing test. Mem. Op. at 17. The Court is correct that Tyndale's owners lack any injury-in-fact – because, as discussed below, the challenged regulations apply only to the corporation itself – but draws the wrong conclusion. Rather than weighing in favor of third-party standing, the lack of any injury to Tyndale's owners is an absolute bar to third-party standing. *See Sylvia's Haven, Inc. v. Mass. Dev. Fin. Agency*, 397 F. Supp. 2d 202, 206 (D. Mass. 2005) (holding that "the absent third party must also have suffered some sort of injury to or infringement of his rights," noting that to hold otherwise "would be a perversion not only of the principle behind third-party standing but also of standing principles in general," and concluding that *Powers v. Ohio*, 499 U.S. 400 (1991), is not to the contrary). In its prior ruling, the Court expressed concern that "if the Court accepted the defendants' position, no Tyndale entity would have standing to challenge the contraceptive coverage mandate." Mem. Op. at 17. But as defendants have made clear, they only dispute the corporation's standing to assert *the claims of its owners*. They do not challenge the corporation's standing to assert *its own claims* – they simply dispute those claims on their merits.

b. Even if the corporation has standing to assert the rights of its owners, the regulations do not impose any requirements on the owners and thus cannot amount to a substantial burden

Even if the religious exercise claims of Tyndale's owners were somehow before the Court, they would fail on the merits because the preventive services coverage regulations also do not substantially burden the religious exercise of the corporate 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).

Thus, Tyndale's owners do not challenge any obligations imposed directly on them, and they cannot claim that the regulations substantially burden *their* religious exercise because the regulations require the group health plan sponsored by their for-profit *company* to provide health insurance that includes contraceptive coverage. As several courts have explained in some detail, a plaintiff cannot establish a substantial burden on his religious exercise by invoking this type of trickle-down theory; to constitute a substantial burden within the meaning of RFRA, the burden must be imposed on the plaintiff himself. *See Hobby Lobby*, 870 F. Supp. 2d at 1293-96; *Conestoga*, 2013 WL 140110, at *8, *14; *Korte*, 2012 WL 6553996, *9-11; *Autocam*, 2012 WL 6845677, at *7; *see also Grote*, 2012 WL 6725905, at *5 (explaining that for a burden to be substantial, it must apply directly to the plaintiff). "To strike down, without the most critical

scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Indeed, "[i]n our modern regulatory state, virtually all legislation (including neutral laws of general applicability) imposes an incidental burden at some level by placing indirect costs on an individual's activity. Recognizing this . . . [t]he federal government . . . ha[s] identified a substantiality threshold as the tipping point for requiring heightened justifications for governmental action." *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 262 (3d Cir. 2008) (Scirica, C.J., concurring); *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003) (warning, in the RLUIPA context, that "[a]pplication of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise . . . would render meaningless the word 'substantial'"); *Living Water Church of God v. Charter Twp. of Meridian*, 258 Fed. App'x 729, 734 (6th Cir. 2007) ("In the 'Free Exercise' context, the Supreme Court has made clear that the 'substantial burden' hurdle is high.").[17]

Here, any impact on the religious exercise of Tyndale's owners results from obligations that the regulations impose on a legally separate corporation's group health plan. As previously explained, this type of attenuated burden on shareholders is not even sufficient for the purposes of standing – and it is certainly not a cognizable *substantial* burden under RFRA.[18] Indeed, cases that find a substantial burden uniformly involve a direct burden on the plaintiff rather than a

[17] In its previous opinion, this Court cited *Thomas*, 450 U.S. 707, for the proposition that even an "indirect" burden can be a substantial burden. *See* Mem. Op. at 21 (quoting *Thomas*, 450 U.S. at 718). But the Court "misunderstand[s] the principle asserted in *Thomas*. While a *compulsion* may certainly be indirect and still constitute a substantial burden, such as the denial of a benefit found in *Thomas*," *Conestoga*, 2013 WL 140110, at *14 n.15, that is not so where the burden itself is indirect, as it is here.

[18] The attenuation is in fact twice removed. A group health plan is a legally separate entity from the company that sponsors it. 29 U.S.C. § 1132(d); *see also, e.g.*, *Grote*, 708 F.3d at 858 (Rovner, J., dissenting).

burden imposed on another entity. *See, 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 *14. Not so here, where the regulations apply to the group health plan sponsored by Tyndale, but not to the corporation's owners. *See Gilardi*, 2013 WL 781150, at *4-*5; *Hobby Lobby*, 870 F. Supp. 2d at 1294; *Korte*, 2012 WL 6553996, at *9 ("[T]he RFRA 'substantial burden' inquiry makes clear that business forms and so-called 'legal fictions' cannot be entirely ignored – in this situation, they are dispositive."); *Autocam*, 2012 WL 6845677, at *7; *Conestoga*, 2013 WL 140110, at *8; *Conestoga*, No. 13-1144, slip op. at 7 (Garth, J., concurring); *Grote*, 708 F.3d at 857-58 (Rovner, J., dissenting).

Plaintiffs' theory boils down to the claim that what is done to the company (or, really, the group health plan sponsored by the company) is also done to its owners. But, as previously explained, as a matter of fundamental corporate law, that is simply not so. Tyndale's owners have chosen to enter into commerce and elected to do so by establishing a for-profit corporation, which is a legal entity separate and distinct from its shareholders and officers. "So long as the business's liabilities are not the [owners'] liabilities – which is the primary and 'invaluable privilege' conferred by the corporate form – neither are the business's expenditures the [owners'] own expenditures." *Grote*, 708 F.3d at 858 (Rovner, J., dissenting) (quoting *Torco Oil Co. v. Innovative Thermal Corp.*, 763 F. Supp. 1445, 1451 (N.D. Ill. 1991) (Posner, J., sitting by designation)). The money used to pay for Tyndale's group health plan "belongs to the company, not to the [owners]." *Id.* Tyndale's owners should not be permitted to eliminate that legal separation only when it suits them to impose their personal religious beliefs on Tyndale's employees. *See Gilardi*, 2013 WL 781150, at *5; *Autocam*, 2012 WL 6845677, at *7; *Conestoga*, 2013 WL 140110, at *8; *Grote*, 708 F.3d at 857-58 (Rovner, J., dissenting).

A contrary view would expand RFRA's scope in an extraordinary way. All corporations act through human agency; but that cannot mean that any legal obligation imposed on a corporation is also the obligation of the owner or that the owner's and corporation's rights and responsibilities are coextensive. *See, e.g.*, *Gilardi*, 2013 WL 781150, at *5; *Hobby Lobby*, 870 F. Supp. 2d at 1294-95; *Conestoga*, 2013 WL 140110, at *8; *Conestoga*, No. 13-1144, slip op. at 7 (Garth, J., concurring); *Autocam*, 2012 WL 6845677, at *7; *Grote*, 708 F.3d at 857-58 (Rovner, J., dissenting). If that were the rule, any of the millions of shareholders of publicly-traded companies could assert RFRA claims on behalf of those companies. Moreover, if an owner's religious beliefs were automatically imputed to the company, any for-profit company with a religious owner or shareholder (or with one or more, but not all, religious owners or shareholders) could impose his own religious beliefs on his employees in a way that deprives those employees of legal rights they would otherwise have, *see Autocam*, 2012 WL 6845677, at *7; *Grote*, 2012 WL 6725905, at *; *Grote*, 708 F.3d at 865-66 (Rovner, J., dissenting), such as discriminating against the company's employees on the basis of religion in establishing the terms and conditions of employment notwithstanding the limited religious exemption that Congress established under Title VII. This result would constitute a wholesale evasion of the rule that a company must be a "religious organization" to assert free exercise rights, *Hosanna-Tabor*, 132 S. Ct. at 706, or a "religious corporation" to permissibly discriminate on the basis of religion in employment, 42 U.S.C. § 2000e-1(a).

This Court's prior ruling disregarded the legal separation between the corporation and its owners and erroneously equated the analysis of standing under Article III with RFRA's substantial burden requirement. As explained above, Tyndale does not have standing to assert the claims of its owners. But even if it did, the existence of a corporation's *standing* to assert the

claims 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. Students Challenging Regulatory Agency Procedures*, 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"). If standing and substantial burden were equivalent, courts would never need to undertake a substantial burden analysis; rather, they would move straight to the compelling interest prong of RFRA once a plaintiff established standing. This is clearly not how the substantial burden analysis works. *See, e.g.*, *Mead v. Holder*, 766 F. Supp. 2d 16, 26, 42 (D.D.C. 2011) (concluding plaintiff had standing to challenge statute but that statute nonetheless did not impose a substantial burden on any exercise of religion), *aff'd*, *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *cert. denied*, 133 S. Ct. 63 (2012). *Stormans* and *Townley* – on which this Court relied – do not suggest otherwise. Both cases held – incorrectly – that the plaintiff corporations had standing to raise the rights of their owners. But neither case had anything to say about whether an alleged burden on a corporation could also be a *substantial* burden on its owners. *See Conestoga*, 2013 WL 140110, at *7-*8 (disagreeing with this Court's reliance on *Stormans* and *Townley*).[19] The other courts that have granted preliminary injunctive relief in cases similar to this one have also uniformly ignored or disregarded the legal separation between corporations and their owners, *see, e.g.*, *Korte*, 2012 WL 6757353, at *3 (stating, without analysis, "[t]hat the Kortes operate their business in the corporate form is not dispositive of their claim"); *Grote*, 708 F.3d at 854 (same); *Sharpe*

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

Holdings, 2012 WL 6738489, at *5 (ignoring the issue entirely), thereby improperly allowing the corporations' owners to take advantage of the benefits of the corporate structure, such as limited liability, when it suits them, but to insist that they and the corporation are one and the same when the corporate form does not suit them.[20]

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

Although the regulations do not require Tyndale or its owners to provide contraceptive services directly, plaintiffs' complaint appears to be that, through Tyndale's health plan and the benefits it provides to employees, plaintiffs will facilitate conduct (the use of 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 the owner has no right to control the choices of his company's employees, who may not share his religious beliefs, when making use of their benefits. Those employees have a legitimate interest in access to the preventive services coverage made available under the challenged regulations.

Indeed, in denying the plaintiffs' motion for emergency relief pending appeal, a motions panel of the Tenth Circuit concluded as much. *See Hobby Lobby*, 2012 WL 6930302, at *3. The Tenth Circuit 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*. (quoting *Hobby Lobby Stores*, 870 F. Supp. 2d at 1294). The court concluded that there was not a significant

[20] The Court's reliance on *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999), *rev'd on other grounds*, 220 F.3d 1134 (9th Cir. 2000) (en banc), *see* Mem. Op. at 22, is misplaced. The plaintiffs in *Thomas* were two individuals who owned residential rental property. Because plaintiffs had not utilized the corporate form, the challenged law applied directly to them, and thus any burden imposed by the law was not attenuated.

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.* Other courts, too, have relied on similar reasoning to reject similar plaintiffs' RFRA claims. *See Autocam*, 2012 WL 6845677, at *6 ("The incremental difference between providing the benefit directly, rather than indirectly, is unlikely to qualify as a substantial burden on the Autocam Plaintiffs."); *O'Brien*, 894 F. Supp. 2d at 1158-60 ("[RFRA] is not a means to force one's religious practices upon others. RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own.").[21]

As these courts concluded, the preventive services coverage regulations result in only an indirect and *de minimis* impact on Tyndale and its owners. In fact, the regulations no more impact the plaintiffs' religious beliefs than the company's payment of salaries to its employees, which those employees can also use to purchase contraceptives. *See O'Brien*, 894 F. Supp. 2d 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,

[21] *See also Conestoga*, 2013 WL 1277419, at *2; *Grote*, 708 F.3d 850 (Rovner, J., dissenting); *Eden Foods*, 2013 WL 1190001, at *4; *Conestoga*, 2013 WL 140110, at *13-14; *Annex Med.*, 2013 WL 101927, at *4-*5; *Grote*, 2012 WL 6725905, at *4-*7; *Hobby Lobby*, 870 F. Supp. 2d at 1293-96.

at *6. Indeed, "if the financial support of which plaintiffs complain was in fact substantially burdensome, secular companies owned by individuals objecting on religious grounds to all modern medical care could no longer be required to provide health care to employees." *O'Brien*, 894 F. Supp. 2d at 1159; *see also Conestoga*, 2013 WL 140110, at *13; *Grote*, 2012 WL 6725905, at *6.

In its prior ruling, this Court suggested that plaintiffs are entitled to decide what does and does not impose a substantial burden on their religious beliefs. *See* Mem. Op. at 27-28. Respectfully, that is not how RFRA works. 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. While defendants do not doubt the sincerity of plaintiffs' beliefs, plaintiffs cannot define those beliefs such that they read the term "substantial" out of RFRA, as the court did in *Legatus*, 901 F. Supp. 2d at 991 ("assum[ing]" that the regulations substantially burdened the owner's exercise of religion because the plaintiff "so claim[ed]"). *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 created a 'substantial burden' upon his exercise of religion simply because he claims it to be so."); *Conestoga*, 2013 WL 140110, at *12 (rejecting the reasoning in *Legatus*); *Autocam*, 2012 WL 6845677, at *6 ("The Court does not doubt the sincerity of Plaintiff Kennedy's decision to draw the line he does, but the Court still has a duty to assess whether the claimed burden – no matter how sincerely felt – really amounts to a substantial burden on a person's exercise of religion."); *Grote*, 2012 WL 6725905, at *6 (rejecting identical argument). "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. RFRA's legislative history makes clear that Congress did not intend such a relaxed standard. The initial version of RFRA prohibited the government from imposing *any* "burden" on free exercise, substantial or otherwise. Congress amended the bill to add the word "substantially," "to make it clear that the compelling interest standards set forth in the act" applies "only to Government actions [that] place a substantial burden on the exercise of" religious liberty. 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *see also id*. (text of Amendment No. 1082).

Finally, the fact that Tyndale's group health plan is self-insured – which this Court found to be a "crucial distinction," Mem. Op. at 24 – is irrelevant. *See Gilardi*, 2013 WL 781150, at *10. It is still the case that "[t]he burden of which plaintiffs complain" rests on "a series of independent decisions by health care providers and patients covered by [Tyndale's plan]." *O'Brien*, 894 F. Supp. 2d at 1159; *see also Grote*, 708 F.3d at 858 (Rovner, J., dissenting) (rejecting this Court's reasoning); *id.* at 861 (noting that whether a plan is self-insured or fully-insured, "the employee is making wholly independent decisions about how to use an element of her compensation"); *Grote*, 2012 WL 6725905, at *6-*7 (same). Furthermore, a group health plan is a separate legal entity from the sponsoring employer even if the plan is self-insured. *See* 29 U.S.C. § 1132(d); *Grote*, 2012 WL 6725905, at *7.[22] "If the Plaintiffs are more comfortable religiously and morally with more layers of insulation between the wages and benefits earned, on

[22] The fact that Tyndale's group health plan is self-insured does not mean that it is self-*administered*. It is Tyndale's third-party administrator, not the corporation itself, that is responsible for processing and approving claims. *See* Verified Compl. ¶ 128, ECF No. 1.

the one hand, and an employee's decision to acquire contraceptives with them, Plaintiffs have the option of restructuring from a self-insured plan to an insured plan." *Autocam*, 2012 WL 6845677, at *6 n.1; *see also Grote*, 708 F.3d at 863 (Rovner, J., dissenting).

In short, because the preventive services regulations "are several degrees removed from imposing a substantial burden on [Tyndale], and one further degree removed from imposing a substantial burden on [its owners]," *O'Brien*, 894 F. Supp. 2d at 1160, the Court should dismiss plaintiffs' RFRA claim even assuming for-profit companies like Tyndale can exercise religion.

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

In its initial brief in opposition to plaintiffs' motion for a preliminary injunction, the government explained at some length that, even if plaintiffs were able to demonstrate a substantial burden on their religious exercise, they would not prevail because the preventive services coverage regulations are justified by two compelling governmental interests, and are the least restrictive means to achieve those interests. *See* Defs.' PI Opp'n at 20-30. Defendants incorporate those arguments by reference here and will not reiterate them. Instead, defendants take this opportunity to briefly address two errors in the Court's preliminary injunction ruling, in which the Court concluded that the government had not shown that the challenged regulations advance compelling governmental interests. *See* Mem. Op. at 28-35.

First, in rejecting the government's compelling interest argument, the Court focused on the absence of a "specific finding that the government *must* ensure that Plan B, [E]lla, and intrauterine devices, as opposed to other forms of contraception, be covered under the plaintiffs' health plan in order to further the government's compelling interest." *Id.* at 31. In other words, the Court suggests that RFRA requires the government to make "specific findings" with respect

to each of the millions of employers and employees to which the regulations apply, as well as for each of the FDA-approved contraceptives encompassed by the regulations. This cannot be right. If RFRA required this level of specificity, it would rather obviously lead to an unworkable standard and would render this regulatory scheme – and potentially any regulatory scheme that is challenged due to religious objections – completely unworkable. *See Lee*, 455 U.S. at 259-60. In practice, courts have not required the government to analyze the impact of a regulation on the single entity seeking an exemption, but have expanded the inquiry to all similarly situated individuals or organizations. *See, e.g., id.* at 260 (considering the impact on the tax system if all religious adherents – not just the plaintiff – could opt out); *United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001) (per curiam) ("Oliver has argued a one-man exemption should be made, however, there is nothing so peculiar or special with Oliver's situation which warrants an exception. There are no safeguards to prevent similarly situated individuals from asserting the same privilege and leading to uncontrolled eagle harvesting."); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990) ("There is no principled way of exempting the school without exempting all other sectarian schools and thereby the thousands of lay teachers and staff members on their payrolls."); *see also, e.g., Graham v. Comm'r*, 822 F.2d 844, 853 (9th Cir. 1987); *United States v. Winddancer*, 435 F. Supp. 2d 687, 697 (M.D. Tenn. 2006).

O Centro is not to the contrary. To be sure, the Court rejected "slippery-slope" arguments for refusing to accommodate a particular claimant. *See* 546 U.S. at 435-36. But it construed the scope of the requested exemption as encompassing all members of the plaintiff religious sect. *See id.* at 433. Similarly, the exemption in *Yoder*, 406 U.S. 205, encompassed all Amish children; and the exemption in *Sherbert*, 374 U.S. 398, encompassed all individuals who had a religious objection to working on Saturdays. *See O Centro*, 546 U.S. at 431. The Court's warning

in *O Centro* against "slippery-slope" arguments was a rejection of arguments by analogy – that is, speculation that providing an exemption to one group will lead to exemptions for other non-similarly situated groups. It was not an invitation to ignore the reality that an exemption for a particular claimant might necessarily lead to an exemption for an entire category of similarly situated entities.

Furthermore, the guidelines adopted by HRSA, which accepted the recommendations made by the IOM, encompass coverage for *all* FDA-approved contraceptive methods "as prescribed by a provider." 77 Fed. Reg. 8725 (Feb. 15, 2012). The decision about which form of contraceptive to use, if any, is a personal medical decision that is made by a woman in consultation with her doctor. "For women with certain medical conditions or risk factors, some contraceptive methods may be contraindicated." IOM REP. at 105. For example, for some women, hormonal contraceptives (like birth control pills) may be contraindicated because of certain risk factors, such as uncontrolled hypertension or coronary artery disease, so the doctor may instead prescribe a copper IUD, which does not contain hormones. The guidelines thus ensure that the decision about which contraceptive method (if any) to use is made by a woman and her doctor – not by her employer – and the government's compelling interest would not be advanced as to plaintiffs' employees were some of those options not available to them.

Second, the Court erred when it found that the existence of certain "exemptions" to the contraceptive coverage requirement "undermines the defendants' interest in applying the contraceptive coverage mandate to the plaintiffs." Mem. Op. at 35. As the Court correctly noted, an exemption only undermines an allegedly compelling interest if "'it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Id.* at 33 (quoting *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993)). But the four "exemptions" relied on by the

Court – unlike the exemption plaintiffs seek for all employers that object to the regulations on religious grounds – do little or no damage to the government's compelling interests. In fact, aside from the religious employer exemption, the "exemptions" referred to by the Court are not exemptions from the preventive services coverage regulations at all, but are instead provisions of the ACA that exclude individuals and entities from other requirements imposed by the ACA. They reflect the government's attempts to balance significant interests supporting the complex administrative scheme created by the ACA. *See Lee*, 455 U.S. at 259; *Winddancer*, 435 F. Supp. at 695-98.

First, the grandfathering of certain health plans with respect to certain provisions of the ACA is not specifically limited to the preventive services coverage regulations. *See* 42 U.S.C. § 18011; 45 C.F.R. § 147.140. In fact, the effect of grandfathering is not really a permanent "exemption," but rather, in effect, a transition in the marketplace with respect to several provisions of the ACA, including the preventive services coverage provision. The grandfathering provision reflects Congress's attempts to balance competing interests – specifically, the interest in spreading the benefits of the ACA, including those provided by the preventive services coverage provision, and the interest in maintaining existing coverage and easing the transition into the new regulatory regime established by the ACA – in the context of a complex statutory scheme. *See* 75 Fed. Reg. at 34,540, 34,546 (June 17, 2010).

The incremental transition of the marketplace into the ACA administrative scheme does nothing to call into question the compelling interests furthered by the challenged regulations. Even under the grandfathering provision, it is projected that more group health plans will transition to the requirements under the regulations as time goes on. Defendants estimate that, as a practical matter, a majority of group health plans will lose their grandfather status by the end of

2013. *See id.* at 34,552; *see also* Kaiser Family Foundation and Health Research & Educational Trust, Employer Health Benefits 2012 Annual Survey at 7-8, 190, *available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/03/8345-employer-health-benefits-annual-survey-full-report-0912.pdf (last visited June 17, 2013) (indicating that 58 percent of firms had at least one grandfathered health plan in 2012, down from 72 percent in 2011, and that 48 percent of covered workers were in grandfathered health plans in 2012, down from 56 percent in 2011).[23] Thus, any purported damage to the compelling interests underlying the regulations will be mitigated, which is in stark contrast to the *permanent* exemption plaintiffs seek. *See Legatus*, 901 F. Supp. 2d at 994 ("[T]he grandfathering rule seems to be a reasonable plan for instituting an incredibly complex health care law while balancing competing interests. To find the Government's interests other than compelling only because of the grandfathering rule would perversely encourage Congress in the future to require immediate and draconian enforcement of all provisions of similar laws, without regard to pragmatic considerations, simply in order to preserve 'compelling interest' status."); *Korte*, 2012 WL 6553996, at *7 ("Like the district court in *Legatus*, this Court does not perceive how a gradual transition undercuts the neutral purpose or general applicability of the mandate.").

Second, 26 U.S.C. § 4980H(c)(2) does *not*, as the Court suggests, *see* Mem. Op. at 32-33, 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

[23] In its initial ruling, the Court drastically overstated the number of individuals in grandfathered plans. *See* Mem. Op. at 34. The Court appears to have drawn its "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 lost grandfathered status, and by the end of 2013, this mid-range estimate increases to 51 percent. 75 Fed. Reg. at 34,553. Further, the government estimates that the percentage of individual market policies losing grandfather status in a given year exceeds the range of 40 to 67 percent. *Id*.; *see also Korte*, 2012 WL 6553996, at *7 n.12.

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).[24] Employees of these small businesses can get health insurance through other ACA provisions, primarily premium tax credits and health insurance exchanges, and the coverage they receive will include all preventive services, including contraception. In addition, small businesses that do 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.[25]

Third, 26 U.S.C. § 5000A(d)(2)(A), which exempts from the minimum coverage provision of the ACA those "member[s] of a recognized religious sect or division thereof" who, on the basis of their religion, are opposed to the concept of health insurance, *see also id.* § 1402(g)(1), does nothing to undermine the compelling interests underlying the contraceptive coverage regulations, as the Court incorrectly suggests, *see* Mem. Op. at 33. The minimum coverage provision will require certain individuals who fail to maintain a minimum level of health insurance to pay a tax penalty beginning in 2014. Again, this provision is entirely unrelated to the preventive services coverage regulations. Nor could it provide any exemption from the preventive services coverage regulations, as it only excludes certain individuals from

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

[25] Even if there were some connection between the preventive services coverage provision and the employer responsibility provision, excluding small employers from the employer responsibility provision would not undermine the government's compelling interests in helping to ensure that employees have access to recommended preventive services. *See* Defs.' PI Opp'n at 26-27 n.18.

the requirement to obtain health coverage and says nothing about the requirement that non-exempt, non-grandfathered group health plans provide preventive services coverage to their participants. It is also clearly an attempt by Congress to accommodate religion and, unlike the exemption sought by plaintiffs, is sufficiently narrow so as not to undermine the larger administrative scheme. *See Lee*, 455 U.S. at 260-61 (discussing 26 U.S.C. § 1402(g), which is incorporated by reference into 26 U.S.C. § 5000A(d)(2)(A) and is thus identical in scope to the exemption at issue here). Furthermore, exempting this particular "readily identifiable," *see id.*, class of individuals from the minimum coverage provision is unlikely to appreciably undermine the compelling interests motivating the preventive services coverage regulations. By definition, a woman who is "conscientiously opposed to acceptance of the benefits of any private or public insurance which . . . makes payments toward the cost of, or provides services for, medical care," 26 U.S.C. § 1402(g)(1), would not use health coverage – including contraceptive coverage – even if it were offered.

Finally, the only true exemption from the preventive services coverage regulations is the exemption for "religious employer[s]." 45 C.F.R. § 147.130(a)(1)(iv). But there is a rational distinction between the narrow exception currently in existence and plaintiffs' requested expansion. The exemption anticipates that the impact on employees of exempted organizations will be minimal, given that any religious objections of the exempted organizations are presumably shared by most, if not all, of the individuals actually making the choice as to whether to use contraceptive services. *See* 77 Fed. Reg. at 8728. Thus, the exception does not undermine the government's compelling interests. The same is not true for Tyndale and other for-profit entities, which cannot discriminate based upon anyone's religious beliefs when hiring, and may employ many individuals who do not share their employer's religious beliefs.

If courts were to grant requests to extend the protections of RFRA to any employer whose owners or shareholders object to the regulations, it is difficult to see how the regulations could continue to function or be enforced in a rational manner. *See O Centro*, 546 U.S. at 435. Providing for voluntary participation among for-profit employers would be "almost a contradiction in terms and difficult, if not impossible, to administer." *Lee*, 455 U.S. at 258. We are a "cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld*, 366 U.S. at 606; *see also S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1211 (6th Cir. 1990), and many people object to countless medical services. If any organization, no matter the high degree of attenuation between the mission of that organization and the exercise of religious belief, were able to seek an exemption from the operation of the preventive services coverage regulations, it is difficult to see how defendants could administer the regulations in a manner that would achieve Congress's goals of improving the health of women and children and equalizing the coverage of preventive services for women. *See United States v. Israel*, 317 F.3d 768, 772 (7th Cir. 2003) (recognizing that granting plaintiff's RFRA claim "would lead to significant administrative problems for the [government] and open the door to a . . . proliferation of claims").

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

Defendants are also entitled to summary judgment on plaintiffs' claims under the First Amendment's Free Exercise, Establishment, and Free Speech Clauses; the Fifth Amendment's Due Process Clause; and the Administrative Procedure Act. Because those claims were briefed by the parties at the preliminary injunction stage and have not been addressed by the Court, the government will not reiterate its arguments here, but incorporates them by reference and respectfully refers the Court to its prior briefing. *See* Defs.' Opp'n at 31-42. Defendants also note

that, since their initial brief was filed in October of last year, several courts have rejected claims virtually identical to those raised by plaintiffs here. *See Conestoga,* 2013 WL 1277419, at *2 (rejecting Free Exercise Clause and Establishment Clause claims); *Eden Foods*, 2013 WL 1190001, at *4-*5 (Free Exercise); *Briscoe*, 2013 WL 755413, at *6-*8 (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); *Hobby Lobby*, 870 F. Supp. 2d at 1287-90 (Free Exercise). This Court should do the same.

CONCLUSION

For the forgoing 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 17th day of June, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 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