No. 13-1654

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOMINO'S FARMS CORPORATION and THOMAS MONAGHAN,

Plaintiffs-Appellees,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; THOMAS E. PEREZ, in his official capacity as Secretary of Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, in his official capacity as Secretary of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN (No. 12-15488) (Hon. Lawrence P. Zatcoff)

BRIEF FOR THE APPELLANTS

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REQUEST FOR ORAL ARGUMENT

This appeal presents the question whether the Religious Freedom Restoration Act ("RFRA") allows a for-profit, secular corporation to deny its employees federally required health coverage of contraceptives, if the corporation's controlling shareholder asserts a religious objection to providing such employee benefits. The same issue is pending before this Court in *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir.) (oral argument heard June 11, 2013), and several other cases. The Third Circuit and Tenth Circuit have issued conflicting decisions on the issue. *Compare Conestoga Wood Specialties Corp. v. Secretary of Health and Human Services*, __ F.3d __, 2013 WL 3845365 (3d Cir. July 26, 2013), *with Hobby Lobby Stores, Inc. v. Sebelius*, __ F.3d __, 2013 WL 3216103 (10th Cir. en banc June 27, 2013). Given the importance of the issue, the government respectfully requests oral argument.

STATEMENT OF JURISDICTION

The district court has jurisdiction under 28 U.S.C. § 1331. The district court issued a preliminary injunction on March 14, 2013. *See* R.39 at Page ID ##825-844. The government filed a notice of appeal on May 13, 2013. *See* R.41 at Page ID ##848-850. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the Religious Freedom Restoration Act ("RFRA") allows a for-profit, secular corporation to deny its employees benefits on the basis of religion.

STATEMENT OF THE CASE

Domino's Farms is a for-profit corporation that manages property for an office park. *See* R.1 ¶¶ 21-26, 70 at Page ID ##5-6, 12 (complaint). People employed by the corporation receive health coverage through the Domino's Farms group health plan, as part of their compensation packages that include wages and non-cash benefits. *See id*. ¶ 72 at Page ID #13.

Mr. Monaghan is the sole shareholder and director of Domino's Farms. *See id*. ¶ 15 at Page ID #5. Mr. Monaghan holds to the Catholic doctrine that all forms of contraception are sinful. *See id*. ¶ 65 at Page ID #11. The corporation, however, does not hire employees on the basis of their religion, and the employees thus are not required to share Mr. Monaghan's religious beliefs.

In this action, Domino's Farms and Mr. Monaghan contend that the requirement that the Domino's Farms group health plan cover Food and Drug Administration ("FDA")-approved contraceptives violates RFRA's requirement that the federal government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. § 2000bb-1(a), (b). Plaintiffs argue that the Domino's Farms group health plan must be exempted from the contraceptive-coverage requirement because Mr. Monaghan has asserted a religious objection to the plan's coverage of contraceptives. Plaintiffs also alleged claims under the First Amendment, but the district court did not address those claims. *See* R.39 at Page ID #829 n.1.

The district court entered a preliminary injunction on the basis of Mr. Monaghan's RFRA claim. *See id*. at Page ID ##825-844. The preliminary injunction is premised on the district court's ruling that Mr. Monaghan and the Domino's Farms corporation are "indistinguishable" and that Domino's Farms "is merely the instrument through and by which Monaghan express[es] [his] religious beliefs." *Id*. at Page ID #832 (quotation marks and citation omitted).[1]

[1] Similar RFRA claims are pending before this Court in *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir.); *Eden Foods, Inc. v. Sebelius*, No. 13-1677 (6th Cir.); and *Legatus v. Sebelius*, No. 13-1092 (6th Cir.). The district court in *Legatus* issued a preliminary injunction. The district courts in *Autocam* and *Eden Foods*

Continued on next page.

STATEMENT OF FACTS

A. Statutory and Regulatory Background

1. Federal law regulates many aspects of the employer-employee relationship, including wages and non-cash benefits. In addition to regulating wages and overtime pay in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., Congress has regulated employee benefits such as group health plans, pension plans, disability benefits, and life insurance benefits through the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., and other statutes. Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., an employer cannot discriminate on the basis of religion in setting the terms or conditions of employment, including employee compensation, unless the employer qualifies for Title VII's religious exemption.

Congress has long regulated the form of employee compensation that is provided through employment-based group health plans, which the federal government subsidizes through favorable tax treatment. Employees typically do not pay taxes on their employer's contributions to their health coverage, which are generally excluded from taxable compensation. *See* Congressional Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 30 (2008). These

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denied preliminary injunctions, and this Court denied injunctions pending appeal. This Court heard oral argument in *Autocam* on June 11, 2013.

federal tax subsidies totaled $246 billion in 2007. *See id*. at 31. As a result of this longstanding federal support, employment-based group health plans are by far the predominant form of private health coverage. In 2009, employment-based plans covered about 160 million people. *See id*. at 4 & Table 1-1.

In 2010, the Patient Protection and Affordable Care Act ("Affordable Care Act") established certain additional minimum standards for employee group health plans. As relevant here, the Affordable Care Act provides that a non-grandfathered plan must cover certain preventive health services without cost-sharing, that is, without requiring plan participants and beneficiaries to make co-payments or pay deductibles. *See* 42 U.S.C. § 300gg-13. This provision applies to employment-based group health plans covered by ERISA. *See* 29 U.S.C. § 1185d.

These preventive health services include immunizations recommended by the Advisory Committee on Immunization Practices, *see id*. § 300gg-13(a)(2); items or services that have an "A" or "B" rating from the U.S. Preventive Services Task Force, *see id*. § 300gg-13(a)(1); preventive care and screenings for infants, children and adolescents as provided in guidelines of the Health Resources and Services Administration ("HRSA"), a component of the Department of Health and Human Services ("HHS"), *see id*. § 300gg-13(a)(3); and certain additional preventive services for women as provided in HRSA guidelines, *see id*. § 300gg-13(a)(4). The Affordable Care Act thus requires coverage of an array of

recommended preventive health services such as immunizations, cholesterol screening, blood pressure screening, mammography, and cervical cancer screening.[2]

2. When the Affordable Care Act was enacted, there were no existing HRSA guidelines relating to preventive care and screening for women. Congress enacted the women's preventive health services coverage requirement because it found that "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009) (Sen. Feinstein). "Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men." *Ibid*.

Accordingly, HHS asked the Institute of Medicine ("Institute" or "IOM") to develop recommendations to help the Departments implement this aspect of the preventive health services coverage requirement. *See* Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 2 (2011) ("IOM

[2] Coverage is also required for services such as colorectal cancer screening, alcohol misuse counseling, screening for iron deficiency anemia, bacteriuria screening for pregnant women, breastfeeding counseling, screening for sexually transmitted infections, depression screening for adolescents, hearing loss screening for newborns, tobacco use counseling and interventions, and vision screening for young children. *See generally* http://www.cdc.gov/vaccines/pubs/ACIP-list.htm; http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm; http://brightfutures.aap.org/pdfs/Guidelines_PDF/20-Appendices_PeriodicitySchedule.pdf.

Report").[3] Consistent with the Institute's recommendations, the guidelines developed by HRSA require coverage for annual well-woman visits, screening for gestational diabetes, testing for human papillomavirus, counseling for sexually transmitted infections, HIV counseling and screening, breastfeeding support and supplies, and domestic violence counseling.[4] In addition, the guidelines require coverage for "'[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed by a provider." 77 Fed. Reg. 8725 (Feb. 15, 2012) (quoting the guidelines). FDA-approved contraceptive methods include oral contraceptive pills, diaphragms, injections and implants, emergency contraceptive drugs, and intrauterine devices.[5]

The implementing regulations authorize an exemption from the contraceptive-coverage requirement for the group health plan of an organization that qualifies as a religious employer. A "religious employer" is defined as a non-profit organization described in the Internal Revenue Code provision that refers to

[3] The Institute of Medicine, which was established by the National Academy of Sciences in 1970, is funded by Congress to provide expert advice to the federal government on matters of public health. *See* IOM Report iv.

[4] *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines, *available at* http://www.hrsa.gov/womensguidelines.

[5] *See* Birth Control Guide, FDA Office of Women's Health, *available at* http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm.

churches, their integrated auxiliaries, conventions or associations of churches, and to the exclusively religious activities of any religious order. *See* 45 C.F.R. § 147.131(a) (cross-referencing § 6033(a)(3)(A)(i) and § 6033(a)(3)(A)(iii) of the Internal Revenue Code).

The implementing regulations also establish accommodations with respect to the contraceptive-coverage requirement for group health plans established or maintained by eligible organizations (and group health insurance coverage provided in connection with such plans). The accommodations are available to a non-profit religious organization that, because of religious objections, is opposed to providing coverage for some or all contraceptive services. *See* 45 C.F.R. § 147.131(b). If an eligible organization receives such an accommodation, the women who participate in the plan will have access to contraceptive coverage without cost sharing though other mechanisms established by the regulations. *See* 78 Fed. Reg. 39,870, 39,872, 39,874-886 (July 2, 2013).

"Consistent with religious accommodations in related areas of federal law, such as the exemption for religious organizations under Title VII of the Civil Rights Act of 1964," the definition of an organization eligible for an accommodation "does not extend to for-profit organizations." *Id*. at 39,875. The Departments explained that they are "unaware of any court granting a religious

exemption to a for-profit organization, and decline to expand the definition of eligible organization to include for-profit organizations." *Ibid.*

B. Factual Background and District Court Proceedings

Domino's Farms is a for-profit corporation that manages property for a 937,203 square-foot office park. *See* R.1 ¶¶ 21-26, 70 at Page ID ##5-6, 12 (complaint). The corporation has 45 full-time employees and 44 part-time employees. *See id*. ¶ 32 at Page ID #6. People employed by the corporation receive health coverage for themselves and their family members through the Domino's Farms group health plan, as part of their compensation packages that include wages and non-cash benefits. *See id*. ¶ 72 at Page ID #13.

Mr. Monaghan is the sole shareholder and director of Domino's Farms. *See id*. ¶ 15 at Page ID #5. Mr. Monaghan holds to the Catholic doctrine that all forms of contraception are sinful. *See id*. ¶ 65 at Page ID #11. The corporation, however, does not hire employees on the basis of their religion, and the employees thus are not required to share Mr. Monaghan's religious beliefs.

In this action, Domino's Farms and Mr. Monaghan contend that, under RFRA, the Domino's Farms group health plan is entitled to an exemption from the federal regulatory requirement that the plan cover FDA-approved contraceptives,

as prescribed by a health care provider. The exemption that plaintiffs seek would encompass all forms of contraception.[6]

Plaintiffs contend that this exemption is required by RFRA because Mr. Monaghan has asserted a religious objection to the plan's coverage of contraceptives. The district court entered a preliminary injunction on the basis of Mr. Monaghan's RFRA claim. *See* R.39 at Page ID ##825-844. The preliminary injunction is premised on the court's ruling that Mr. Monaghan and the Domino's Farms corporation are "indistinguishable" and that Domino's Farms "is merely the instrument through and by which Monaghan express[es] [his] religious beliefs." *Id*. at Page ID #832 (quotation marks and citation omitted).

SUMMARY OF ARGUMENT

Domino's Farms is a for-profit corporation that manages property for a 937,203 square-foot office park. The corporation's employees are not hired on the basis of their religion. People employed by Domino's Farms receive health

[6] Although plaintiffs describe certain forms of FDA-approved contraceptives as "abortifacients," R.1 ¶ 126 at Page ID ##21-22, these drugs are not abortifacients within the meaning of federal law because they have no effect if a woman is pregnant. *See* 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997) ("Emergency contraceptive pills are not effective if the woman is pregnant; they act by delaying or inhibiting ovulation, and/or altering tubal transport of sperm and/or ova (thereby inhibiting fertilization), and/or altering the endometrium (thereby inhibiting implantation)."); 45 C.F.R. § 46.202(f) ("Pregnancy encompasses the period of time from implantation until delivery.").

coverage through the Domino's Farms group health plan, as part of their compensation packages that include wages and non-cash benefits.

Plaintiffs contend that the Domino's Farms group health plan must be exempted from the federal requirement to cover FDA-approved contraceptives, as prescribed by a health care provider. They assert that this exemption is required by RFRA because Mr. Monaghan, who is the corporation's sole shareholder, has asserted a religious objection to the plan's coverage of contraceptives. Comparable claims have been made in other litigation by for-profit corporations engaged in a variety of secular pursuits, such as the sale of automobile parts, vehicle safety systems, mineral and chemical products, and fresh produce.[7]

A majority of the en banc Tenth Circuit recently accepted the argument that RFRA allows for-profit corporations to deny employee benefits on the basis of religion. *See Hobby Lobby Stores, Inc. v. Sebelius*, __ F.3d __, 2013 WL 3216103 (10th Cir. June 27, 2013). That decision is incorrect for the reasons set out in Chief Judge Briscoe's dissent and in the Third Circuit's more recent decision in

[7] *See, e.g.*, *Autocam Corp. v. Sebelius*, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012), *appeal pending*, No. 12-2673 (6th Cir.) (automobile parts); *Grote Industries, LLC v. Sebelius*, __ F. Supp. 2d __, 2012 WL 6725905 (S.D. Ind. Dec. 27, 2012), *appeal pending*, No. 13-1077 (7th Cir.) (vehicle safety systems) *O'Brien v. HHS*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012), *appeal pending*, No. 12-3357 (8th Cir.) (mineral and chemical products); *Gilardi v. Sebelius*, __ F. Supp. 2d __, 2013 WL 781150 (D.D.C. March 3, 2013), *appeal pending*, No. 13-5069 (D.C. Cir.) (fresh produce).

Conestoga Wood Specialties Corp. v. Secretary of Health and Human Services, __ F.3d __, 2013 WL 3845365 (3d Cir. July 26, 2013), which expressly rejected the Tenth Circuit's reasoning.

RFRA does not apply unless the federal government substantially burdens "a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). The Tenth Circuit incorrectly interpreted RFRA to depart from the centuries of jurisprudence that pre-dated RFRA's enactment. The majority relied on the Dictionary Act's definition of "person," even though the question is not whether corporations are "persons" but whether for-profit corporations are persons engaged in the "exercise of religion" within the meaning of RFRA. The Dictionary Act is of no help on that point. Instead, as Chief Judge Briscoe explained, the relevant focus is the "200-year span between the adoption of the First Amendment and RFRA's passage," during which "the Supreme Court consistently treated free exercise rights as confined to individuals and non-profit religious organizations." *Hobby Lobby*, __ F.3d __, 2013 WL 3216103, *45 (Briscoe, C.J., dissenting). Therefore, "there is no plausible basis for inferring that Congress intended or could have anticipated that for-profit corporations would be covered by RFRA." *Id*. at *47.

The Tenth Circuit compounded its error by imputing the religious beliefs of the controlling shareholders to the corporate entities themselves. The district court here likewise ruled that the Domino's Farms corporation and Mr. Monaghan are

"indistinguishable." R.39 at Page ID #832. The Supreme Court, by contrast, has emphasized that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). "One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public." *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946).

The Tenth Circuit was likewise wrong to interpret RFRA to depart from the pre-existing federal statutes that regulate the relationship between employers and their employees. The majority found it unremarkable that, under its interpretation of RFRA, for-profit corporations could obtain religious exemptions that "come at the expense of their employees." *Hobby Lobby*, __ F.3d __, 2013 WL 3216103, *24. The Supreme Court, however, has cautioned that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). That principle informed the Court's pre-RFRA interpretation of religious accommodations in federal employment statutes, and no court has ever extended a religious exemption to an employer operating in the "commercial, profit-making world." *Corporation*

of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987). Under RFRA, as under pre-existing federal employment statutes, a corporation's for-profit status provides an objective basis to deny it a religious exemption, without "'trolling through a person's or institution's religious beliefs.'" *University of Great Falls v. NLRB*, 278 F.3d 1335, 1341-42 (D.C. Cir. 2002) (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)).

Even apart from these central flaws in plaintiffs' position, their claims fail because the particular burden of which they complain—that the corporation must contribute funds for a comprehensive health plan that an employee can decide to use for health services that Mr. Monaghan deems immoral—is too attenuated to be a cognizable burden on religious exercise, much less a substantial burden. The religious objection that plaintiffs assert here resembles the religious objection that the Supreme Court has found to be non-cognizable in the taxpayer context, where the connection between a taxpayer's contribution of funds and the way such funds are used is too remote to be a burden on the taxpayer's free exercise of religion. Moreover, even assuming *arguendo* that strict scrutiny applies, the employees' compelling interests in receiving health coverage for the contraceptives their doctors prescribe far outweigh whatever burden Mr. Monaghan may feel from being associated with a corporation that provides such health coverage.

STANDARD OF REVIEW

This Court reviews a preliminary injunction for an abuse of discretion and reviews questions of law de novo. *See Obama for America v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012).

ARGUMENT

I. Plaintiffs Cannot Show Irreparable Harm, and The Balance Of Equities And Public Interest Preclude A Preliminary Injunction.

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "'A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest.'" *Obama for America*, 697 F.3d at 428 (quoting *Winter*, 555 U.S. at 20).

For the reasons set out below, plaintiffs cannot establish a likelihood of success on the merits. Accordingly, plaintiffs cannot substantiate their assertion of irreparable harm. *See, e.g., McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012) ("Because [plaintiff] does not have a likelihood of success on the merits . . . his argument that he is irreparably harmed by the deprivation of his First Amendment rights also fails.").

The balance of harms and public interest also preclude a preliminary injunction. The religious exemption that plaintiffs seek would come at the expense of the Domino's Farms employees, who would be denied health coverage for all forms of FDA-approved contraceptives. The employees' compelling interests in receiving the health coverage to which they are entitled by law far outweighs whatever burden Mr. Monaghan may feel from being associated with a corporation that provides such coverage.

II. Plaintiffs Cannot Demonstrate A Likelihood Of Success On The Merits.

A. RFRA Does Not Allow For-Profit Corporations To Deny Employee Benefits On The Basis Of Religion.

RFRA provides that the federal government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. § 2000bb-1(a), (b). The district court concluded that, by enacting this statute, Congress gave for-profit corporations the right to deny employee benefits on the basis of religion. The court reasoned that the Domino's Farms corporation is "indistinguishable" from Mr. Monaghan, who regards all forms of birth control as sinful. R.39 at Page ID #832. And the court opined that, under RFRA, Mr. Monaghan's religious beliefs trump the rights of Domino's Farms employees to receive the health coverage of contraceptives to which they are entitled by federal law.

The Tenth Circuit recently accepted a comparable argument in a divided en banc decision. *See Hobby Lobby Stores, Inc. v. Sebelius*, __ F.3d __, 2013 WL 3216103 (10th Cir. June 27, 2013). The lead plaintiff is Hobby Lobby Stores, Inc., a for-profit corporation that operates a chain of more than 500 arts-and-crafts stores and has more than 13,000 full-time employees. Employees of Hobby Lobby and its corporate affiliate, Mardel, Inc., obtain health coverage through the Hobby Lobby group health plan. The Tenth Circuit held that these for-profit corporations are "persons" engaged in the "exercise of religion" within the meaning of RFRA. The Tenth Circuit imputed to the corporate entities the religious beliefs of the controlling shareholders, the Greens, who believe that life begins at conception and who oppose any form of birth control that can prevent the implantation of a fertilized egg in a woman's uterus. And the Tenth Circuit ruled that, under RFRA, the Greens' religious beliefs override the rights of Hobby Lobby employees to receive the federally required coverage of these contraceptives.

The *Hobby Lobby* decision is incorrect for the reasons set out in Chief Judge Briscoe's dissent and in the Third Circuit's recent decision in *Conestoga Wood Specialties Corp. v. Sebelius*, __ F.3d __, 2013 WL 3845365 (3d Cir. July 26, 2013), which expressly rejected the Tenth Circuit's reasoning.[8] The *Hobby Lobby*

[8] On July 31, the plaintiffs in *Conestoga Wood* filed a petition for rehearing en banc.

decision rests on a series of legal errors. First, the majority incorrectly held that for-profit corporations are "persons" engaged in the "exercise of religion" within the meaning of RFRA. Second, by imputing to the corporations the religious beliefs of the shareholders, the majority disregarded the bedrock corporate law principle that a corporation is distinct from its shareholders. Third, the majority incorrectly construed RFRA to depart from pre-existing federal employment statutes, which do not allow for-profit corporations to obtain religious exemptions that come at the expense of their employees.

1. In holding that RFRA grants for-profit corporations the right to demand exemptions from federal law on the basis of religion, the Tenth Circuit majority relied on the Dictionary Act, which states that the term "person" includes corporations unless the context of a federal statute indicates otherwise. *See* 1 U.S.C. § 1. However, the question presented here and in *Hobby Lobby* is not whether corporations are "persons," but whether for-profit corporations are "persons" engaged in the "exercise of religion" within the meaning of RFRA. The Dictionary Act cannot answer that question.

Instead, the relevant context is the "200-year span between the adoption of the First Amendment and RFRA's passage," during which "the Supreme Court consistently treated free exercise rights as confined to individuals and non-profit religious organizations." *Hobby Lobby*, __ F.3d __, 2013 WL 3216103, *45

(Briscoe, C.J., dissenting in relevant part). Thus, "there is no plausible basis for inferring that Congress intended or could have anticipated that for-profit corporations would be covered by RFRA." *Id*. at *47 (quotation omitted); *accord Conestoga Wood*, __ F.3d __, 2013 WL 3845365, *5 ("we are not aware of any case preceding the commencement of litigation about the Mandate, in which a for-profit, secular corporation was itself found to have free exercise rights"); *Mersino Management Co. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 3546702 (E.D. Mich. July 11, 2013) (rejecting the Tenth Circuit's reasoning).

RFRA was enacted to restore the Supreme Court's free exercise jurisprudence that pre-dated the Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1993). RFRA was "not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise." *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 733-34 (6th Cir. 2007) (quoting 146 Cong. Rec. S7774–01, S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy) (addressing the parallel provisions of the Religious Land Use and Institutionalized Persons Act ("RLUIPA")); *see also* S. Rep. No. 111, 103d Cong., 1st Sess. 12 (1993) ("To be absolutely clear, [RFRA] does not expand, contract or alter the ability of a claimant to obtain relief in a manner

consistent with the Supreme Court's free exercise jurisprudence under the compelling government interest test prior to *Smith*.").

Under the pre-*Smith* case law, natural persons could seek exemptions from regulations that interfered with their exercise of religion. The two cases cited in RFRA itself—*Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)—are illustrative. In *Sherbert*, the Court held that a state government could not deny unemployment compensation to an individual who lost her job because her religious beliefs prevented her from working on a Saturday. And, in *Yoder*, the Court held that a state government could not compel Amish parents to send their children to high school. *See also Thomas v. Review Board*, 450 U.S. 707 (1981) (applying *Sherbert*'s reasoning to hold that a state government could not deny unemployment compensation to an individual who lost his job because of his religious beliefs).

The pre-RFRA case law also allowed churches to assert free exercise claims on behalf of their members. For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), a church successfully challenged a local ordinance that made it unlawful for its members to perform the ritual animal sacrifice that forms part of the Santeria religion. Accordingly, when the Supreme Court applied RFRA in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the Court held that RFRA allowed a religious sect to

obtain, on behalf of its members, an exemption from a federal law that prevented the sect's members from receiving communion in the form of a sacramental tea.[9]

Even a church has only a limited First Amendment right to obtain religious exemptions that come at the expense of its employees. "Since the passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705 (2012). This "ministerial exception" does not extend to lay employees, however. "The exception instead ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical,'—is the church's alone." *Id*. at 709 (citation omitted).

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[9] The *Hobby Lobby* majority incorrectly stated that a church cannot rely on associational standing principles unless "*all members* of the association 'would otherwise have standing to sue in their own right.'" *Hobby Lobby*, __ F.3d. __, 2013 WL 3216103, *16 n.11 (emphasis added; citation omitted). The doctrine of associational standing requires an organization to show (among other things) "that its members, *or any one of them*, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 552 (1996) (emphasis added; citation and quotation marks omitted).

The Tenth Circuit did not dispute that, during the "200-year span between the adoption of the First Amendment and RFRA's passage, the Supreme Court consistently treated free exercise rights as confined to individuals and non-profit religious organizations." *Hobby Lobby*, __ F.3d __, 2013 WL 3216103, *45 (Briscoe, C.J., dissenting in relevant part). No pre-*Smith* case held or even suggested that for-profit corporations could demand exemptions from regulation on the basis of religion.

The two cases on which the Tenth Circuit relied—*Braunfeld v. Brown*, 366 U.S. 599 (1961), and *United States v. Lee*, 455 U.S. 252 (1982)—rejected free exercise claims raised by individuals and did not concern corporations. In *Braunfeld*, the Supreme Court rejected the free exercise claim asserted by Orthodox Jewish individuals who faced criminal prosecution if they sold their goods on Sundays, even though the Sunday closing law placed substantial pressure on the Jewish merchants "to give up their Sabbath observance, a basic tenet of Orthodox Jewish faith[.]" *Braunfeld*, 366 U.S. at 602.

In *Lee*, the Supreme Court rejected an Amish farmer's claim that he had a free exercise right to be exempted from the requirement to pay Social Security taxes on behalf of his employees. The Court emphasized that exempting the employer "operates to impose the employer's religious faith on the employees," *Lee*, 455 U.S. at 261, who would be denied the employee benefits to which they

were entitled by federal law. Even with respect to an *individual* employer, the Supreme Court held: "When followers of a particular sect enter into commercial activities as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Ibid*.

Thus, when Congress enacted RFRA, it would have understood that for-profit corporations could not rely on the statute to escape generally applicable regulation. "The limitation of RFRA's applicability to individuals and non-profit religious organizations is reinforced by examining the legislative history of RFRA." *Hobby Lobby*, __ F.3d __, 2013 WL 3216103, *46 (Briscoe, C.J., dissenting). The committee reports and debates are replete with references to natural persons and churches, but "[e]ntirely absent from the legislative history . . . is any reference to for-profit corporations." *Ibid*.

2. The Tenth Circuit compounded its error by imputing the religious beliefs of the controlling shareholders to the corporate entities themselves. The Tenth Circuit declared that "[t]he corporate plaintiffs believe life begins at conception." *Hobby Lobby*, __ F.3d __, 2013 WL 3216103, *20. But, to support that pronouncement, the majority cited *the Greens'* belief that "human life begins when sperm fertilizes an egg." *Id*. at *2; *see also id*. at *5. The Tenth Circuit thus conflated the corporations with the controlling shareholders. Here, too, the district

court declared that Mr. Monaghan and the Domino's Farms corporation are "indistinguishable." R.39 at Page ID #832.

This reasoning disregards bedrock tenets of American corporate law. "It is a fundamental principle 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.'" *Conestoga Wood Specialties Corp. v. Sebelius*, __ F.3d __, 2013 WL 3845365, *7 (3d Cir. July 26, 2013) (quoting *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001)); *see also 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.").

"One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public." *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946). The Tenth Circuit majority found it significant that the *Hobby Lobby* corporations are "closely held" and that their controlling shareholders are "unanimous" in their religious beliefs. *Hobby Lobby*, __ F.3d __, 2013 WL 3216103, *17. But, as the Supreme Court's decision in *Cedric Kushner* illustrates,

the tenet that a corporation is distinct from its shareholders applies even when an individual is the corporation's sole shareholder.

3. The Tenth Circuit was likewise mistaken to interpret RFRA to depart from the pre-existing federal statutes that regulate the relationship between employers and their employees. In the Tenth Circuit's view, RFRA allows the religious beliefs of the controlling shareholders to trump the employees' rights to receive the health coverage to which they are entitled by federal law. The Tenth Circuit found it unremarkable that, under its interpretation of RFRA, for-profit corporations could obtain religious exemptions that "come at the expense of their employees." *Hobby Lobby*, __ F.3d __, 2013 WL 3216103, *24. The majority declared that "[a]ccommodations for religion frequently operate by lifting a burden from the accommodated party and placing it elsewhere," and opined that that "is RFRA's basic purpose." *Ibid*.

The Supreme Court, however, has cautioned that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries," *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005), and that principle informed the Supreme Court's pre-RFRA interpretation of religious accommodations in the context of employment. For example, in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81, 84 (1977), the Supreme Court held that Title VII of the Civil Rights Act of 1964 does not allow an employee to obtain a

religious accommodation that would "come at the expense of" other employees or result in "more than a *de minimis* cost" to the employer. *Id*. at 81. The Court explained that granting employees "days off necessary for strict observance of their religion" would come "at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends." *Ibid*. To accommodate the employee's religious exercise, the employer "would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath." *Ibid*. The Court concluded that "Title VII does not contemplate such unequal treatment." *Ibid*.

The Tenth Circuit noted that the government has accommodated "certain *religious employers*, at the expense of their employees." *Hobby Lobby*, __ F.3d __, 2013 WL 3216103, *24 (emphasis added). But such accommodations have never been extended to for-profit corporations. To the contrary, the employers found to qualify for religious exemptions in statutes such as Title VII, the Americans with Disabilities Act (ADA), and the National Labor Relations Act (NLRA), all have been non-profit, religious institutions, as in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). There, the Supreme Court held that Title VII's religious exemption permitted the Mormon Church to discharge a building engineer who

failed to observe the Church's standards in such matters as church attendance, tithing, and abstinence from coffee and alcohol. *See Amos*, 483 U.S. at 330 & n.4.

The *Amos* Court rejected the claim that Title VII's religious employer exemption impermissibly advances religion in violation of the Establishment Clause. The Court reasoned that, by amending the Title VII exemption to reach all of a religious organization's non-profit activities, rather than just its religious activities, Congress avoided entangling governmental inquiries into whether the particular activities of a religious organization are religious or secular in nature. The Court explained that "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." *Id*. at 336. It noted that "[t]he line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission." *Ibid*.

The *Amos* Court emphasized that the case concerned only the non-profit activities of a church, *see id*. at 339, and the concurring opinions stressed the same point.[10] The religious exemptions in Title VII and other federal statutes have never

[10] *See Amos*, 483 U.S. at 341 (Brennan, J., concurring, joined by Marshall, J.) ("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

Continued on next page.

been extended to employers operating in the "commercial, profit-making world." *Amos*, 483 U.S. at 339. The Tenth Circuit majority dismissed that distinction as irrelevant, declaring that the *Amos* Court "never reached the question of how for-profit activity might have changed its analysis." *Hobby Lobby*, __ F.3d __, 2013 WL 3216103, *11. But the reasoning of *Amos*, by its terms, does not apply to employers engaged in for-profit, commercial activity. The *Amos* Court reasoned that, to avoid entangling governmental inquiries into the nature of a religious organization's activities, Congress could exempt the "secular nonprofit activities of religious organizations from Title VII's prohibition on religious discrimination in employment." *Cutter*, 544 U.S. at 719 (citing *Amos*, 483 U.S. at 329-30). "As the *Amos* Court noted, it is hard to draw a line between the secular and religious activities of a religious organization." *University of Great Falls v. NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002). By contrast, "it is relatively straight-forward to distinguish between a non-profit and a for-profit entity." *Ibid.*; *accord Spencer v. World Vision, Inc.*, 633 F.3d 723, 734 (9th Cir. 2011) (O'Scannlain, J., concurring).

Plaintiffs do not contend that Domino's Farms qualifies for the religious exemptions in Title VII, the ADA, the NLRA, or any other federal statute that

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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.").

regulates the employment relationship. Likewise, RFRA provides no basis to exempt the corporation from the regulations that govern health coverage under the Domino's Farms group health plan, which is a significant aspect of employee compensation. Under RFRA, as under pre-existing federal employment statutes, a corporation's for-profit status provides an objective basis to deny it a religious exemption, without "'trolling through a person's or institution's religious beliefs.'" *University of Great Falls*, 278 F.3d at 1341-42 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)).

B. The Obligation To Cover Contraceptives Lies With Domino's Farms, Not With Mr. Monaghan.

Plaintiffs cannot circumvent the limits of RFRA by asserting that the contraceptive-coverage requirement is a substantial burden on Mr. Monaghan's personal exercise of religion. The obligation to provide contraceptive-coverage lies with the Domino's Farms corporation, not with Mr. Monaghan as an individual. The Third Circuit correctly held that such corporate regulation cannot be treated as if it were a substantial burden on a controlling shareholder's personal exercise of religion. *See Conestoga Wood*, __ F.3d __, 2013 WL 3845365, *6-8; *see also Eden Foods, Inc. v. Sebelius*, No. 13-1677, at 2 (6th Cir. June 28, 2013) (denying an injunction pending appeal because the contraceptive-coverage "mandate is imposed on Eden Foods, not Potter," who is the corporation's sole shareholder).

Federal law does not require Mr. Monaghan personally to provide health coverage to Domino's Farms employees, or to satisfy the myriad other requirements that federal law places on Domino's Farms. "It is only the legally separate" corporation that has "any obligation under the mandate." *Autocam Corp. v. Sebelius*, 2012 WL 6845677, *7 (W.D. Mich. Dec. 24, 2012), *appeal pending*, No. 12-2673 (6th Cir.). It is Domino's Farms that acts as the employing party; it is Domino's Farms 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 v. Sebelius*, 708 F.3d 850, 857 (7th Cir. 2013) (Rovner, J., dissenting).

The district court nonetheless declared that Mr. Monaghan's own religious exercise is substantially burdened by the regulation of the Domino's Farms corporation. The court relied on the Ninth Circuit's reasoning in *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988); and *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), which opined that a closely held corporation "is merely the instrument through and by which" the shareholders "express their religious beliefs," and that such a corporation "presents no rights of its own different from or greater than its owners' rights." *Townley*, 859 F.2d at 619-620; *see also Stormans*, 586 F.3d at 1119-1120 (following *Townley*). The district court here likewise ruled that Domino's Farms "is 'merely the instrument through and by

which Monaghan express[es] [his] religious beliefs.'" R.39 at Page ID #832 (quoting *Stormans*, 586 F.3d at 1120).

The Third Circuit correctly rejected "the *Townley/Stormans* theory," which "rests on erroneous assumptions regarding the very nature of the corporate form." *Conestoga Wood*, __ F.3d __, 2013 WL 3845365, *7. As discussed above, "'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' the corporation." *Ibid*. (quoting *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001).[11]

"'The owners of an LLC or corporation, even a closely-held one, have an obligation to respect the corporate form, on pain of losing the benefits of that form

[11] Indeed, "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,'" even when the plaintiff is the corporation's sole shareholder. *Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc.*, 862 F.2d 597, 602-603 (6th Cir. 1988). *See, e.g.*, *Diva's Inc. v. City of Bangor*, 411 F.3d 30, 35, 42 (1st Cir. 2005) (dismissing sole shareholder's First Amendment claim for lack of standing); *Potthoff v. Morin*, 245 F.3d 710, 717-718 (8th Cir. 2001) (same); *The Guides, Ltd. v. Yarmouth Group Property Management, Inc.*, 295 F.3d 1065, 1070, 1071-73 (10th Cir. 2002) (race discrimination claim); *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1317 (4th Cir. 1994) (Privileges and Immunities Clause claim); *Chance Management, Inc. v. State of South Dakota*, 97 F.3d 1107, 1115 (8th Cir. 1996) (same); *Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969) (finding "nothing in the Civil Rights Act" that would permit a plaintiff-stockholder to circumvent the rule that, "even though a stockholder owns all, or practically all, of the stock in a corporation, such a fact of itself does not authorize him to sue as an individual").

should they fail to do so.'" *Conestoga Wood*, __ F.3d __, 2013 WL 3845365, *8. (quoting *Grote*, 708 F.3d at 858 (Rovner, J., dissenting)). Mr. Monaghan is "not at liberty to treat the company's bank accounts as [his] own; co-mingling personal and corporate funds is a classic sign that a company owner is disregarding the corporate form and treating the business as his alter ego." *Grote*, 708 F.3d at 858 (Rovner, J., dissenting). "So long as the business's liabilities are not [Mr. Monaghan's] liabilities—which is the primary and 'invaluable privilege' conferred by the corporate form, *Torco Oil Co. v. Innovative Thermal Corp.*, 763 F. Supp. 1445, 1451 (N.D. Ill. 1991) (Posner, J., sitting by designation)—neither are the business's expenditures [Mr. Monaghan's] own expenditures." *Ibid*. The obligation to provide health coverage under the Domino's Farms group health plan and the money used to pay for that coverage "belong[] to the company, not to" Mr. Monaghan. *Ibid*. "[I]t is fundamental corporation and agency law—indeed, it can be said to be the whole purpose of corporation and agency law—that the shareholder and contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478 (2006).

"One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for

the protection of the public." *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946). Mr. Monaghan "chose to incorporate and conduct business through [Domino's Farms], thereby obtaining both the advantages and disadvantages of the corporate form." *Conestoga Wood*, __ F.3d __, 2013 WL 3845365, *8. He cannot "'move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms.'" *Ibid*. (quoting *Potthoff v. Morin*, 245 F.3d 710, 717 (8th Cir. 2001) (quoting *Kush v. Am. States Ins. Co.*, 853 F.2d 1380, 1384 (7th Cir. 1988)). "The law protects that separation between the corporation and its owners for many worthwhile purposes." *Autocam Corp. v. Sebelius*, 2012 WL 6845677, *7 (W.D. Mich. Dec. 24, 2012). "Neither the law nor equity can ignore the separation when assessing claimed burdens on the individual owners' free exercise of religion caused by requirements imposed on the corporate entities they own." *Ibid*.

C. The Particular Burden Of Which Plaintiffs Complain Is Too Attenuated To Be Substantial Within The Meaning Of RFRA.

For the reasons discussed above, plaintiffs' attempts to conflate the Domino's Farms corporation with Mr. Monaghan cannot salvage their RFRA claim. Even apart from this central flaw in plaintiffs' argument, their claim fails because the particular burden of which they complain—that the corporation is required to contribute funds for a comprehensive health plan that an employee can

elect to use to pay for services that Mr. Monaghan deems immoral—is too attenuated to be substantial for purposes of RFRA.

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

A group health plan "covers many medical services, not just contraception." *Grote v. Sebelius*, 708 F.3d 850, 865 (2013) (Rovner, J., dissenting). "To the extent" that Mr. Monaghan is "funding anything at all—and . . . one must disregard the corporate form to say that" he is—he is "paying for a plan that insures a comprehensive range of medical care that will be used in countless ways" by the employees of Domino's Farms and their family members. *Ibid.* The decision as to what specific "services will be used is left to the employee and her doctor." *Ibid*. "No individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful

sense [Mr. Monaghan's] decision or action." *Ibid*. Indeed, "the Privacy Rule incorporated into the regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") imposes a wall of confidentiality between an employee's health care decisions (and the plan's financial support for those decisions) and the employer." *Id*. at 858.

The religious objection that plaintiffs assert here closely resembles the religious objection that the Supreme Court has found to be non-cognizable in the taxpayer context. In *Doremus v. Board of Ed. of Hawthorne*, 342 U.S. 429 (1952), the Supreme Court "'rejected a state taxpayer's claim of standing to challenge a state law authorizing public school teachers to read from the Bible because 'the grievance which [the plaintiff] sought to litigate ... is not a direct dollars-and-cents injury but is a religious difference.'" *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 600-601 (2007) (plurality op.) (quoting *Doremus*, 342 U.S. at 434). The *Doremus* Court held that "'the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure.'" *Hein*, 551 U.S. at 600 (quoting *Doremus*, 342 U.S. at 433). The *Hein* plurality confirmed that there is "no taxpayer standing to sue under the Free Exercise Clause." *Id*. at 609-610. In other words, a taxpayer's claim that

his funds will be used in ways he deems immoral does not establish a cognizable burden on his free exercise of religion, much less a substantial burden.[12]

Here, too, Mr. Monaghan is, "in both law and fact, separated by multiple steps from both the coverage that the company health plan provides and from the decisions that individual employees make in consultation with their physicians as to what covered services they will use." *Grote*, 708 F.3d at 858 (Rovner, J., dissenting). To hold that "a company shareholder's religious beliefs and practices are implicated by the autonomous health care decisions of company employees, such that the obligation to insure those decisions, when objected to by a shareholder, represents a substantial burden on that shareholder's religious liberties" would be "an unusually expansive understanding of what acts in the commercial sphere meaningfully interfere with an individual's religious beliefs and practices." *Id*. at 866. "RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *O'Brien v. HHS*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012), *appeal pending*, No. 12-3357 (8th Cir.).

[12] "Justice Alito's plurality opinion in *Hein* 'is controlling because it expresses the narrowest position taken by the Justices who concurred in the judgment.'" *Laskowski v. Spellings*, 546 F.3d 822, 827 (7th Cir. 2008) (citations omitted).

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

Although "'courts are not the arbiters of scriptural interpretation, *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981), the RFRA still requires the court to determine whether the burden imposed on a plaintiff's stated religious beliefs is 'substantial.'" *Conestoga Wood Specialties Corp. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 140110, *10 (E.D. Pa. Jan. 11, 2013). Otherwise, "the standard expressed by Congress under the RFRA would convert to an 'any burden' standard." *Id*. at *13. Congress, however, amended the initial version of RFRA to add the word "substantially," and thus made clear that "any burden" would not suffice. *See* 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy & text of Amendment No. 1082).

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

Because plaintiffs cannot establish a prima facie case under RFRA, there is no reason to consider whether the contraceptive-coverage requirement is the least restrictive means to advance compelling governmental interests. *See* 42 U.S.C. § 2000bb-1(b). Contrary to plaintiffs' premise, Congress did not make corporate regulations subject to strict scrutiny at the behest of a corporation's controlling shareholder.

In any event, plaintiffs' argument fails on this secondary inquiry as well because the contraceptive-coverage requirement is narrowly tailored to advance compelling interests in public health and gender equality. It is difficult to imagine an interest that is more compelling for a woman than her "decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

1. "[T]he Government clearly has a compelling interest in safeguarding the public health by regulating the health care and insurance markets." *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011), *aff'd*, *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011). The Affordable Care Act increases access to recommended preventive health services by requiring that these services be covered without cost sharing, that is, without requiring plan participants and beneficiaries to make co-payments or pay deductibles. *See* 42 U.S.C. § 300gg-13.

Even small increments in cost sharing have been shown to reduce the use of recommended preventive health services. *See* IOM Report 108-109. "Cost barriers to use of the most effective contraceptive methods are important because long-acting, reversible contraceptive methods and sterilization have high up-front costs." *Id*. at 108. "A recent study conducted by Kaiser Permanente found that when out-of-pocket costs for contraceptives were eliminated or reduced, women were more likely to rely on more effective long-acting contraceptive methods." *Id*. at 109.

In addition to protecting a woman's compelling interest in autonomy over her procreation, *see Eisenstadt*, 405 U.S. at 453, access to contraceptives is a crucial public health protection because an unintended pregnancy can have major negative health consequences for both the woman and the developing fetus. The Institute of Medicine described the harms to the woman and fetus that can occur when pregnancies are unintended. *See* IOM Report 103. For example, short intervals between pregnancies are associated with low birth weight and prematurity. *See ibid*. When a pregnancy is unintended, a woman may delay prenatal care or prolong behaviors that present risks for the developing fetus. *See ibid*. And, for women with certain medical conditions (such as diabetes), pregnancy can pose serious health risks. *See id*. at 103-104.

The requirement to cover women's recommended preventive health services without cost sharing also protects the distinct compelling interest in gender equality. The Supreme Court has recognized the "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984). "Assuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests." *Ibid*. In enacting the Affordable Care Act's preventive health services coverage requirement, Congress found that "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009) (Sen. Feinstein). "Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men." *Ibid*. And this disproportionate burden on women creates "financial barriers . . . that prevent women from achieving health and well-being for themselves and their families." IOM Report 20. The women's preventive health services coverage requirement is designed to equalize preventive health services coverage for women and men, through, among other things, increased access to family planning services for women. *See, e.g.*, 155 Cong. Rec. at S12114 (Sen. Feinstein); *see also* 77 Fed. Reg. at 8728.

2. There is no doubt that the exemption that plaintiffs demand here would undermine Congress's objectives. Whereas Congress sought to increase access to women's recommended preventive health services by requiring that these services be covered without cost sharing, plaintiffs seek to exclude coverage of contraceptives entirely from the Domino's Farms plan.

The district court concluded that this exemption would not undermine the government's compelling interests because grandfathered plans are not subject to the statutory requirement to cover recommended preventive health services without cost sharing. *See* R.39 at 840-841. But the Affordable Care Act's grandfathering provision, 42 U.S.C. § 18011, does not have the effect of providing the type of permanent exemption from a coverage requirement that plaintiffs demand here. Although grandfathered plans are not subject to certain requirements, including the requirement to cover recommended preventive health services without cost sharing, the grandfathering provision is transitional in effect, and it is expected that a majority of plans will lose their grandfathered status by the end of 2013. *See* 75 Fed. Reg. 34,538, 34,552 (June 17, 2010). Changes to a group health plan such as the elimination of certain benefits, an increase in cost-sharing requirements, or a

decrease in employer contributions can cause a plan to lose its grandfathered status. *See* 45 C.F.R. § 147.140(g).[13]

The Domino's Farms plan is not grandfathered because plaintiffs made the economic decision to increase the percentage that plan participants and beneficiaries must pay through cost-sharing. *See* R.1 ¶ 109 at Page ID #19. Having made that economic decision, plaintiffs cannot now contend that Domino's Farms employees should be treated as if they had the advantages of a grandfathered plan. The grandfathering provision is "a reasonable plan for instituting an incredibly complex health care law while balancing competing interests." *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 994 (2012), *appeal pending*, No. 13-1092 (6th Cir.). "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

[13] The district court overstated the number of individuals covered under grandfathered plans. Its figures were drawn from the total number of individuals covered under health plans in existence at the start of 2010, and they disregarded the fact that the number of grandfathered plans is steadily declining. *See, e.g.*, Kaiser Family Foundation and Health Research & Educational Trust, Employer Health Benefits 2012 Annual Survey at 7-8, 190, *available at* http://ehbs.kff.org/pdf/2012/8345.pdf (last visited February 23, 2013) (indicating that 58 percent of firms had at least one grandfathered health plan in 2012, down from 72 percent in 2011, and that 48 percent of covered workers were in grandfathered health plans in 2012, down from 56 percent in 2011).

similar laws, without regard to pragmatic considerations, simply in order to preserve 'compelling interest' status." *Ibid*.

3. The district court alternatively opined that regulating the terms of group health plans is not the least restrictive means to accomplish the government's objectives. It suggested that, instead, "the Government could provide the contraceptive services directly, or perhaps offer incentives to employers who provide for such services (as opposed to sanctioning employers who do not)." R.39 at Page ID #841. The court reasoned that "contraceptive services are already readily available "at sites such as community health centers, public clinics, and hospitals with income-based support." *Ibid*. (quotation marks and citation omitted).

These proposals—which would require federal taxpayers to pay the cost of contraceptives for the employees of for-profit, secular companies—reflect a fundamental misunderstanding of RFRA and the "least restrictive means" test that it incorporates. That test has never been interpreted to require the government to create or expand programs in order to "subsidize private religious practices." *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 94 (Cal. 2004) (rejecting challenge to a state-law requirement that certain health insurance policies cover prescription contraceptives).

CONCLUSION

The preliminary injunction should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,761 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Alisa B. Klein
Alisa B. Klein

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2013, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein
Alisa B. Klein

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry	Page ID# Range	Description
R.1	1-40	Complaint
R.39	825-844	Opinion and Order
R.41	848-850	Notice of Appeal