UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DOMINO'S FARMS CORPORATION; and THOMAS MONAGHAN, Owner of Domino's Farms Corporation,

Plaintiffs,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; *et al.,*

Defendants.
_____/

Case No. 1:12-cv-15488
Honorable Lawrence P. Zatkoff
United States District Judge
Magistrate Judge Michael Hluchaniuk

ATTORNEY GENERAL BILL SCHUETTE'S AMICUS BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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STATEMENT OF INTEREST OF AMICUS CURIAE ATTORNEY GENERAL

The Michigan Constitution provides for the protection of religious worship and also protects the religious liberty of Michigan citizens by guaranteeing that "[t]he civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief." Mich. Const. art I, § 4.

The claim here was filed by a Michigan business, Domino's Farms Corporation, which is owned by Thomas Monaghan, and they claim that the HHS Mandate violates their religious liberty under the Religious Freedom Restoration Act and the First Amendment by requiring them to provide certain products and services in their insurance plans over their religious objections. Although the claims are not based on Michigan law, the principle of religious freedom is one of the central values in Michigan law and it implicates the role of the Attorney General, who is the chief legal officer for the State. Consistent with this role, the Attorney General is authorized by Michigan law, Mich. Comp. Law § 14.28, to safeguard the interests of the people of the State when in his judgment this is necessary.

In the view of the Attorney General, the HHS Mandate is a substantial burden as applied against the religious practice of these plaintiffs and others like them under RFRA, and there is no compelling interest that justifies this violation. Moreover, there are other less restrictive means by which this may be achieved.

The Amicus Curiae Brief of the State of Michigan prepared by the Attorney General is being filed pursuant to Fed. R. Civ. Pro. 7.

INTRODUCTION

> "Nothing is more dreaded than the national government meddling with religion."
>
> John Adams (letter to Benjamin Rush, June 12, 1812)

Congress enacted the Religious Freedom Restoration Act (RFRA) in response to *Employment Division v. Smith,* 494 U.S. 872 (1990), which effectively immunized virtually any statute of general applicability from constitutional challenge. RFRA's purpose was to restore a system of First Amendment analysis that protected more adequately Americans' religious liberty. RFRA's reinvigorated understanding of religious liberty is directly relevant here.

Plaintiffs have religious objections to the HHS Mandate's requirement that Plaintiffs provide certain reproductive products and services, including early abortion-inducing drugs, in the insurance plans to their employees, contrary to the unambiguous teachings of the Catholic Church. Domino's Farms Corporation is a Michigan business owned by Thomas Monaghan that is run consistent with Catholic principles. Domino's Farms has designed its health insurance policies with Blue Cross/Blue Shield to exclude contraceptives and other services that violate Plaintiffs' religious principles. The HHS Mandate requiring Plaintiffs to provide reproductive products and services substantially burdens these principles under RFRA.

The United States Government lacks a compelling interest justifying this burden on Plaintiffs or on other businesses that have equally-held religious objections to the HHS Mandate. The Affordable Care Act ("the Act") includes

several significant exceptions. The United States cannot contend that the mandate must be applied to all businesses without exception, and to Plaintiffs in particular, when tens of millions of plan participants are already excluded from the mandate's purview.

Given the strength of the Plaintiffs' RFRA claim on the merits, the United States is forced to reach for an alternative argument: that RFRA applies only to businesses that are religious in nature and does not apply to secular ones. But this is not so. There is nothing in RFRA that limits its application to businesses that sell religious goods or are operated by a church. A business may be (and often is) animated by religious principles, even if the tasks it performs are secular in nature. This is true whether it is Domino's Farms that operates a business-office park, a Jewish-owned deli that does not sell non-Kosher foods, a Muslim-owned financial brokerage that will not lend money for interest, or a hotel chain with religious owners who will not carry pornographic broadcasting.

The insidious effect of the United States Government's argument is to push religious beliefs expressed by the ordinary person or business out of the public square. Religious liberty cannot be confined to the sanctuary and sacristy. Such a truncated view of religion threatens to create a barren public culture, denuded of the religious beliefs of ordinary American citizens. This is an important principle, and it applies to all Americans and to all faiths. Plaintiffs' motion for preliminary injunction should be granted.

ARGUMENT

I. The HHS mandate requiring Domino's Farms to cover contraception, sterilization, and related services violates the Plaintiffs' religious liberty under RFRA.

Under RFRA, Congress has provided for the protection of a person's free exercise of religion even from laws of "general applicability":

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability[.]

42 U.S.C. § 2000bb-1(a). The only exception to this rule is when the government can prove that the burden (1) "is in furtherance of a compelling governmental interest," and (2) "is the least restrictive means of furthering that compelling interest." *Id.*

RFRA's purpose was to return to the constitutional standards governing the First Amendment before the decision in *Smith,* 494 U.S. 872 (1990), which "virtually eliminated the requirement that the government justify burdens on religious exercise without compelling justification." 42 U.S.C. § 2000bb(a). Accord *Cutter v. Wilkinson,* 423 F.3d 579, 582 (6th Cir. 2005). RFRA codified the "compelling interest" standard for laws of general application that substantially burdened the free exercise of religion. As RFRA itself explains, its purposes are:

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b).

There are three points the Attorney General advances in this *amicus*: (1) the HHS Mandate imposes a substantial burden on Plaintiffs' free exercise of religion; (2) there are no compelling reasons to apply the mandate to Plaintiffs and other similarly-situated persons, particularly where there are less restrictive means by which the United States could accomplish the objective of guaranteeing access to reproductive services; and (3) the United States' argument that RFRA and the First Amendment do not apply to secular businesses – only religious ones – violates RFRA's terms. The Attorney General will emphasize the third point, given its importance to all Michigan citizens, regardless of religious faith.

A. The HHS mandate to provide contraception imposes a substantial burden on Plaintiffs' free exercise of religion.

Thomas Monaghan has designed a health insurance plan for Domino's Farms with Blue Cross/Blue Shield of Michigan that specifically excludes contraception, abortion, sterilization, and other services because these products and services would conflict with the teachings of the Catholic Church. (Compl., ¶¶ 33, 50-55.)

The teachings of the Catholic Church against contraception and abortion are clear. See "Married Love and the Gift of Life," approved November 2006 by the United States Conference of Catholic Bishops.[1] See also *Humanae Vitae,* encyclical of Pope Paul VI, released on July 25, 1968.[2] And the courts generally defer to the official statements of religious organizations regarding their doctrines and

[1] This document may be found online on the website of the USCCB at http://usccb.org/beliefs-and-teachings/what-we-believe/love-and-sexuality/married-love-and-the-gift-of-life.cfm (last visited on January 29, 2013).
[2] The encyclical is available on the Vatican's website at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html (last visited January 29, 2013).

disciplines. See *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America,* 344 U.S. 94, 113 (1952) ("whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them") (internal quotes omitted). This is because "[r]eligion . . . must be left to the conviction and conscience" of the person. *People v. DeJonge,* 501 N.W.2d 127, 136 (Mich. 1993) (internal quotes omitted).

That the federal mandate at issue is a rule of general applicability does not shield it from RFRA's strict scrutiny. That is why Congress passed RFRA in the first place. "[L]aws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2).

The two cases that RFRA cites in its text, *Sherbert*, 374 U.S. 398 (1963), and *Yoder*, 406 U.S. 205 (1972), each examined state laws of general applicability. In *Sherbert,* the Supreme Court determined that a South Carolina law that disqualified a Seventh Day Adventist, who refused to work on Saturdays, from unemployment benefits had to yield to her free exercise of her religion. *Sherbert,* 374 U.S. at 410. Even though this was an "incidental burden," i.e., an unintended effect, the State was required to come forward with a compelling interest to justify it. *Id.* at 403. So, too, in *Yoder*, where the obligation of Wisconsin law was for children to have compulsory education through age 16. *Yoder,* 406 U.S. at 207. This statute was an unconstitutional burden on Amish children and therefore "beyond the power of the State to control, even under regulations of general applicability." *Id.* at 220.

RFRA's general standards for determining whether there is a "substantial burden" on a person's exercise of religion also come from *Sherbert* and *Yoder*. The "disqualification for benefits" in *Sherbert* was a substantial burden on the plaintiff's exercise of her religion because she was forced to choose between work and following the precepts of her religion:

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Sherbert, 374 U.S. at 404. The same is true here. The HHS Mandate requires Domino's Farms and its own Thomas Monaghan either to abandon their commitment to Catholic principles or face a yearly fine of $2,000 *per employee* for failing to provide health insurance for contraception as well as for early abortion-inducing drugs.

Likewise in *Yoder,* the Supreme Court determined that the requirement for Amish children to attend compulsory second education would substantially interfere with their religious development by exposing them to "worldly influences." *Yoder,* 406 U.S. at 218. It would "contravene[] the basic religious tenets and practices of the Amish faith." *Id.* Again, the same is true here. The provision of contraception contravenes the basic religious tenets and practices of the Catholic Church.

The courts have split on whether the showing here would constitute a "substantial burden," even if only examining decisions within the two Michigan federal districts Compare *Legatus v. Sebelius,* ___ F. Supp. 2d ___, 2012 WL

5359630, *6 (E. D. Mich. October 31, 2012) (plaintiffs were likely to show the HHS mandate substantially burdens their religious observance), with *Autocam Corp v. Sebelius,* ___ F. Supp. 2d ___, 2012 WL 6845677, * 6-7 (W. D. Mich. December 24, 2012) (no substantial burden).[3]

There are two primary arguments that the United States advanced on this point in its answer filed in the response to a request for a TRO: (1) the RFRA does not apply to private, secular for-profit businesses; and (2) any burden here is too attenuated to constitute a "substantial burden." This Court should reject each point.

1. The RFRA does not only apply to religious businesses.

The United States argues that Domino's Farms cannot complain about the burden because it "elected to organize itself as a secular, for-profit entity and to enter commercial activity[.]" (U.S., Br. in Opp. to TRO, p. 11.) This argument mis-understands the proper inquiry for whether there is a substantial burden on a person's right to free exercise under RFRA. A person does not lose his right to free exercise of religion by engaging in action in the public sphere.

In an order granting a preliminary injunction against the HHS Mandate, the Seventh Circuit expressly rejected the very same argument the government advances here. The controlling point for the court was that the private individuals

[3] The U.S. Court of Appeals for the Sixth Circuit denied Autocam's motion for injunction pending appeal of this decision in a 2-to-1 unpublished order, see Case No. 12-2673, noting that the U.S. Supreme Court had denied a motion to stay in another case and that the divergence of opinion in the district courts established a "possibility" but not necessarily a likelihood of success on the merits. *Autocam Corp v. Sebelius,* Order dated December 28, 2012, slip op., pp. 2-3. The panel did decide to expedite the appeal.

would have to violate their conscience in the operation of the business even if these business were secular and for profit:

> [The government's primary argument] ignores that Cyril and Jane Korte are also plaintiffs. Together they own nearly 88% of K & L Contractors. It is a family-run business, and they manage the company in accordance with their religious beliefs. This includes the health plan that the company sponsors and funds for the benefit of its nonunion workforce. That the Kortes operate their business in the corporate form is not dispositive of their claim. See generally *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). The contraception mandate applies to K & L Contractors as an employer of more than 50 employees, and *the Kortes would have to violate their religious beliefs to operate their company in compliance with it.*

Korte v. Sebelius, 2012 WL 6757353, *3 (7th Cir. December 28, 2012) (emphasis added). The same applies here. Thomas Monaghan is the sole owner of Domino's Farms. Just as the Kortes, the mandate would require Mr. Monaghan to violate his beliefs to operate Domino's Farms in compliance with the mandate.

The case the United States cites to support its claim in response to the TRO (p. 11), *United States v. Lee,* 455 U.S. 252, 257 (1982), only confirms Plaintiffs' argument. In *Lee,* the Supreme Court examined whether the Social Security tax imposed an unconstitutional burden on the Amish, and the Court concluded that because "the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights." *Id.* at 257. The Court ultimately determined that the Government's interest were compelling. *Id.* at 260. Although the right to the free

exercise of religion had to yield, there was nevertheless a substantial burden imposed on the Amish community.

The danger of the United States' error here is that it suggests that protections for religious liberty only apply as a category to the private realm and never the public one. The case in point to demonstrate this mistake is Adell Sherbert. She was fired because she would not work on Saturday; the government refused her unemployment benefits for the same reason. *Sherbert,* 374 U.S. at 401. In contrast to the Amish community in *Lee,* the State in *Sherbert* had to yield because it could not demonstrate a compelling interest in enforcing this law against her. This was so *even though Ms. Sherbert was not engaged in a religious occupation*. A citizen need not leave her religious convictions at the corporate door. That is true for Thomas Monaghan as well. And this same principle applies for a family-owned or closely-held corporation as here that is run consistent with religious principles.

2. The substantial burden here is not too attenuated.

Although there are distinctions between Domino's Farms and Thomas Monaghan and the individuals in *Sherbert* and *Yoder,* the better reasoned analysis acknowledges the religious claims of the plaintiffs and defers to the party's understanding of the religious doctrine. See *Legatus,* 2012 WL 5359630, *6. This deference is consistent with Supreme Court precedent. See *Kedroff,* 344 U.S. at 113. See also *Thomas v. Review Bd. of Ind. Emp't Sec. Div.,* 450 U.S. 707, 716 (1981) ("it is not within the judicial function and judicial competence to inquire

whether the petitioner or his fellow worker more correctly perceived the commands of their common faith").

In contrast, the United States here invites the courts to scrutinize religious claims and determine whether the mandate really is a substantial burden. Such an endeavor invariably requires an investigation of religious doctrine, and here, the teachings of the Catholic Church.

In *O'Brien v. U.S. Dep't of Health & Human Services,* ___ F. Supp. 2d ___, 2012 WL 4481208, *6 (E.D. Mo. September 28, 2012), the court determined that the claim was "too attenuated" because the employer merely provides the funds by which employees elect to engage in conduct that violates the religious beliefs of the employer:

> [P]laintiffs remain free to exercise their religion, by not using contraceptives and by discouraging employees from using contraceptives. The 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 covered by OIH's plan, subsidize someone else's participation in an activity that is condemned by plaintiffs' religion.

O'Brien, 2012 WL 4481208, *6. The suggestion is that the independent, intervening actions of the employees would absolve the employer of any moral culpability of employees' claimed transgressions. The district court in *Autocam* reasoned in the same fashion in determining that there was no substantial burden. *Autocam,* 2012 WL 6845677, *6-7 ("The incremental difference between providing the benefit directly, rather than indirectly, is unlikely to qualify as a substantial burden on the Autocam Plaintiffs. . . . Standing between the Kennedy Plaintiffs and the decisions some Autocam employees make to procure contraceptive services are not only the

independent decisions of an employee and the employee's health care provider, but also the corporate form itself.")

The United States advances the same legal reasoning here. (U.S., Br. in Opp. to TRO, pp. 3-4) ("Just as Domino's Farms's employees have always retained the ability to choose whether to procure contraceptive services by using the salaries the corporation pays them, under the current regulations those employees retain the ability to choose what health services they wish to obtain according to their own beliefs and preferences.") The danger with this kind of reasoning, of course, is that it attempts to weigh the importance of the doctrine from the standpoint of the religious institution and the individual business owner. And here, the National Conference of Catholic Bishops has stated that that the law is a "mandate to act against our teachings":

> This error in [the government's] theory has grave consequences in principle and practice. Those deemed by HHS not to be "religious employers" will be forced by government to violate their own teachings within their very own institutions. This is not only an injustice in itself, but it also undermines the effective proclamation of those teachings to the faithful and to the world.

"March 14 Statement on Religious Freedom and HHS Mandate," A Statement of the Administrative Committee of the United States Conference of Catholic Bishops.[4]

Domino's Farms' argument is a straightforward one: that a person has a greater moral obligation if it directly provides the service to the employee or ensures that another entity (an insurer) provides the service than it does in paying an

[4] This document may be found at the following website: http://www.usccb.org/issues-and-action/religious-liberty/march-14-statement-on-religious-freedom-and-hhs-mandate.cfm (last visited on January 28, 2013).

employee a wage and the employee elects to purchase the service. For example, consider a Quaker-owned business' commitment to pacifism and its owner's objections to handguns. If there were a mandate that required a business to either provide handguns to its employees for self defense or contract with a weapons supplier to provide a handgun, there would be an arguable moral difference in taking those actions than in paying the employee's wage. The closer the employer is to the direct provision, the more responsible it is for the conduct taken. See, e.g., *Korte,* 2012 WL 6757353, *3 ("The religious-liberty violation at issue here inheres in the *coerced* coverage of contraception, abortifacients, sterilization, and related services, not—or perhaps more precisely, not only—in the later purchase or use of contraception or related services.") (emphasis in original). To put it another way, it is one thing for employees to use their paycheck to purchase alcohol. It is an entirely different matter to compel the employer to provide beer.

Moreover, the government's argument that this moral analysis of Catholic doctrine is wrong runs afoul of the Supreme Court's admonition not to second guess a religious authority's understanding of its own doctrine. *Kedroff,* 344 U.S. at 113; *Thomas,* 450 U.S. at 716. The HHS mandate, as indicated by the relevant religious officials here, would be a substantial burden on the religious liberty of Domino's Farms and Thomas Monaghan.

B. The United States does not have a compelling interest in applying this mandate to Plaintiffs, particularly where there are less restrictive means by which it may achieve this end.

In *O Centro*, the Supreme Court outlined the proper analytical framework for determining whether there is a compelling governmental interest that justifies a

substantial burden on a person's religious liberty. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 424-31 (2006). The Court was careful to note that this examination requires an inquiry into whether there is a compelling interest to apply the government mandate to the "particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro,* 546 U.S. at 431. This narrowing of the inquiry damages the United States Government's claim here, where there is no dispute that the HHS Mandate already contains multiple categories of employers to which the mandate does not currently apply: (1) a narrow exemption for religious organizations; (2) the mandate does not apply to employers with fewer than 50 employees; and (3) a grandfathering provision that shields more than 190 million health plan participants from the mandate's application. See *Newland,* 2012 WL 3069154, *7 ("this massive exemption [for grandfathered plans] completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs"). See also *Legatus,* 2012 WL 5359630, *9 ("About 193 million health plans were in existence on March 23, 2010, and presumably qualified as grandfathered.").

The United States's position – that the HHS Mandate requires national uniformity – cannot withstand strict scrutiny. Even excluding the grandfathering exemption on which the *Newland* court relied, the other exceptions demonstrate the lack of compelling nature in the Government's claim.

The exception for religious organizations governs "religious employers" that primarily inculcate the religious belief of the religious organization, employ primarily persons who share the tenets of the religious group, and serve persons who share

that religious faith. 45 C.F.R. § 147.130(A), (B). Just within the Catholic Church, this exception applies to more than 15,000 parishes. Center for Applied Research (CARA) of Georgetown University, "Frequently Requested Church Statistics."[5]

As for the exemption regarding plans with fewer than 50 employees, the 2007 economic census (compiled every five years) indicates that there were more than 20 million paid employees at firms nationwide with fewer than 20 employees. See Table 2b "Employment Size of Employer and Nonemployer Firms, 2007."[6] In other words, there are tens of millions of U.S. employees whose employers are not required to comply with this contraceptive mandate, not even counting the 190 million plan participants subject to the "grandfathering" provision.

These exemptions defeat the Government's claim that the federal mandate *must* be imposed on all other businesses, including Plaintiffs. In *O Centro,* the Court examined whether the United States violated RFRA by applying the federal Controlled Substances Act to a religious sect that used a plant that contains a hallucinogen in its communion as a sacramental tea. *O Centro,* 546 U.S. at 423. The compelling interest that the United States Government put forward was "the *uniform* application of the Controlled Substances Act, such that no exception to the ban on use of the hallucinogen can be made to accommodate the sect's sincere religious practice." *Id.* The Court rejected this argument, concluding that the Act

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[5] This report may be found at the CARA website: http://cara.georgetown.edu/CARAServices/requestedchurchstats.html (last visited January 29, 2013).

[6] This United States Census Bureau document may be found at: http://www.census.gov/econ/smallbus.html (last visited on January 29, 2013).

itself contemplated exceptions, since the Attorney General was authorized to grant "waiv[ers]" where consistent with the public health and safety. *Id.* at 432.

The same reasoning applies here. The number of employees affected by exempting Plaintiffs and other similarly-situated businesses would be small in comparison to the exemptions already provided to employers with fewer than 50 employees. The claim that there can be no exceptions to this rule – even where it burdens the free exercise of religion – rings hollow, particularly if this Court examines only Plaintiffs and their employees, as the Supreme Court in *O Centro* indicated should be done. See *Legatus,* 2012 WL 5359630 *10 ("The court has no doubt that every level of Government has an interest in promoting public health as a general matter, but remains uncertain that the Government will be able to prove a compelling interest in promoting the specific interests at issue in this litigation.").

Equally important, there are other less restrictive means the Government could have chosen. As Plaintiffs noted on page 15 of their motion for preliminary injunction, among other suggestions, the United States could provide tax credits to these employers to encourage them to make contraceptive and other services available. The district court in *Newland* delineated this same point about the various ways in which the Government could directly provide this benefit: "creation of a contraception insurance plan with free enrollment, direct compensation of contraception and sterilization providers, creation of a tax credit or deduction for contraceptive purchases, or imposition of a mandate on the contraception manufacturing industry to give its items away for free." *Newland,* 2012 WL 3069154, *7. The strength of this point is underscored by the fact that tax credits

are the mechanism by which the Act attempts to enable employers with fewer than 50 employees to obtain health care, as noted by the United States itself. See 42 U.S.C. § 18021; § 18031(d)(2)(B)(i).

The United States argues that this suggested approach would "impose considerable costs and burdens" on the government and therefore was "impractical." (U.S., Br. in Opp. to TRO, p. 22.) But the district court in *Newland* rejected this same argument for reasons that are equally applicable here:

> Defendants have failed to adduce facts establishing that government provision of contraception services will necessarily entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women. Once again, the current existence of analogous programs heavily weighs against such an argument.

Newland, 2012 WL 3069154, *8. At a bare minimum, any "impracticality" of such a government program is outweighed by the violation of Plaintiffs' religious liberty.

C. RFRA applies to businesses that operate according to religious principles, even if they are not operated by a religious organization.

Given RFRA's plain application to the HHS Mandate and the United States' inability to satisfy RFRA's stringent test, the United States is left to argue that RFRA protects only *religious* organizations, not secular, for-profit corporations. (U.S., Br. in Opp. to the TRO, pp. 8-13.) The law does not support that claim.

There is no dispute that First Amendment protection for speech and association applies equally to religious and secular organizations. *Citizens United v. Federal Election Commission,* 558 U.S. 310; 130 S. Ct. 876, 900 (2010) ("The Court has thus rejected the argument that political speech of corporations or other

associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"). Indeed, the analysis on which the Supreme Court based its decision in *Citizens United* appears to exclude the Government's claim that the First Amendment does not apply to secular businesses:

> Freedom of speech *and the other freedoms encompassed by the First Amendment* always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause, and the Court has not identified a separate source for the right when it has been asserted by corporations.

First National Bank of Boston v. Bellotti, 435 U.S. 765, 780 (1978) (citations omitted; emphasis added).

If a corporation is protected as a person under the First Amendment, it follows that a corporation would be a "person" under 42 U.S.C. § 2000bb-1 of RFRA. See 42 U.S.C. § 2000bb(a) (stating that RFRA secures the federal test for protections for the First Amendment before the *Smith* decision). But see *Holy Land Foundation for Relief and Development v. Ashcroft,* 333 F.3d 156, 167 (D.C. Cir. 2003) (reserving the question but casting doubt on whether a non-profit corporation was a "person" within meaning of RFRA). And on this point, the First Amendment does not distinguish between its protection of the free exercise of religion and its protection of free speech between organizations and individuals or between religious corporations and secular ones.

The district court in *Hobby Lobby Stores, Inc. v. Sebelius,* 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012) adopted the Government's argument, and determined that secular businesses are not protected by the First

Amendment and are not protected by RFRA. *Id.* at 2012 WL 5844972, *8. The court explained:

> General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take religiously-motivated actions separate and apart from the intention and direction of their individual actors. Religious exercise is, by its nature, one of those "purely personal" matters referenced in *Belloti* which is not the province of a general business corporation.

Id. This description provides the kind of constrained understanding of religious liberty that caused Congress to pass the RFRA in the first instance. And, of course, after reaching this conclusion, the court then determined that the owners could not invoke the defense of RFRA because the obligations had not been imposed on the owners, but on the business itself. *Id.* at 1294. The catch-22 nature of this analysis is transparent. The Seventh Circuit rejected this kind of distinction. *Korte,* 2012 WL 6757353, *3.

Consider a Jewish-deli that is privately owned by a Jewish family that decides that it will not sell non-Kosher food. The suggestion that this is a privately-owned business that has no religious protections because it has engaged in secular commercial business is an impoverished understanding of both the First Amendment and of RFRA. A federal mandate to sell pork would offend the religious practice of such a business and its family owners. The claim otherwise would limit the religious practice to only those entities that are owned by religious institutions or sell exclusively religious goods. But the First Amendment is for everyone, not just for religious organizations.

This conclusion that secular businesses, particularly a family-owned or closely-held one, would have its right to religious liberty protected under RFRA and the First Amendment comports with common sense. On a basic level, a corporation is a group formed to achieve a particular mission and is comprised of natural persons. A business may establish religious principles on which to operate its business even if its mission is secular in nature.

This misguided effort to circumscribe religious liberty to only religious organizations is similar to confining religious practice to worship, as if religious principles should not animate a corporation – or a person – in public and commercial life. It is akin to the error that suggests that only priests or ministers should express religious views. But this is a misunderstanding of religion and religious freedom. It is the right of the ordinary person.

CONCLUSION AND RELIEF SOUGHT

The Attorney General asks that this Court grant Plaintiffs' request for a preliminary injunction.

Respectfully submitted,

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Dated: January 29, 2013

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2013, I electronically filed the foregoing papers with the Clerk of the Court using ECF system which will send notification of such filing to the following:

HONORABLE LAWRENCE ZATKOFF
MAGISTRATE JUDGE MICHAEL J. HLUCHANIUK
ERIN MERSINO, ATTORNEY FOR PLAINTIFFS
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