IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

| | |
|---|---|
| DOMINO'S FARMS CORPORATION; and THOMAS MONAGHAN,<br><br>Plaintiffs,<br><br>v.<br><br>KATHLEEN SEBELIUS, *et al.*,<br><br>Defendants. | Case No. 2:12-cv-15488<br><br>Judge Lawrence P. Zatkoff<br><br>Magistrate Judge Michael Hluchaniuk |

**DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER**

**TABLE OF CONTENTS**


TABLE OF AUTHORITIES ..... ii

ISSUES PRESENTED ..... vii

CONTROLLING OR MOST APPROPRIATE AUTHORITIES ..... viii

INTRODUCTION ..... 1

BACKGROUND ..... 5

I. STATUTORY AND REGULATORY BACKGROUND ..... 5

II. CURRENT PROCEEDINGS ..... 7

STANDARD OF REVIEW ..... 8

ARGUMENT ..... 8

I. PLAINTIFFS CANNOT SHOW LIKELIHOOD OF SUCCESS ON THE MERITS ..... 8

A. Plaintiffs' Religious Freedom Restoration Act Claim Lacks Merit ..... 8

1. The preventive services coverage regulations do not substantially burden any "exercise of religion" by for-profit, secular companies and their owners ..... 8

2. Alternatively, any burden imposed by the challenged regulations is too attenuated to constitute a substantial burden ..... 14

3. Even if there were a substantial burden on religious exercise, the regulations serve compelling government interests and are the least restrictive means to achieve those interests ..... 15

a. The regulations significantly advance compelling governmental interests in women's health and equality ..... 15

b. The regulations are the least restrictive means of advancing the government's compelling interests ..... 18

B. Plaintiffs' First Amendment claims Are Meritless ..... 21

1. The regulations do not violate the Free Exercise Clause ..... 21

2. The regulations do not violate the right to free speech or free association ..... 23

II. PLAINTIFFS CANNOT ESTABLISH IRREPARABLE HARM, AND AN INJUNCTION WOULD INJURE THE GOVERNMENT AND THE PUBLIC ..... 24

# TABLE OF AUTHORITIES

## FEDERAL CASES

*American Pulverizer v. U.S. Dep't of Health & Human Servs.*,
No. 12-3459, slip op. (W.D. Mo. Dec. 20, 2012) ....................14

*Anselmo v. Cnty. of Shasta*,
No. CIV. 2:12-361 WBS EFB, 2012 WL 2090437 (E.D. Cal. 2012)....................9

*Autocam Corp. v. Sebelius*,
No. 1:12-CV-1096, slip op. (W.D. Mich. Dec. 24, 2012) .................... *passim*

*Axson-Flynn v. Johnson*,
356 F.3d 1277 (10th Cir. 2004) ....................22

*Buchwald v. Univ. of N.M. Sch. of Med.*,
159 F.3d 487 (10th Cir. 1998) ....................16

*Cedric Kushner Promotions, Ltd. v. King*,
533 U.S. 158 (2001)....................13

*Church of the Lukumi Babalu Aye v. City of Hialeah*,
508 U.S. 520 (1993)....................12, 18, 22

*Combs v. Homer-Center Sch. Dist.*,
540 F.3d 231 (3d Cir. 2008)....................12

*Corp. of the Presiding Bishop v. Amos*,
483 U.S. 327 (1987)....................10

*EEOC v. Townley Eng'g and Mfg. Co.*,
859 F.2d 610 (9th Cir. 1988) ....................14

*Elrod v. Burns*,
427 U.S. 347 (1976)....................24

*Emp't Div., Dep't of Human Res. of Or. v. Smith*,
494 U.S. 872 (1990)....................4, 8, 22, 23

*Fund for Animals v. Frizzell*,
530 F.2d 982 (D.C. Cir. 1975) ....................2, 25

*Gonzales v. Arizona*,
485 F.3d 1041, 1046 (9th Cir. 2007) ....................15

*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,
546 U.S. 418 (2006)....................8

*Hobby Lobby Stores, Inc. v. Sebelius*,
No. 12-6294, slip op. (10th Cir. Dec. 20, 2012) ....................3, 14

*Hobby Lobby Stores, Inc. v. Sebelius*,
870 F. Supp. 2d 1278, 1296 (W.D. Okla. 2012) .................... *passim*

*Holy Land Found. for Relief & Dev. v. Ashcroft*,
219 F. Supp. 2d 57 (D.D.C. 2002) .......... 9

*Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*,
132 S. Ct. 694 (2012) .......... 9, 13

*Huron Mountain Club v. U.S. Army Corps of Eng'rs*,
No. 2:12-CV-197, 2012 WL 3060146 (W.D. Mich. 2012) .......... 1, 25

*Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*,
344 U.S. 94 (1952) .......... 9

*Korte v. U.S. Dep't of Health & Human Servs.*,
No. 12-cv-01072-MJR, 2012 WL 6553996 (S.D. Ill. Dec. 14, 2012) .......... *passim*

*LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*,
503 F.3d 217 (3d Cir. 2007) .......... 10

*Levitan v. Ashcroft*,
281 F.3d 1313 (D.C. Cir. 2002) .......... 9

*Legatus v. Sebelius*,
No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012) .......... 1, 13, 20

*Living Water Church of God v. Charter Twp. of Meridian*,
258 F. App'x 729, 2007 WL 4322157 (6th Cir. 2007) .......... 12

*McNeilly v. Land*,
684 F.3d 611 (6th Cir. 2012) .......... 25

*Mead v. Holder*,
766 F. Supp. 2d 16 (D.D.C. 2011) .......... 16

*Nautilus Ins. Co. v. Reuter*,
537 F.3d 733 (7th Cir. 2008) .......... 14

*New Life Baptist Church Acad. v. Town of E. Longmeadow*,
885 F.2d 940 (1st Cir. 1989) .......... 18, 20, 21

*Newland v. Sebelius*,
No. 1:12-cv-1123-JLK, 2012 WL 3069154 (D. Colo. July 27, 2012) .......... 14

*N.E. Ohio Coalition for Homeless v. Blackwell*,
467 F.3d 999 (6th Cir. 2006) .......... 8

*Oakland Tribune, Inc. v. Chronicle Publ'g Co.*,
762 F.2d 1374 (9th Cir. 1985) .......... 25

*O'Brien v. U.S. Dep't of Health & Human Servs.*,
No. 4:12-CV-476(CEJ), 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012) .......... *passim*

*Obama for America v. Husted*,
Nos. 12-4055, 12-4076, 2012 WL 4753397 (6th Cir. Oct. 5, 2012) .......... 8

*Olsen v. Mukasey*,
541 F.3d 827 (8th Cir. 2008) ....................22

*Roberts v. U.S. Jaycees*,
468 U.S. 609 (1984)....................16

*Rumsfeld v. Forum for Academic & Inst. Rights ("FAIR")*,
547 U.S. 47 (2006)....................23, 24

*Sherbert v. Verner*,
374 U.S. 398 (1963)....................11

*S. Ridge. Baptist Church v. Indus. Comm'n of Ohio*,
911 F.2d 1203 (6th Cir. 1990) ....................18

*Stormans, Inc. v. Selecky*,
586 F.3d 1109 (9th Cir. 2009) ....................14, 25

*Texas v. Johnson*,
491 U.S. 397 (1989)....................24

*Tough Traveler, Ltd. v. Outbound Prods.*,
60 F.3d 964 (2d Cir. 1995)....................25

*Tyndale v. Sebelius*,
No. 12-1635(RBW), 2012 WL 5817323 (D.D.C. Nov. 16, 2012) ....................13, 14

*Werft v. Desert Sw. Annual Conference of the United Methodist Church*,
377 F.3d 1099 (9th Cir. 2004) ....................9

*United States v. Lee*,
455 U.S. 252 (1982)....................1, 11, 13

*United States v. Wilgus*,
638 F.3d 1274 (10th Cir. 2011) ....................18, 20

*Winter v. Natural Res. Def. Council, Inc.*,
555 U.S. 7 (2008)....................8

*Wisconsin v. Yoder*,
406 U.S. 205 (1972)....................11

**STATE CASES**

*Catholic Charities of Diocese of Albany v. Serio*,
859 N.E.2d 459 (N.Y. 2006)....................5, 21, 24

*Catholic Charities of Sacramento v. Superior Court*,
85 P.3d 67 (Cal. 2004) ....................5, 20, 21, 24

*Handley v. Wyandotte Chems. Corp.*,
325 N.W.2d 447 (Mich. Ct. App. 1982) ....................12

*McClure v. Sports and Health Club*,
370 N.W.2d 844 (Minn. 1985)....................11

## FEDERAL STATUTES

26 U.S.C. § 4980H....................19

29 U.S.C. § 1132....................12

42 U.S.C. § 18011....................19

42 U.S.C. § 2000bb-1....................8, 9, 10

42 U.S.C. § 2000e-1....................10, 13

42 U.S.C. § 2000e-2....................10

42 U.S.C. § 300gg-11....................20

42 U.S.C. § 300gg-13....................5, 19

42 U.S.C. § 300gg-91....................11

Pub. L. No. 111-148, 124 Stat. 119 (2010)....................5

Pub. L. No. 103-141, 107 Stat. 1488 (1993)....................8

## FEDERAL REGULATIONS

26 C.F.R. § 54.9815-2713T....................6

29 C.F.R. § 2590.715-2713....................6

45 C.F.R. § 147.126....................20

45 C.F.R. § 147.130....................6, 7, 11

45 C.F.R. § 147.140....................19

75 Fed. Reg. 34,538 (June 17, 2010)....................19

75 Fed. Reg. 41,726 (July 19, 2010)....................6

76 Fed. Reg. 46,621 (Aug. 3, 2011)....................7

77 Fed. Reg. 8725 (Feb. 15, 2012)....................7

## LEGISLATIVE MATERIALS

155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009)....................17

155 Cong. Rec. S12265-02, S12274 (daily ed. Dec. 3, 2009)....................17

H.R. Rep. No. 111-443 pt. II (2010)....................20, 21

**MISCELLANEOUS**

FDA, Birth Control Guide ....................................................................................................6

HRSA, Women's Preventive Services: Required Health
Plan Coverage Guidelines....................................................................................6, 23

INST. MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN:
CLOSING THE GAPS (2011) ...................................................................................... *passim*

## ISSUES PRESENTED

1. Have plaintiffs shown a likelihood of success on their claim that the preventive services coverage regulations substantially burden their religious exercise under the Religious Freedom Restoration Act?

2. Assuming the regulations substantially burden plaintiffs' religious exercise, have plaintiffs shown a likelihood of success on their claim that the regulations do not serve compelling governmental interests or are not the least restrictive means to achieve those interests?

3. Have plaintiffs shown a likelihood of success on their claims that the regulations violate the First Amendment's Free Exercise and Free Speech Clauses?

4. Assuming plaintiffs have shown a likelihood of success on the merits, have plaintiffs established irreparable harm and that the public interest weighs in favor of granting a preliminary injunction?

**CONTROLLING OR MOST APPROPRIATE AUTHORITIES**

*United States v. Lee*, 455 U.S. 252 (1982)

*Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012)

*Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006)

*Cedric Kushner Promotions, Ltd. v. King*, 533 158 (2001)

*Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987)

*Hobby Lobby v. Sebelius*, No. 12-6294, slip op. (10th Cir. Dec. 20, 2012), *application for injunction pending appellate review docketed*, No. 12A644 (Dec. 21, 2012)

*Hobby Lobby v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012)

*Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, slip op. (W.D. Mich. Dec. 24, 2012)

*Korte v. U.S. Dep't of Health & Human Servs.*, No. 12-cv-01072-MJR, 2012 WL 6553996 (S.D. Ill. Dec. 14, 2012)

*O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-CV-476(CEJ), 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012)

## INTRODUCTION

Plaintiffs Domino's Farms, a for-profit property management company, and its owner, Thomas Monaghan, ask the Court for so-called "emergency" relief, seeking a temporary restraining order ("TRO") only ten days before the preventive services coverage regulations will apply to Domino's Farms's employee health plan. The Court should deny plaintiffs' motion.

Putting aside momentarily plaintiffs' inability to show likelihood of success on the merits, plaintiffs cannot possibly be entitled to a TRO given plaintiffs' egregious and unexplained delay in bringing this suit. Although the challenged requirement was established in August 2011, plaintiffs did not file their Complaint until December 14, 2012—over sixteen months later. And it was only on Friday, December 21 that plaintiffs moved for a TRO. This is extraordinary given that two other entities with which Monaghan himself is closely associated—Ave Maria University and Legatus[1]—challenged the preventive services coverage regulations several months ago, and are represented by the same counsel as plaintiffs in this case. *See* Complaint, *Ave Maria Univ. v. Sebelius*, No. 1:12-cv-88 (M.D. Fla. Feb. 21, 2012), ECF No. 1; Complaint, *Legatus v. Sebelius*, No. 2:12-cv-12061 (E.D. Mich. May 7, 2012), ECF No. 1. Given Monaghan's clear awareness of the challenged regulations for at nine seven months, plaintiffs' delay raises serious questions as to whether they have waited until the eleventh hour to obtain some sort of strategic advantage. In any event, whatever plaintiffs' reasons, their delay is completely at odds with any claim that they are now entitled to the extraordinary equitable relief of a TRO. *See Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, slip op. at 15 (W.D. Mich. Dec. 24, 2012) (denying a similar motion for preliminary injunction, noting that "the immediacy of the dilemma Plaintiffs face is in no small part of their own making"); *see also Huron Mountain Club v. U.S. Army Corps of Eng'rs*, No. 2:12-CV-197, 2012 WL 3060146, at *14 (W.D. Mich. 2012) ("Since an application for preliminary injunction is based on an urgent need for the protection of [a] Plaintiff's rights, a long delay in seeking relief indicates that speedy action is

---

[1] As stated in plaintiffs' Compliant, Monaghan is the founder of both Ave Maria University and Legatus. Compl. ¶¶ 39, 40.

not required.") (quotations omitted); *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (denying preliminary injunctive relief and noting that a delay of forty-four days after final regulations were issued was "inexcusable"). Any "emergency" now, is entirely of plaintiffs' own creation.

Turning to the merits, plaintiffs' challenge rests largely on the theory that a for-profit, secular corporation engaged in property management can exercise religion and thereby avoid the reach of laws designed to regulate commercial activity. This cannot be. Indeed, the Supreme Court has recognized that, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *United States v. Lee*, 455 U.S. 252, 261 (1982). Nor can the owner of a for-profit, secular corporation eliminate the legal separation provided by the corporate form, which the owner has chosen because it benefits him, to impose his personal religious beliefs on the corporate entity's employees. To hold otherwise would permit for-profit, secular companies and their owners to become laws unto themselves. Because there are an infinite variety of alleged religious beliefs, such companies and their owners could claim countless exemptions from an untold number of general commercial laws designed to protect against unfair discrimination in the workplace and to protect the health and well-being of individual employees and their families. Such a system would not only be unworkable, it would also cripple the government's ability to solve national problems through laws of general application. This Court, therefore, should reject plaintiffs' effort to bring about an unprecedented expansion of constitutional and statutory free exercise rights.

For these reasons and others, plaintiffs' motion for a TRO should be denied because plaintiffs are not likely to succeed on the merits of their claims. With respect to plaintiffs' Religious Freedom Restoration Act ("RFRA") claim, neither of the plaintiffs can show, as each must, that the regulations impose a substantial burden on their religious exercise. Domino's Farms is a for-profit, secular employer, and a secular entity—by definition—does not exercise

religion. Indeed, the first court to directly address this question held—in the course of denying a similar request for preliminary injunctive relief—that "secular, for-profit corporations[] do not have free exercise rights." *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1296 (W.D. Okla. 2012), *emergency motion for stay pending appeal denied*, No. 12-6294, slip op. (10th Cir. Dec. 20, 2012), *application for injunction pending appellate review docketed*, No. 12A644 (Dec. 21, 2012); *see also Korte v. U.S. Dep't of Health & Human Servs.*, No. 12-cv-01072-MJR, 2012 WL 6553996, at *6 (S.D. Ill. Dec. 14, 2012), *appeal docketed*, No. 12-3841 (7th Cir. Dec. 18, 2012) (observing that "the exercise of religion [i]s a purely personal guarantee that cannot be extended to corporations" (quotation omitted)).

The allegations of Monaghan of a substantial burden on his own individual religious exercise fare no better, as the regulations that purportedly impose such a burden apply only to certain group health plans and health insurance issuers. Monaghan himself is neither. It is well established that a corporation and its owner are wholly separate entities, and the Court should not permit Monaghan to eliminate that legal separation to impose his personal religious beliefs on the corporate entity's group health plan or its employees. Only the corporation is subject to the challenged regulations. In part for that reason, the *Hobby Lobby*, *Korte*, and *Autocam* courts found the owners and officers of a corporation had not shown a substantial burden on their individual religious exercise. *Hobby Lobby*, 870 F. Supp. 2d at 1294; *Korte*, 2012 WL 6553996, at *9-11; *Autocam*, slip op. at 11-13. Monaghan cannot use the corporate form alternatively as a shield and a sword, depending on what suits him in any given circumstance.

Furthermore, as the Tenth Circuit recently recognized, the regulations do not substantially burden the companies' or their owners' exercise of religion because any burden caused by the regulations is simply too attenuated to qualify as a *substantial* burden. *See Hobby Lobby*, Order at 7; *see also O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-CV-476(CEJ), 2012 WL 4481208, at *5-7 (E.D. Mo. Sept. 28, 2012) (dismissing identical claim for this reason), *appeal docketed*, No. 12-3357 (8th Cir. Oct. 4, 2012); *Hobby Lobby*, 870 F. Supp. 2d at 1293-96; *Korte*, 2012 WL 6553996, at *10-11; *Autocam*, slip op. at 11. 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. Plaintiffs remain free to advocate against their employees' use of contraceptive services (or any other services). Ultimately, an employee's health care choices remain those of the employee, not of Domino's Farms.

Finally, even if the challenged regulations were deemed to substantially burden either plaintiff's religious exercise, the regulations would not violate RFRA because they are narrowly tailored to serve two compelling governmental interests: improving the health of women and children, and equalizing the provision of preventive care for women and men so that women who choose to can be a part of the workforce on an equal playing field with men.

Plaintiffs' First Amendment claims are equally meritless. The Free Exercise Clause does not prohibit a law that is neutral and generally applicable, even if the law prescribes conduct that an individual's religion proscribes. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). The preventive services coverage regulations fall within this rubric because they do not target, or selectively burden, religiously motivated conduct. The regulations apply to all non-exempt, non-grandfathered plans, not just those of employers with a religious affiliation. Indeed, all of the courts that have addressed Free Exercise challenges to these regulations—*Hobby Lobby*, 870 F. Supp. 2d at 1287-90; *O'Brien*, 2012 WL 4481208, at *7-9; *Korte*, 2012 WL 6553996, at *8; and *Autocam*, slip op. at 9, 14-15—concluded as much. Nor do the regulations violate plaintiffs' free speech or free association rights. The regulations compel conduct, not speech. They do not require plaintiffs to say anything; nor do they prohibit plaintiffs from expressing to company employees or the public their views in opposition to the use of contraceptive services. And the regulations do not interfere in any way with the composition of the company's workforce. For these reasons, the *O'Brien* and *Autocam* courts dismissed free exercise and free speech challenges identical to those raised here, *O'Brien*, 2012 WL 4481208, at *7-13; *Autocam*, slip op. at 7-9, 14-15, and the highest courts of both New York and California

have upheld similar state laws against similar First Amendment challenges, *see Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 461 (N.Y. 2006); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 74 n.3 (Cal. 2004).

Finally, plaintiffs cannot establish irreparable harm, and entering an injunction would injure the government and the public. Absent a showing of likelihood of success on the merits (which plaintiffs cannot make), plaintiffs cannot establish that they will be irreparably harmed if the Court does not enjoin the application of the regulations to Domino's Farms. In contrast, the employees of Domino's Farms would be denied the benefits of receiving a health plan through their employer that covers the full range of recommended contraceptive services. This would perpetuate the public health and gender equality problems the government tried to solve through promulgation of the challenged regulations.

## BACKGROUND

### I. STATUTORY AND REGULATORY BACKGROUND

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

The government issued interim final regulations implementing the preventive services coverage provision on July 19, 2010. 75 Fed. Reg. 41,726. Those regulations provide, among other things, that a group health plan or health insurance issuer offering non-grandfathered health coverage must provide coverage for newly recommended preventive services, without cost-sharing, for plan years that begin on or after the date that is one year after the date on which the new recommendation is issued. 26 C.F.R. § 54.9815-2713T(b)(1); 29 C.F.R. § 2590.715-2713(b)(1); 45 C.F.R. § 147.130(b)(1). Because there were no existing HRSA guidelines relating to preventive care and screening for women, HHS tasked the Institute of Medicine ("IOM") with developing recommendations to implement the requirement to provide preventive services for women. IOM REP. at 2. After an extensive science-based review, IOM recommended that HRSA guidelines include, as relevant here, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id.* at 11. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices (IUDs). FDA, Birth Control Guide, *available at* http://www.fda.gov/ForConsumers/ByAudience/ForWomen/ ucm118465.htm. IOM determined that coverage, without cost-sharing, for these services is necessary to increase access, and thereby reduce unintended pregnancies (and the negative health outcomes that disproportionately accompany such pregnancies) and promote healthy birth spacing. IOM REP. at 102-03.

On August 1, 2011, HRSA adopted IOM's recommendations, subject to an exemption relating to certain religious employers authorized by an amendment to the interim final regulations. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), *available at* http://www.hrsa.gov/womensguidelines/. The amendment to the interim final regulations, issued on the same day, authorized HRSA to exempt group health plans established or maintained by certain religious employers (and associated group health insurance coverage) from any requirement to cover contraceptive services under

HRSA's guidelines. 76 Fed. Reg. 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A).[2] The religious employer exemption was modeled after the religious accommodation used in multiple states that had already required health insurance issuers to provide coverage for contraception. 76 Fed. Reg. at 46,623.

In February 2012, the government adopted in final regulations the definition of religious employer contained in the amended interim final regulations while also establishing a temporary enforcement safe harbor for non-grandfathered group health plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage (and any associated group health insurance coverage). 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012). During the safe harbor period, the government intends to amend the preventive services coverage regulations to further accommodate non-exempt, non-grandfathered religious organizations' religious objections to covering contraceptive services. 77 Fed. Reg. at 8728. The government began the process of further amending the regulations on March 21, 2012, when it published an Advance Notice of Proposed Rulemaking ("ANPRM") in the Federal Register. 77 Fed. Reg. 16,501.

## II. CURRENT PROCEEDINGS

Plaintiffs brought this action to challenge the lawfulness of the preventive services coverage regulations to the extent that they require the health coverage Domino's Farms makes available to its employees to cover certain recommended contraceptive services. On December 14, 2012—sixteen months after the contraceptive coverage requirement was established—plaintiffs filed suit; they moved for a TRO on December 21 claiming they would suffer irreparable harm if the preventive services coverage regulations were not enjoined as to them. In support of their motion, plaintiffs rely solely on their RFRA, Free Exercise, and Free Speech claims. *See* Pls.' Br. in Supp. of Mot. for TRO, Dec. 21, 2012 ("Pls.' Br."), ECF No. 8.

[2] To qualify, an employer must meet all of the following criteria: (1) the inculcation of religious values is the purpose of the organization; (2) the organization primarily employs persons who share the religious tenets of the organization; (3) the organization serves primarily persons who share the religious tenets of the organization; and (4) the organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended. 45 C.F.R. § 147.130(a)(1)(iv)(B).

## STANDARD OF REVIEW

A motion for a TRO is evaluated under the same standards as a motion for a preliminary injunction. *See N.E. Ohio Coalition for Homeless v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). It 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 [TRO] must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20; *Obama for America v. Husted*, Nos. 12-4055, 12-4076, 2012 WL 4753397, at *4, 12 (6th Cir. Oct. 5, 2012).

## ARGUMENT

### I. PLAINTIFFS CANNOT SHOW LIKELIHOOD OF SUCCESS ON THE MERITS

#### A. Plaintiffs' Religious Freedom Restoration Act Claim Lacks Merit

##### 1. The preventive services coverage regulations do not substantially burden any "exercise of religion" by for-profit, secular companies and their owners

Congress enacted RFRA, Pub. L. No. 103-141, 107 Stat. 144 (codified at 42 U.S.C. § 2000bb-1 *et seq.*), in order to reinstate the pre-*Smith* compelling interest test for evaluating legislation that substantially burdens the free exercise of religion. 42 U.S.C. § 200bb-1(b). Under RFRA, the federal government generally may not "substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability.'" *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424 (2006) (quoting 42 U.S.C. § 2000bb-1(a)). But the government may substantially burden the exercise of religion if it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

Here, plaintiffs have not shown that the regulations substantially burden their religious exercise. Plaintiffs claim is premised on the assumption that Domino's Farms can "exercise[s] . . . religion" with the meaning of RFRA, 42 U.S.C. § 2000bb-1(b). But that position cannot be reconciled with Domino's Farm's status as a secular company. The terms "religious" and

"secular" are antonyms; a "secular" entity is defined as "not overtly or specifically religious." *See Merriam-Webster's Collegiate Dictionary* 1123 (11th ed. 2003). Thus, by definition, a secular company does not engage in any "exercise of religion," 42 U.S.C. § 2000bb-1(a), as required by RFRA. *See Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002); *Hobby Lobby*, 870 F. Supp. 2d at 1291-92; *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 83 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003).

Domino's Farms is plainly secular. The company's pursuits are not religious; it is a for-profit property management corporation. Compl. ¶¶ 24, 70. The company was not organized for carrying out a religious purpose; its Articles of Incorporation make no reference at all to any religious purpose. *See* Domino's Farms Corp., Articles of Incorporation, *available at* http://www.dleg.state.mi.us/bcs_corp/dt_corp.asp?id_nbr=312755&name_entity=DOMINO'S%20FARMS%20CORPORATION. Although Domino's Farms has an on-site chapel, the company does not claim to be affiliated with a formally religious entity, such as a church, or that any such entity participates in the management of the company. Nor does the company assert that it employs persons of a particular faith. The government is aware of no case in which a secular, for-profit employer like Domino's Farms prevailed on a RFRA claim.

Because Domino's Farms is a secular employer, it is not entitled to the protections of the Free Exercise Clause or RFRA. This is because, although the First Amendment freedoms of speech and association are "enjoyed by religious and secular groups alike," the Free Exercise Clause "gives special solicitude to the rights of *religious* organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (emphasis added). The cases are replete with statements like this. *See, e.g.*, *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (the Supreme Court's precedent "radiates . . . a spirit of freedom for *religious* organizations, an independence from secular control or manipulation") (emphasis added); *Werft v. Desert Sw. Annual Conference*, 377 F.3d 1099, 1102 (9th Cir. 2004) ("The Free Exercise Clause protects . . . *religious* organizations . . . .") (emphasis added); *Anselmo v. Cnty. of Shasta*, No. CIV. 2:12-361 WBS EFB, 2012 WL

2090437, at *13 (E.D. Cal. 2012) ("Although corporations and limited partnerships have broad rights, the court has been unable to find a single [Religious Land Use and Institutionalized Persons Act ("RLUIPA")] case protecting the religious exercise rights of a non-religious organization such as Seven Hills."). Because RFRA incorporates Free Exercise jurisprudence, the same logic applies.

Indeed, no court has ever held that a for-profit, secular corporation is a "religious corporation" for purposes of federal law. Thus, secular companies cannot lawfully discriminate on the basis of religion in hiring or firing their employees or otherwise establishing the terms and conditions of their employment. Title VII of the Civil Rights Act generally prohibits religious discrimination in the workplace. *See* 42 U.S.C. § 2000e-2(a). But that bar does not apply to "a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [a corporation] of its activities." *Id.* § 2000e-1(a). It is clear that Domino's Farms does not qualify as a "religious corporation"; it is for-profit, it engages in property management, and it alleges no religious purpose or affiliation. *See LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217, 226 (3d Cir. 2007).

It would be extraordinary to conclude that Domino's Farms is not a "religious corporation" under Title VII (and it clearly is not) and thus cannot discriminate in employment on the basis of religion, 42 U.S.C. § 2000e-1(a), but nonetheless "exercise[s] . . . religion" within the meaning of RFRA, *id.* § 2000bb-1(b).[3] Such a conclusion would allow a secular company to impose its owner's religious beliefs on its employees in a way that denies those employees the protection of general laws designed to protect their health and well-being. A host of laws and regulations would be subject to attack. Moreover, any secular company would have precisely the same right as a religious organization to, for example, require that its employees "observe the [company owner's] standards in such matters as regular church attendance, tithing, and

[3] Indeed, such a conclusion would undermine Congress's decision to limit the exemption in Title VII to religious organizations; any company that does not qualify for Title VII's exemption could simply sue under RFRA for an exemption from Title VII's prohibition against discrimination in employment.

abstinence from coffee, tea, alcohol, and tobacco." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 330 n.4 (1987). These consequences underscore why the Free Exercise Clause, RFRA, and Title VII distinguish between secular and religious organizations, with only the latter receiving special protection.[4]

It is significant that Domino's Farms elected to organize itself as a secular, for-profit entity and to enter commercial activity. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261; *see also McClure v. Sports & Health Club*, 370 N.W.2d 844, 853 (Minn. 1985) ("By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs."). Having chosen this path, the corporation may not impose its owner's personal religious beliefs on its employees (some of whom may not share the owner's beliefs) by refusing to cover certain contraceptive services. *Lee*, 455 U.S. at 261 ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.").[5]

The challenged regulations also do not substantially burden Monaghan's religious exercise. By their terms, the regulations apply to group health plans and health insurance issuers. *See, e.g.*, 42 U.S.C. § 300gg-91(a)(1); 45 C.F.R. § 147.130. Monaghan is neither. Nonetheless, Monaghan claims that the regulations substantially burden *his* religious exercise because the regulations require the group health plan sponsored by his for-profit secular *company* to provide health insurance that includes certain contraceptive coverage. As the courts in *Hobby Lobby*, *Korte*, and *Autocam* explained, however, a plaintiff cannot establish a substantial burden on his

---

[4] *Sherbert v. Verner*, 374 U.S. 398 (1963), *Wisconsin v. Yoder*, 406 U.S. 205 (1972), upon which plaintiffs rely, Pls.' Br. at 11, involved *individual* plaintiffs, not companies.

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

religious exercise by invoking this type of trickle-down theory; to constitute a substantial burden within the meaning of RFRA, the burden must be imposed on the plaintiff himself. *See Hobby Lobby,* 870 F. Supp. 2d at 1293-96; *Korte*, 2012 WL 6553996, at *9-11; *Autocam*, slip op. at 11-12. "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Indeed, "[i]n our modern regulatory state, virtually all legislation (including neutral laws of general applicability) imposes an incidental burden at some level by placing indirect costs on an individual's activity. Recognizing this . . . [t]he federal government . . . ha[s] identified a substantiality threshold as the tipping point for requiring heightened justifications for governmental action." *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 262 (3d Cir. 2008) (Scirica, C.J., concurring); *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007) ("In the 'Free Exercise' context, the Supreme Court has made clear that the 'substantial burden' hurdle is high.").

Here, any burden on Monaghan's religious exercise results from obligations the regulations impose on a legally separate, secular corporation.[6] This type of attenuated burden is not cognizable under RFRA. Indeed, cases that find a substantial burden uniformly involve a direct burden on the plaintiff rather than a burden imposed on another entity. *See, e.g.*, *Lukumi*, 508 U.S. at 524. Not so here, where the regulations apply to the group health plan sponsored by Domino's Farms, not Monaghan himself.

Monaghan's theory boils down to the claim that what's done to the company (or group health plans sponsored by the company) is also done to its owner. But, as a legal matter, that is simply not so. Monaghan has chosen to enter into commerce and elected to do so by establishing a for-profit corporation—a "creature of statute" that is its "own 'person' under Michigan law, []

[6] The attenuation is in fact twice removed. A group health plan is a legally separate entity from the company that sponsors it. 29 U.S.C. § 1132(d). And, as explained below, Domino's Farms is a legally separate entity from Monaghan.

distinct and separate from [its] owners." *Handley v. Wyandotte Chems. Corp.*, 325 N.W.2d 447, 449 (Mich. Ct. App. 1982). Indeed, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). In short, "[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." *Id*. Monaghan should not be permitted to eliminate that legal separation only when it suits him to impose his personal religious beliefs on Domino's Farms's group health plan or its employees.

A contrary view would expand RFRA's scope in an extraordinary way. All corporations act through human agency; but that cannot mean that any legal obligation imposed on a corporation is also the obligation of the owner or that the owner's and corporation's rights and responsibilities are coextensive. *See, e.g.*, *Hobby Lobby*, 870 F. Supp. 2d at 1294; *Autocam*, slip op. at 12.. If an owner's religious beliefs were automatically imputed to the company, any secular company with a religious owner or shareholder (or with one or more, but not all, religious owners or shareholders) could impose its owner's or shareholder's beliefs on the company's employees in a way that deprives those employees of legal rights they would otherwise have, such as by discriminating against the company's employees on the basis of religion in establishing the terms and conditions of employment notwithstanding the limited religious exemption that Congress established under Title VII. This result would constitute a wholesale evasion of the rule that a company must be a "religious organization" to assert free exercise rights, *Hosanna-Tabor*, 132 S. Ct. at 706, or a "religious corporation" to permissibly discriminate on the basis of religion in employment, 42 U.S.C. § 2000e-1(a). [7]

[7] The court in *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *6 (E.D. Mich. Oct. 31, 2012), declined to decide whether a for-profit corporation can assert RFRA rights. Further, the court "assume[d]" that the regulations substantially burdened the owner's exercise of religion merely because the plaintiffs "so claim[ed]." *Id.* at *6. But this approach reads the substantial burden requirement right out of RFRA, which a court may not do. In any event, the court concluded that the plaintiffs had not shown a likelihood of success on the merits. *Id.* at *13.

*(continued on next page…)*

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

Although the regulations do not require Domino's Farms or Monaghan to provide contraceptive services directly, plaintiffs' complaint appears to be that, through the company's group health plan and the benefits it provides to employees, plaintiffs will facilitate conduct (the use of contraceptives) that they find objectionable. But this complaint has no limits. A company provides numerous benefits, including a salary, to its employees and by doing so in some sense facilitates whatever use its employees make of those benefits. But the owner has no right to control the choices of his company's employees, who may not share his religious beliefs, when making use of their benefits.

Indeed, in denying the plaintiffs' motion for emergency relief pending appeal, the Tenth Circuit in *Hobby Lobby* concluded as much. The Tenth Circuit agreed with the district court that "the particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients . . . subsidize *someone else's* participation in an activity that is condemned by plaintiff[s'] religion." Order at 7 (quoting *Hobby Lobby Stores*, 870 F. Supp. 2d at 1294. The

---

The court in *Tyndale v. Sebelius*, No. 12-1635(RBW), 2012 WL 5817323 (D.D.C. Nov. 16, 2012), did not address this argument either, but rather, erroneously equated the analysis of standing under Article III with RFRA's substantial burden requirement. *Id.* at *7-8. The existence of a corporation's *standing* does not mean that a requirement, which is not imposed on the corporation's owners at all, amounts to a *substantial burden* on the owners' exercise of religion. *Compare United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973) (an "identifiable trifle" is sufficient to establish injury in fact), *with Hobby Lobby*, 870 F. Supp. 2d at 1294-95 (discussing the meaning of "substantial burden"). For similar reasons, *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), and *EEOC v. Townley Eng'g & Mfg. Co*, 859 F.2d 610 (9th Cir. 1988), on which the *Tyndale* court relied—are not persuasive. Both cases addressed standing; neither had anything to say about whether an alleged burden on a corporation could also be a *substantial* burden on its owners. The court in *Tyndale* also erred by treating the company and its owners as "alter-ego[s] . . . for religious purposes." 2012 WL 5817323, at *8. A company and its owners cannot be treated as alter-egos for some purposes and not others; if the veil is pierced, it is pierced for all purposes. *See, e.g.*, *Nautilus Ins. Co. v. Reuter*, 537 F.3d 733, 738 (7th Cir. 2008); *Korte*, 2012 WL 6553996, at *11.

For similar reasons, the rulings in *Newland v. Sebelius*, No. 12-cv-1123, 2012 WL 3069154 (D. Colo. July 27, 2012), *appeal docketed*, No. 12-1380 (10th Cir. Sept. 26, 2012), and *American Pulverizer v. U.S. Dep't of Health & Human Servs*, No. 12-3459, slip op. (W.D. Mo. Dec. 20, 2012), do not help plaintiffs. In both cases, the courts explicitly declined to address defendants' argument that a for-profit, secular company cannot exercise religion within the meaning of RFRA, concluding that the question needed "more deliberate investigation." *Newland*, 2012 WL 3069154, at *6; *American Pulverizer*, slip op. at 8. For the reasons explained above, *see supra* pp. 8-14, this Court cannot enter a preliminary injunction without addressing this issue. Moreover, defendants believe the *Newland* and *American Pulverizer* courts' compelling interest and least restrictive means analyses are flawed for the reasons explained below.

court concluded that there was not a substantial likelihood that it would find such a burden to be "substantial," as to do so would "extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship." *Id.* Moreover, the court held that this was so as to both the corporate plaintiffs and the individual owner plaintiffs, finding that "their common failure to demonstrate a substantial likelihood of success on the RFRA prima facie case suffices to dispose of the motion." *Id.* at 6 n.4.

The Tenth Circuit's reasoning is similar to the district courts' analyses *O'Brien*, *Hobby Lobby*, *Korte*, and *Autocam*.[8] For example, assuming but not deciding, that the for-profit company in *O'Brien* could exercise religion, the court nevertheless determined that any burden on that exercise (as well as the owner's exercise of religion) is too attenuated to state a claim for relief. 2012 WL 4481208, at *5-7. The court explained that "the plain meaning of 'substantial,'" as used in RFRA, "suggests that the burden on religious exercise must be more than insignificant or remote." *Id*. at *5; *see also Hobby Lobby*, 870 F. Supp. 2d at 1294; *Korte*, 2012 WL 6553996, at *9-11; *Autocam*, slip op. at 10-12. The court noted that the regulations have no more of an impact on the plaintiffs' beliefs than the company's payment of salaries to its employees, which those employees can also use to purchase contraceptives. *Id.* at *7. Indeed, the court observed, "if the financial support of which plaintiffs complain was in fact substantially burdensome, secular companies owned by individuals objecting on religious grounds to all modern medical care could no longer be required to provide health care to employees." *Id.* at *6. In short, because the preventive services coverage regulations "are several degrees removed from imposing a substantial burden on [Domino's Farms], and one further degree removed from imposing a substantial burden on [Monaghan]," *id.* at *7, plaintiffs cannot show a likelihood of success on the merits, even assuming a for-profit secular company like Domino's Farms can exercise religion.

[8] Although a motions panel of the Eighth Circuit issued a stay pending appeal in *O'Brien*, the panel gave no explanation whatsoever for its conclusions. Motions panel decision issued without explanation, like the one in *O'Brien*, are hardly persuasive authority. *See, e.g.*, *Gonzalez v. Arizona*, 485 F.3d 1041, 1046 (9th Cir. 2007); *Korte*, 2012 WL 6553996, at *11 n.16.

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

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

Even if plaintiffs were able to demonstrate a substantial burden on their religious exercise, they would not prevail because the challenged regulations are justified by two compelling governmental interests, and are the least restrictive means to achieve those interests. The promotion of public health is unquestionably a compelling governmental interest. *See Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011); *Buchwald v. Univ. of N.M.*, 159 F.3d 487, 498 (10th Cir. 1998). And, as explained in the interim final regulations, the primary predicted benefit of the regulations is that "individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of disease." 75 Fed. Reg. at 41,733; *see also* 77 Fed. Reg. at 8728. Indeed, "[b]y expanding coverage and eliminating cost sharing for recommended preventive services, these interim final regulations could be expected to increase access to and utilization of these services, which are not used at optimal levels today." 75 Fed. Reg. at 41,733. Increased access to contraceptive services is a key part of these predicted health outcomes, as a lack of contraceptive use has proven to have negative health consequences for both women and a developing fetus. *See* IOM REP. at 20, 103-04.

Closely tied to this interest is a related, but separate, compelling interest that is furthered by the preventive services coverage regulations. As the Supreme Court explained in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), there is a fundamental "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." *Id.* at 626. As such, "[a]ssuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests." *Id.* By including in the ACA gender-specific preventive health services for women, Congress made clear that the goals and benefits of effective preventive health care apply with equal force to women, who might otherwise be excluded from such benefits if their unique health care burdens and responsibilities were not taken into account

in the ACA. As explained by members of Congress, "women have different health needs than men, and these needs often generate additional costs. Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men." *See* 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009). IOM REP. at 19. These costs result in women often forgoing preventive care. *See, e.g.*, 155 Cong. Rec. at S12274. Accordingly, this disproportionate burden on women creates "financial barriers . . . that prevent women from achieving health and well-being for themselves and their families." IOM REP. at 20. Thus, Congress's goal was to equalize the provision of health care for women and men in the area of preventive care, including the provision of family planning services for women. *See* 155 Cong. Rec. at S12271.

Plaintiffs miss the point when they attempt to minimize the magnitude of the government's interests by arguing that contraception is widely available and even subsidized for certain individuals at lower income levels. *See* Pls.' Br. at 13-14. Although a majority of employers cover FDA-approved contraceptives, *see* IOM REP. at 109, many women forgo preventive services, including certain reproductive health care, because of cost-sharing imposed by their health plans, *see id.* at 19-20, 109. The challenged regulations eliminate that cost-sharing. 77 Fed. Reg. at 8728. And, of course, the government's interest in ensuring access to contraceptive services is *particularly* compelling for women employed by companies not currently offering such coverage, like Domino's Farms.

Each woman who wishes to use contraceptives and who works for Domino's Farms or a similarly situated company (and each woman who is a covered spouse or dependent of an employee) is significantly disadvantaged when her company chooses to provide a plan that fails to cover such services without cost-sharing. As revealed by the IOM Report, those female employees (and covered spouses and dependents) would be, as a whole, less likely to use contraceptive services in light of the financial barriers to obtaining them and would then be at risk of unhealthier outcomes, both for the women themselves and their potential newborn children. IOM REP. at 102-03. They would also be at a competitive disadvantage in the workforce due to their lost productivity. These harms would befall female employees (and

covered spouses and dependents) who do not share their employer's religious beliefs and might not have been aware of those beliefs when they joined the ostensibly secular company. Plaintiffs' desire for Domino's Farms not to make available a health plan that permits such individuals to exercise their own choice as to contraceptive use must yield to the Government's compelling interest in avoiding the adverse and unfair consequences. *See Lee*, 455 U.S. at 261 (religious exemption is improper if it "operates to impose the employer's religious faith on the employees").

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

The preventive services coverage regulations, moreover, are the least restrictive means of furthering the underlying interests. When determining whether a particular regulatory scheme is "least restrictive," the appropriate inquiry is whether the individual or organization with religious objections, and those similarly situated, can be exempted from the scheme—or whether the scheme can otherwise be modified—without undermining the government's compelling interest. *See, e.g.*, *S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1206 (6th Cir. 1990) (describing the least restrictive means test as "the extent to which accommodation of the defendant would impede the state's objectives"); *see also, e.g.*, *United States v. Wilgus*, 638 F.3d 1274, 1289-95 (10th Cir. 2011); *New Life Baptist Church Acad. v. Town of E. Longmeadow*, 885 F.2d 940, 946 (1st Cir. 1989) (Breyer, J.). The government is not required "to do the impossible—refute each and every conceivable alternative regulation scheme." *Wilgus*, 638 F.3d at 1289. The government need only "refute the alternative schemes offered by the challenger." *Id.*

Plaintiffs do not explain how they and similarly situated entities could be exempted from the regulations without significant damage to the governmental interests in public health and gender equality; and they do not offer any less restrictive means, except perhaps vague suggestions that the government could simply provide contraceptive services directly. *See* Pls.' Br. at 15. Instead, plaintiffs contend that the regulations cannot be the least restrictive means of achieving the government's compelling interests when defendants "have carved out a number of exemptions for secular purposes." Pls.' Br. at 15.

But, contrary to plaintiffs' assertions, this is not a case where underinclusive enforcement of a law suggests that the government's "supposedly vital interest" is not really compelling. *Lukumi*, 508 U.S. at 546-47. Nor do the "exemptions" mentioned by plaintiffs change the fact that the regulations are the least restrictive means of advancing the government's compelling interests. First, 26 U.S.C. § 4980H9(c)(2) does *not* exempt small employers from the preventive services coverage regulations. *See* 42 U.S.C. § 300gg-13(a); 76 Fed. Reg. at 46,622 n.1. Instead, it excludes employers with fewer than fifty full-time equivalent employees from the employer responsibility provision, meaning that, starting in 2014, such employers are not subject to assessable payments if they do not provide health coverage to their full-time employees and certain other criteria are met. *See* 26 U.S.C. § 4980H(c)(2). Employees of these small businesses can get their health insurance through other ACA provisions, primarily premium tax credits and health insurance Exchanges, and the coverage they receive will include all preventive services, including contraception. In addition, small businesses that choose to offer non-grandfathered health coverage to their employees are required to provide coverage for recommended preventive services, including contraceptive services, without cost-sharing. And there is reason to believe that many small employers will continue to offer health coverage to their employees, because the ACA, among other things, provides for tax incentives for small businesses to encourage the purchase of health insurance. *See id.* § 45R

Second, the grandfathering of certain health plans with respect to certain provisions of the ACA is not specifically limited to the preventive services coverage regulations. *See* 42 U.S.C. § 18011; 45 C.F.R. § 147.140. In fact, the effect of grandfathering is not really a permanent "exemption," but rather, over the long term, a transition in the marketplace with respect to several provisions of the ACA, including the preventive services coverage provision. The grandfathering provision reflects Congress's attempts to balance competing interests—specifically, the interest in spreading the benefits of the ACA, including those provided by the preventive services coverage provision, and the interest in maintaining existing coverage and easing the transition into the new regulatory regime established by the ACA—in the context of a

complex statutory scheme. *See* 75 Fed. Reg. 34,538, 34,540, 34,546 (June 17, 2010). The incremental transition of the marketplace into the ACA administrative scheme does nothing to call into question the compelling interests furthered by the preventive services coverage regulations. Even under the grandfathering provision, it is projected that more group health plans will transition to the requirements under the regulations as time goes on. Defendants estimate that, as a practical matter, a majority of group health plans will lose their grandfather status by 2013. *See* 75 Fed. Reg. at 34,552. Thus, any purported damage to the compelling interests underlying the regulations will be quickly mitigated, which is in stark contrast to the *permanent* exemption from the regulations that plaintiffs seek. Plaintiffs would have this Court believe that an interest cannot truly be "compelling" unless Congress is willing to impose it on everyone all at once despite competing interests, but offers no support for such an untenable proposition. *See Legatus*, 2012 WL 5359630, at *9; *Korte*, 2012 WL 6553996, at *7.[9]

Finally, even in this Court were to consider plaintiffs' vague suggestions that the government could provide preventive services as a less restrictive means, it should reject them as entirely infeasible. Rather than suggesting modifications to the current employer-based system that Congress enacted, *see generally* H.R. Rep. No. 111-443, pt. II, at 984-86 (2010) (explaining why Congress chose to build on the employer-based system), plaintiffs would have the system turned upside-down to accommodate Monaghan's beliefs at enormous administrative and financial cost to the government. But just because plaintiffs can devise an entirely new legislative and administrative scheme does not make that scheme a feasible less restrictive means. *See Wilgus*, 638 F.3d at 1289; *New Life Baptist*, 885 F.2d at 946. In effect, plaintiffs want

[9] The third and last "exemption" mentioned by plaintiffs is "waivers for high grossing employers." Pls. Br. at 15. It is not clear what plaintiffs mean, but for purposes of discussion the government assumes that they are referring to the annual limits waiver program. *See* 42 U.S.C. § 300gg-11; 45 C.F.R. § 126. The annual limits provision of the ACA restricts annual dollar limits on essential health benefits provided by health insurance issuers and group health plans. *See id.* The Secretary of HHS had the authority to waive these restrictions for plans if compliance "would result in a significant decrease in access to benefits under the plan or health coverage." 45 C.F.R. § 147.126(d)(3). These waivers are not related to the preventive services coverage regulations, and those non-exempt, non-grandfathered plans that received annual limits waivers are still required to provide the required preventive services coverage.

the government "to subsidize private religious practices," *Catholic Charities of Sacramento*, 85 P.3d at 94, by expending significant resources to adopt an entirely new legislative or administrative scheme or fundamentally alter an existing one. But a proposed alternative scheme is not an adequate alternative—and thus not a viable less restrictive means to achieve the compelling interest—if it is not "feasible" or "plausible." *New Life Baptist*, 885 F.2d at 947. In determining whether a proposed alternative scheme is feasible, courts often consider the additional administrative and fiscal costs of the scheme. *See, e.g.*, *id.* at 947. Plaintiffs' alternatives would impose considerable costs and burdens and would otherwise be impractical.[10]

Nor would the proposed alternatives be equally effective in advancing the government's compelling interests. As discussed above, Congress determined that the best way to achieve the goals of the ACA, including expanding preventive services coverage, was to utilize the existing employer-based system. Plaintiffs' alternatives would require establishing entirely new government programs or fundamentally altering an existing one, and would almost certainly require women to take steps to find out about the availability of and sign up for the new benefit, thereby ensuring that fewer women would take advantage of it. Nor do plaintiffs offer suggestions as to how these programs could be integrated with the employer-based system or how women would obtain government-provided preventive services in practice.

**B. Plaintiffs' First Amendment Claims Are Meritless**

**1. The regulations do not violate the Free Exercise Clause**

For the reasons explained above, a for-profit, secular employers like Domino's Farms does not engage in any exercise of religion protected by the First Amendment. But even if it did, the regulations are neutral laws of general applicability and therefore do not violate the Free Exercise Clause. That was precisely the holding in *O'Brien*, *Hobby Lobby*, and *Korte*, as well as the highest courts of two states that addressed nearly identical free exercise challenges to similar

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

state laws. *See O'Brien*, 2012 WL 4481208, at *7-9; *Hobby Lobby*, 870 F. Supp. 2d at 1287-90; *Korte*, 2012 WL 6553996, at *6-8; *Diocese of Albany*, 859 N.E.2d at 468-69; *Catholic Charities of Sacramento*, 85 P.3d at 81-87.

A neutral and generally applicable law does not violate the Free Exercise Clause even if it prescribes conduct that an individual's religion proscribes or has the incidental effect of burdening a particular religious practice. *Smith*, 494 U.S. at 879. A law is neutral if it does not target religiously motivated conduct but rather has as its purpose something other than the disapproval of a particular religion, or of religion in general. *Lukumi*, 508 U.S. at 533, 545. A law is generally applicable if it does not selectively impose burdens only on conduct motivated by religious belief. *Id*. at 535-37, 545. The regulations at issue here are neutral and generally applicable, as they do not target religiously motivated conduct; their purpose is to promote public health and gender equality by increasing access to and utilization of recommended preventive services, including those for women. *See Hobby Lobby*, 870 F. Supp. 2d at 1289-90; *O'Brien*, 2012 WL 4481208, at *7; *Korte*, 2012 WL 6553996, at *7-8. The regulations reflect expert recommendations about the medical need for the services, without regard to any religious motivations for or against such services. As the IOM Report shows, this purpose is entirely secular in nature. *Id*. at 2-4, 7-8.

Plaintiffs maintain that the regulations are not generally applicable because they contain certain categorical exceptions. *See* Pls.' Br. 18. But the existence of "express exceptions for objectively defined categories of [entities]," like the ones plaintiffs reference, does not negate a law's general applicability. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004). None of the "exemptions" to the regulations cited by plaintiffs interferes with the regulations' general applicability. For example, the exception for grandfathered plans is available on equal terms to all employers, whether religious or secular. *See O'Brien*, 2012 WL 4481208, at *8; *Hobby Lobby*, 870 F. Supp. 2d at 1290; *see also Ungar v. New York City Hous. Auth.*, 363 F. App'x 53, 56 (2d Cir. 2010); *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008). Plaintiffs also maintain that defendants have created a system of individualized exemptions. Pls.' Br. at 20-21. To

warrant strict scrutiny, however, a system of individualized exemptions must be one that enables the government to make a subjective, case-by-case inquiry of the reasons for the relevant conduct, and the government must utilize that system to grant exemptions for secular reasons but not for religious reasons. *Smith*, 494 U.S. 884. Plaintiffs point to no such system with respect to the challenged regulations, and there is none.[11] Because the regulations are neutral laws of general applicability, plaintiffs' free exercise claim is without merit.[12]

#### 2. The regulations do not violate the right to free speech or free association

Plaintiffs' free speech claim fares no better. The right to freedom of speech "prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 61 (2006). But the preventive services coverage regulations do not require plaintiffs—or any other person, employer, or entity—to say anything. Plaintiffs' assertion that the regulations require Domino's Farms to provide coverage of education and counseling "against" their religious beliefs, Pls.' Mem. at 20, demonstrates a fundamental misunderstanding of the regulations' requirements. The regulations do not purport to regulate the content of the education or counseling provided—that is between the patient and her health care provider. *See O'Brien*, 2012 WL 4481208, at *12. Taken to its conclusion, plaintiffs' theory would preclude virtually all government efforts to regulate health coverage, as medical visits almost invariably involve some communication between the patient and a health care provider, and there may be many instances in which the entity providing the coverage disagrees with the content of this communication.

The regulations also do not limit what plaintiffs may say. Plaintiffs remain free under the regulations to express whatever views they may have on the use of contraceptive services (or any other health care services) as well as their views on the regulations' requirement that certain

[11] Plaintiffs misunderstand the regulations when they assert that HRSA has "unbridled discretion" to grant or deny an exemption to the plan of an employer that meets the religious employer exemption criteria. Pls.' Br. at 18. Any plan that meets the criteria is not required to cover contraceptive services. *See* HRSA Guidelines.

[12] Even if the regulations were not neutral and generally applicable, they would not violate the Free Exercise Clause because they satisfy strict scrutiny. *See supra* pp. 15-21.

group health plans and health insurance issuers cover certain contraceptive services. Indeed, plaintiffs may encourage Domino's Farms's employees not to use contraceptive services. The regulations, thus, regulate conduct, not speech. *See FAIR*, 547 U.S. at 60-62.

Moreover, the conduct required by the regulations is not "inherently expressive," such that it is entitled to First Amendment protection. *Id*. at 66. An employer that provides a health plan that covers contraceptive services, along with numerous other medical items and services, because it is required by law to do so is not engaged in the sort of conduct the Supreme Court has recognized as inherently expressive. *Compare id.* at 65-66 (making space for military recruiters on campus is not conduct that indicates colleges' support for, or sponsorship of, recruiters' message), *with Texas v. Johnson*, 491 U.S. 397, 406 (1989) (flag burning is expressive conduct); *see also Catholic Charities of Sacramento*, 85 P.3d at 89 ("a law regulating health care benefits is not speech"); *Diocese of Albany*, 859 N.E.2d at 465. Because the regulations do not compel any speech or expressive conduct, they do not violate the Free Speech Clause. *See O'Brien*, 2012 WL 4481208, at *11-13 (dismissing identical claim).

Plaintiffs' expressive association claim is similarly flawed. The regulations do not interfere in any way with the composition of the company's workforce. Nor do they force Domino's Farms to hire employees it does not wish to hire (although Title VII prohibits the company from religious discrimination in hiring because it is not a religious corporation). And plaintiffs are free to associate to voice their disapproval of the use of contraception and the regulations. If the statute at issue in *FAIR*, which required law schools to allow military recruiters on campus if other recruiters were allowed on campus, did not violate the law schools' right to expressive association, 547 U.S. at 68-70, neither do the preventive services coverage regulations violate plaintiffs' right.

### C. PLAINTIFFS CANNOT ESTABLISH IRREPARABLE HARM, AND AN INJUNCTION WOULD INJURE THE GOVERNMENT AND THE PUBLIC

Although "[t]he loss of First Amendment freedoms," or a violation of RFRA, "for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S.

347, 373 (1976), in this case, plaintiffs have not shown that the challenged regulations violate their First Amendment or RFRA rights, so there has been no "loss of First Amendment freedoms" for any period of time. *Id.* In this respect, as plaintiffs recognize, Pls.' Br. at 9, the merits and irreparable injury prongs of the analysis merge together, and plaintiffs cannot show irreparable injury without also showing a likelihood of success on the merits, which they cannot do. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012). In addition, as explained above, plaintiffs' egregious delay further counsels against a finding of irreparable harm. *See Autocam*, slip op. at 15; *Huron Mountain Club*, 2012 WL 3060146, at *14; *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975).[13]

On the other hand, issuing a preliminary injunctive would harm the government and the public. Enjoining the regulations as to a for-profit, secular corporation would undermine the government's ability to achieve Congress's goals of improving the health of women and children and equalizing the coverage of preventive services for women and men. It would also be contrary to the public interest to deny the employees of Domino's Farms, some of whom may not share Monaghan's religious beliefs, the benefits of the preventive services coverage regulations. Those employees should not be denied the benefits of receiving a health plan through their employer that covers contraceptive services. The female employees of Domino's Farms (and covered spouses and dependents) would have more difficulty accessing contraceptive services, placing them at greater risk of negative health consequences for themselves and their newborn children and putting them at a competitive disadvantage in the workforce. *See* IOM REP. at 20, 102-04; 77 Fed. Reg. at 8728. Any potential harm to plaintiffs resulting from Domino's Farms's desire not to provide coverage for certain recommended contraceptive services is thus outweighed by the harm an injunction would cause to the public and the government.

---

[13] *See also, e.g.*, *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) ("[T]he failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury."); *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("[L]ong delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.").

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

Respectfully submitted this 25th day of December, 2012,

STUART F. DELERY
Principal Deputy Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

BARBARA L. MCQUADE
United States Attorney

JENNIFER RICKETTS
Director, Federal Programs Branch

SHEILA M. LIEBER
Deputy Director

*/s/ Bradley P. Humphreys*
BRADLEY P. HUMPHREYS
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W.
Washington, D.C. 20001
Tel: (202) 514-3367; Fax: (202) 616-8470
Email: bradley.p.humphreys@usdoj.gov
VA Bar. No. 83212

*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

I certify that, on December 25, 2012, I electronically filed the foregoing paper with the Clerk of Court using the ECF system, which will send notification of such filing to the following:

Erin Mersino, Esq. (P21410)
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
emersion@thomasmore.org
(734 827-2001

*/s/ Bradley P. Humphreys*
BRADLEY P. HUMPHREYS
Trial Attorney