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

MERSINO MANAGEMENT CO., *et al.*,	Case No. 2:13-cv-11296
Plaintiffs,	Judge Paul Borman
v.	Magistrate Judge R. Steven Whalen
KATHLEEN SEBELIUS, *et al.*,	
Defendants.	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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

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INTRODUCTION

Plaintiffs, a for-profit management corporation and its owners, claim that their sincerely held religious beliefs prohibit them from providing health coverage for contraceptive services as required by regulations. Plaintiffs' motion for injunctive relief should be denied at the outset because plaintiffs' inexplicable delay in bringing this action negates any claim of irreparable harm. The regulations were issued in August 2011, yet plaintiffs inexplicably waited well over a year and a half to file suit, and then waited an additional month and a half to move for so-called emergency relief. This Court should not grant plaintiffs the extraordinary remedy of a preliminary injunction given that plaintiffs have sat on their purported rights.[1]

In any event, plaintiffs have not shown a likelihood of success on the merits. Plaintiffs' challenge rests largely on the theory that Mersino Management Company ("MMC"), a for-profit management corporation, 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 such a company's owners or officers eliminate the legal separation provided by the corporate form to impose their personal religious beliefs on the corporation's employees. To hold otherwise would permit for-profit, secular corporations and their shareholders and officers to become laws unto themselves, claiming countless exemptions from an untold number of general laws designed to improve the health and well-being of individual employees based on an infinite variety of alleged religious beliefs. Because there are an infinite variety of alleged religious beliefs, such companies and their owners could claim countless exemptions from general commercial laws designed to protect against unfair

[1] Plaintiffs' delay is all the more striking considering that plaintiffs' counsel has been involved in similar litigation for over a year, *see, e.g.*, Complaint, *Legatus v. Sebelius*, No. 2:12-cv-12061 (E.D. Mich., filed May 7, 2012), and thus has clearly been aware of the challenged regulations requirements long before plaintiffs filed their complaint.

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 free exercise rights.

Indeed, motions panels for the Sixth, Tenth, and Third Circuits recently denied analogous motions for preliminary injunctive relief pending appeal. *See Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012); *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012), *app. for inj. pending appellate review denied*, No. 12A644, 2012 WL 6698888 (Sotomayor, J., in chambers); *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, 2013 WL 1277419 (3d Cir. Feb. 7, 2013). Twelve district courts have also rejected plaintiffs' arguments.[2]

BACKGROUND

Before the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), many Americans did not receive the preventive health care they needed to stay healthy, avoid or delay the onset of disease, lead productive lives, and reduce health care costs. Due largely to cost, Americans used preventive services at about half the recommended rate. *See* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 19-20, 109 (2011) ("IOM REP."), *available at* http://www.nap.edu/catalog.php?record_id=13181.

[2] *See Eden Foods v. Sebelius*, No. 2:13-cv-11229-DPH, (W.D. Mich. May 13, 2013); *Armstrong v. Sebelius*, No. 1:13-cv-563-RBJ (D. Colo. May 10, 2013); *M.K. Chambers Co. v. Dep't of Health & Human Servs.*, No. 13-cv-11379, 2013 WL 1340719 (E.D. Mich. Apr. 3, 2013); *Gilardi v. Sebelius*, __ F. Supp. 2d __, 2013 WL 781150 (D.D.C. Mar. 3, 2013), *appeal docketed sub nom. Gilardi v. HHS*, No. 13-5069 (D.C. Cir. Mar. 3, 2013); *Briscoe v. Sebelius*, __ F. Supp. 2d __, 2013 WL 755413 (D. Colo. Feb. 27, 2013); *Conestoga Wood Specialties Corp. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013); *Annex Medical, Inc. v. Sebelius*, No. 12-cv-2804, 2013 WL 101927 (D. Minn. Jan. 8, 2013), *appeal pending*, No. 13-1118 (8th Cir.); *Grote Indus., LLC v. Sebelius*, __ F. Supp. 2d __, 2012 WL 6725905 (S.D. Ind. Dec. 27, 2012), *appeal pending sub nom. Grote v. Sebelius*, No. 13-1077 (7th Cir.); *Autocam Corp. v. Sebelius*, No. 1:12-cv-1096, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012); *Korte v. HHS*, __ F. Supp. 2d __, 2012 WL 6553996 (S.D. Ill. Dec. 14, 2012), *appeal pending*, No. 12-3841 (7th Cir.); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012), *appeal pending*, No. 12-6294 (10th Cir.); *O'Brien v. HHS*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012), *appeal pending*, No. 12-3357 (8th Cir.).

Section 1001 of the ACA, which includes the preventive services coverage provision relevant here, seeks to cure this problem by making preventive care affordable and accessible for many more Americans. Specifically, the provision requires all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, "[for] women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]." 42 U.S.C. § 300gg-13(a)(4).

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.[3] After conducting an extensive science-based review, IOM recommended that HRSA guidelines include, as relevant here, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id.* at 10-12. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices (IUDs).[4] 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 unintended 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

[3] IOM, which was established by the National Academy of Sciences in 1970, is funded by Congress to provide expert advice to the federal government on matters of public health. IOM REP. at iv.

[4] Although plaintiffs describe IUDs, Plan B, and Ella as abortion-causing devices and drugs, *See, e.g.*, Compl. ¶¶ 167-75, Mar. 22, 2013, ECF No. 1, these devices and drugs are not abortifacients within the meaning of federal law. *See, e.g.*, 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997) ("Emergency contraceptive pills are not effective if the woman is pregnant[.]"); 45 C.F.R. § 46.202(f).

Guidelines ("HRSA Guidelines"), *available at* http://www.hrsa.gov/womensguidelines; 76 Fed. Reg. 46,603, 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A). In February 2012, the government adopted in final regulations the definition of "religious employer" while also creating a temporary enforcement safe harbor for non-grandfathered group health plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage. 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012). The government intends to amend the regulations during the safe harbor period to further accommodate non-profit religious organizations' religious objections to covering contraceptive services, *id.* at 8728, and issued a Notice of Proposed Rulemaking on February 6, 2013, 78 Fed. Reg. 8456.

ARGUMENT

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff "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.

I. PLAINTIFFS CANNOT ESTABLISH IRREPARABLE HARM

The Court should deny plaintiffs' motion at the outset because plaintiffs' inexplicable delay in bringing this action belies any claim of irreparable harm. The contraceptive coverage requirement was issued on August 1, 2011, but plaintiffs waited over a year and a half to file suit, and then another month and a half—until just weeks before the start of their health insurance plan year—to seek preliminary injunctive relief. Such delay undermines plaintiffs' claim that providing the coverage while this case is resolved will cause irreparable harm, and provides a sufficient basis for the Court to deny plaintiffs' motion. *See, e.g.*, *Huron Mountain Club v. U.S. Army Corps of Eng'rs*, No. 2:12-CV-197, 2012 WL 3060146, at *4 (W.D. Mich. July 25, 2012) ("[A] long delay in seeking relief indicates that speedy action is not required."); *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (noting, in denying preliminary injunction, that delay of forty-four days after final regulations were issued was "inexcusable");

Badillo v. Playboy Entm't Grp., No. 8:04-cv-591, 2004 WL 1013372, at *2 (M.D. Fla. Apr. 16, 2004) (concluding that nine-month delay was "fatal" to claim of irreparable harm). In any event, plaintiffs cannot show irreparable harm because, as explained below, they have not shown a likelihood of success on the merits. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012) (in free exercise context, a plaintiff cannot show harm without likelihood of success on the merits).

II. PLAINTIFFS CANNOT SHOW LIKELIHOOD OF SUCCESS ON THE MERITS

A. Plaintiffs' Religious Freedom Restoration Act Claim Is Without Merit

1. The regulations do not substantially burden any exercise of religion by a for-profit, secular company and its owner

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

For several reasons, plaintiffs cannot show that the challenged regulations substantially burden any exercise of religion, and thus cannot succeed on their RFRA claim. First, MMC is not an individual or a "religious organization," and thus cannot "exercise religion," under RFRA. Second, because the regulations apply only to the corporation, and not to the Mersinos, the Mersinos' religious exercise is not substantially burdened. And third, any burden imposed by the regulations is too attenuated to qualify as substantial.

a. There is no substantial burden on MMC because a for-profit, secular company does not exercise religion

Plaintiffs' claim that MMC "exercise[s] . . . religion" within the meaning of RFRA, 42 U.S.C. § 2000bb-1(b), cannot be reconciled with MMC's status as a secular company: its corporate activities are not religious; its Articles of Incorporation make no reference at all to any

religious purpose, *see* Mersino Management Co., Articles of Incorporation, *available at* http://www.dleg.state.mi.us/bcs_corp/sr_corp.asp (search by corporation name required); it does not claim to be affiliated with or managed by any formally religious entity; and it does not assert that it employs persons of a particular faith. Although defendants do not question the sincerity of the Mersinos' religious beliefs, the sincere religious beliefs of a corporation's owners do not make the corporation religious. Otherwise, every corporation with a religious owner—no matter how secular the corporation's purpose—would be considered religious, which would dramatically expand the scope of RFRA and the Free Exercise Clause. *See Grote*, 708 F.3d at 856-58 (Rovner, J., dissenting) (describing the potential consequences of such an expansion); *see also Autocam*, 2012 WL 6845677, at *7-8. Because MMC is a secular corporation, it—by definition—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); *Holy Land Found. v. Ashcroft*, 219 F. Supp. 2d 57, 83 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003). After all, the terms "religious" and "secular" are antonyms; a "secular" entity is defined as "not overtly or specifically religious." *See Merriam-Webster's Coll. Dictionary* 1123 (11th ed. 2003).

Numerous courts have rejected RFRA challenges nearly identical to MMC's on this basis. *See, e.g.*, *Conestoga*, 2013 WL 1277419, at *2; *Hobby Lobby*, 870 F. Supp. 2d at 1287, 1296.[5] Indeed, the government is aware of no case in which a secular, for-profit employer like MMC prevailed on a RFRA claim. After all, although the First Amendment freedoms of speech and association are "right[s] enjoyed by religious and secular groups alike," the Free Exercise Clause "gives special solicitude to the rights of *religious* organizations." *Hosanna-Tabor 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*

[5] *See also Eden Foods*, Order at 6-10; *Gilardi*, 2013 WL 781150, at *6-8; *Briscoe*, 2013 WL 755413, at *4-5; *Korte*, 2012 WL 6553996, at *6; *Conestoga*, 2013 WL 140110, at *6-7, 10. By contrast, those courts that have ruled against defendants in similar cases have unanimously bypassed the question of whether a for-profit, secular corporation can exercise religion under RFRA. *See, e.g., Legatus v. Sebelius*, Case No. 12-12061, 2012 WL 5359630, at *5 (E.D. Mich. Oct. 31, 2012) (declining to decide "whether [plaintiff], as a for-profit business, has an independent First Amendment right to free exercise of religion").

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); *Hosanna-Tabor*, 132 S. Ct. at 706 (Free Exercise Clause "protects a *religious* group's right to shape its own faith and mission") (emphasis added); *Anselmo v. Cnty. of Shasta*, 2012 WL 2090437, at *12 (E.D. Cal. 2012). Because RFRA incorporates Free Exercise jurisprudence, the same logic applies. *See Holy Land Found.*, 333 F.3d at 167. In short, only a religious organization can "exercise religion" under RFRA.

No court has ever held that a for-profit, secular corporation is a "religious corporation" for purposes of federal law. For example, it is clear that MMC does not qualify as a "religious corporation" for the purposes of Title VII. *See, e.g.*, *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007); *Spencer v. World Vision, Inc.*, 633 F.3d 723, 734, 748 (9th Cir. 2011). As a result, secular companies like MMC cannot permissibly discriminate on the basis of religion in hiring or firing employees or otherwise establishing the terms and conditions of employment. *See* 42 U.S.C. § 2000e-1(a), 2(a). It would be extraordinary to conclude that, nevertheless, MMC exercises religion within the meaning of RFRA. Such a conclusion would allow a secular corporation 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 corporation would have precisely the same right as a religious organization to, for example, require that its employees "observe the [company owner's] standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco." *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.[6]

[6] None of the cases plaintiffs cite held that a for-profit, secular corporation may exercise religion, and the government is not aware of any such case. *See Hobby Lobby*, 870 F. Supp. 2d at 1288. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981); and *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), involved *individual*

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It is significant that the Mersinos elected to organize MMC 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 owners' personal religious beliefs on its employees by refusing to cover certain contraceptive services. *Lee*, 455 U.S. at 261.

b. The regulations do not substantially burden the Mersinos' religious exercise because the regulations apply only to MMC, a separate and distinct legal entity

The regulations also do not substantially burden the Mersinos' religious exercise. By their terms, the regulations apply to group health plans and health insurance issuers. *See, e.g.*, 45 C.F.R. § 147.130. The Mersinos are neither. Nonetheless, the Mersinos claim that the regulations substantially burden *their* religious exercise because the regulations require the group health plan sponsored by their for-profit secular *company* to provide health insurance that includes certain contraceptive coverage. But a plaintiff cannot establish a substantial burden on his religious exercise by invoking this type of trickle-down theory. Indeed, cases that find a substantial burden uniformly involve a direct burden on the plaintiff rather than a burden imposed on another, legally separate, entity. *See, e.g.*, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524 (1993); *Potter v. Dist. of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009).

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plaintiffs, not corporations. The plaintiff in *Lee*, 455 U.S. 252, was an Amish individual who employed several other people on his farm, not a secular company, much less a corporation with layers of legal separation from its owner. In *McClure*, 370 N.W.2d at 854, a state hearing examiner "pierced the 'corporate veil'" to make the individual owners of the stock and assets of a corporation "liable for the illegal actions of" the corporation. *Braunfeld v. Brown*, 366 U.S. 599 (1961), and *Commack Self-Service Kosher Meats, Inc.*, 680 F.3d 194 (2d Cir. 2012), rejected free exercise challenges to state laws that regulated retail store hours and kosher food labels. And both *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009), and *EEOC v. Townley Engineering and Manufacturing Co.*, 859 F.2d 610, 619-20 (9th Cir. 1988), both declined to decide whether "a for-profit corporation can assert its own rights under the Free Exercise Clause."

The Mersinos' theory boils down to the claim that what's done to the corporation (or group health plan sponsored by the corporation)[7] is also done to its owner. But, as a legal matter, that is simply not so. The Mersinos chose 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, [ ] 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.*

"Generally, if a harm has been directed toward the corporation, then only the corporation has standing to assert a claim," and this "shareholder standing rule applies even if the plaintiff is the sole shareholder of the corporation." *Potthoff v. Morin*, 245 F.3d 710, 716 (8th Cir. 2001) (citing cases); *see also Bartel v. Kemmerer City*, 482 F. App'x 323, 326 (10th Cir. 2012) (unpublished). The Mersinos "may not move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms." *Potthoff*, 245 F.3d at 717 (quotation omitted). "So long as the business's liabilities are not [the Mersinos'] liabilities—which is the primary and 'invaluable privilege' conferred by the corporate form, *Torco Oil Co. v. Innovative Thermal Corp.*, 763 F. Supp. 1445, 1451 (N.D. Ill. 1991) (Posner, J., sitting by designation)—neither are the business's expenditures [the Mersinos'] own expenditures." *Grote*, 708 F.3d at 858 (Rovner, J., dissenting). The money used to pay for health coverage under the MMC's group health plan "belongs to the company, not to" the Mersinos. *Id*. The Mersinos should not be permitted to eliminate the legal separation between corporation and owner only when it suits them to impose their personal religious beliefs on the corporate entity's group

[7] The attenuation here is in fact twice removed, as a group health plan is a legally separate entity from the company that sponsors it. 29 U.S.C. § 1132(d).

health plan or its employees. For this reason, numerous courts have rejected RFRA challenges nearly identical to the Mersinos' claim.[8]

All corporations, of course, act through human agency; but that cannot mean that any legal obligation imposed on a corporation is also the owner's obligation or that the owners' and corporation's rights are coextensive. If that were true, any of the millions of shareholders of publicly traded companies could assert RFRA claims on those companies' behalf and thereby impose the shareholders' beliefs on the companies' employees in a way that deprives them of legal rights they would otherwise have, such as by discriminating against the company's employees on the basis of religion in establishing the 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).

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

Although the regulations do not require MMC or the Mersinos to provide contraceptive services directly, plaintiffs' complaint appears to be that, through MMC's health plan and the benefits it provides to employees, plaintiffs will facilitate conduct (the use of certain contraceptives) that they find objectionable. But this complaint has no limits. A company provides numerous benefits, including a salary, to its employees and by doing so in some sense

[8] *See Eden Foods*, Order at 6-10; *Gilardi*, 2013 WL 781150, at *4-5, *9-10; *Briscoe*, 2013 WL 755413, at *5-6; *Conestoga*, 2013 WL 140110, at *14; *Autocam*, 2012 WL 6845677, at *7; *Korte*, 2012 WL 6553996, at *9-11; *Hobby Lobby*, 870 F. Supp. 2d at 1293-96.

On the other hand, the courts to have granted preliminary injunctive relief in cases similar to this one have uniformly ignored or disregarded the legal separation between corporations and their owners. A company and its owners, however, cannot be treated as alter-egos for some purposes and not others; if the corporate veil is pierced, it is pierced for all purposes. *See, e.g.*, *Nautilus Ins. Co. v. Reuter*, 537 F.3d 733, 738 (7th Cir. 2008); *Korte*, 2012 WL 6553996, at *11; *Autocam*, 2012 WL 6845677, at *7 ("Whatever the ultimate limits of this principle may be, at a minimum it means the corporation is not the alter ego of its owners for purposes of religious belief and exercise."); *Conestoga*, 2013 WL 140110, at *8 ("It would be entirely inconsistent to allow the [corporation's owners] to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations."); *Grote*, 708 F.3d 850, 856 (Rovner, J., dissenting).

facilitates whatever use its employees make of those benefits. But the owners have no right to control the choices of their company's employees, who may not share their religious beliefs, when making use of their benefits.

Indeed, in denying the plaintiffs' motion for emergency relief pending appeal, a motions panel of the Sixth Circuit concluded as much. *See Autocam*, Order at 2 (relying on the district court's reasoned opinion in determining that the plaintiffs had not established more than a mere possibility of relief). Other courts too have relied on similar reasoning to reject similar plaintiffs' RFRA claims. *See, e.g.*, *Hobby Lobby*, 2012 WL 6930302, at *3; *O'Brien*, 894 F. Supp. 2d at 1159 ("[RFRA] is not a means to force one's religious practices upon others. RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own."), *appeal pending*, No. 12-3357 (8th Cir. Oct. 4, 2012).[9] Although "[c]ourts are not arbiters of scriptural interpretation," *Thomas*, 450 U.S. at 716, "RFRA still requires the court to determine whether the burden a law imposes on a plaintiff's stated religious belief is 'substantial.'" *Conestoga*, 2013 WL 140110, at *12; *see also Autocam*, 2012 WL 6845677, at *6; *see also 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."). For the reasons set forth above, any burden imposed by the challenged regulations is not substantial within the meaning of RFRA.[10]

[9] *See also Eden Foods*, Order at 8-10; *Conestoga*, 2013 WL 1277419, at *2; *Grote*, 708 F.3d 850 (Rovner, J., dissenting); *Conestoga*, 2013 WL 140110, at *13-14; *Annex Med., Inc. v. Sebelius*, 2013 WL 101927, at *4-5 (D. Minn. Jan. 8, 2013), *appeal pending*, No. 13-1118 (8th Cir. Jan. 11, 2013); *Grote Indus.*, 2012 WL 6725905, at *4-7; *Hobby Lobby*, 870 F. Supp. 2d at 1293-96.

[10] Plaintiffs "misunderstand the principle asserted in *Thomas*, [450 U.S. at 718]," when they claim that the case establishes that an indirect burden may nonetheless be substantial. *Conestoga*, 2013 WL 140110, at *14 n.15. "While a *compulsion* may certainly be indirect and still constitute a substantial burden, such as the denial of a benefit found in *Thomas*, '[t]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion . . . would radically restrict the operating latitude of the legislature.'" *Id.* (quoting *Braunfeld*, 366 U.S. at 606).

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

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

"[T]he Government clearly has a compelling interest in safeguarding the public health by regulating the health care and insurance markets." *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011); *see also, e.g.*, *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir. 1998). And the challenged regulations further this compelling interest. 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. 41,726, 41,733 (July 19, 2010); *see also* 77 Fed. Reg. at 8727. 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 FDA-approved contraceptive services is a key part of these predicted health outcomes, as a lack of contraceptive use has proven in many cases to have negative health consequences for both women and a developing fetus. As IOM concluded in identifying services recommended to "prevent conditions harmful to women's health and well-being," unintended pregnancy may delay "entry into prenatal care," prolong "behaviors that present risks for the developing fetus," and cause "depression, anxiety, or other conditions." IOM REP. at 20, 103-04. Contraceptive coverage also helps to avoid "the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." *Id.* at 103.

Closely tied to this interest is a related compelling interest in "removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984). 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 equally to women, who might otherwise be excluded from such benefits if their unique health care needs and higher out-

of-pocket costs were not taken into account in the ACA. *See* 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009). These costs result in women often forgoing preventive care. *See, e.g.*, 155 Cong. Rec. S12265-02, S12274 (daily ed. Dec. 3, 2009); IOM REP. at 20. Congress's attempt to equalize the provision of preventive health care services, with the resulting benefit of women being able to equally contribute as healthy and productive members of society, furthers a compelling governmental interest. *Cf. Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 92-93 (Cal. 2004).

Of course, the government's interest in ensuring access to contraceptive services is *particularly* compelling for women employed by companies that wish to eliminate such coverage, like MMC. Taking into account the "particular claimant whose sincere exercise of religion is [purportedly] being substantially burdened," *O Centro*, 546 U.S. at 430-31, exempting MMC and other similar companies from the obligation of their health plans to cover contraceptive services without cost-sharing would remove its employees (and their employees' families) from the very protections that were intended to further the compelling interests recognized by Congress. *See, e.g.*, *Graham v. Comm'r*, 822 F.2d 844, 853 (9th Cir. 1987) ("Where, as here, the purpose of granting the benefit is squarely at odds with the creation of an exception, we think the government is entitled to point out that the creation of an exception does violence to the rationale on which the benefit is dispensed in the first instance."). Women who work for MMC or similarly situated companies 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 themselves and their newborn children. IOM REP. at 102-03. They also would have unequal access to preventive care and would be at a competitive disadvantage in the workforce due to their inability to decide for themselves if and when to bear children. These harms would befall female employees (and covered spouses and dependents) who do not necessarily share the individual plaintiffs' religious beliefs. Plaintiffs' desire not to provide a health plan that permits such individuals to exercise their own choice must yield to the government's compelling interest in avoiding the adverse and unfair consequences that such

individuals would suffer as a result of the company's decision to impose the company's owners' religious beliefs on them. *See Lee*, 455 U.S. at 261 (noting that a religious exemption is improper where it "operates to impose the employer's religious faith on the employees").[11]

Plaintiffs argue that the interests underlying the regulations cannot be considered compelling when millions of people are not protected by the regulations at the moment. But 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. First, the ACA's grandfathering is not a permanent "exception"—it is transitional, and it is expected that a majority of plans will lose their grandfathered status by the end of 2013. *See* 75 Fed. Reg. 34,538, 34,552 (June 17, 2010).[12] Grandfathering thus does nothing to call into question the compelling interests furthered by the regulations, as this provision is "a reasonable plan for instituting an incredibly complex health care law while balancing competing interests."[13] *Legatus v. Sebelius*, Case No. 12-12061, 2012 WL 5359630, *9 (E.D. Mich. Oct. 31, 2012), *appeal docketed*, No. 13-1092 (6th Cir. Jan. 24, 2013); *see also Lee*, 455 U.S. at 259 ("The Court has

[11] To the degree plaintiffs assert that defendants must show a compelling interest as to MMC specifically, separately analyzing the need for the regulations as to each and every employer and employee in America, plaintiffs are mistaken. That level of specificity would be nearly impossible to establish and would render this regulatory scheme—and potentially any regulatory scheme challenged due to religious objections—completely unworkable. In practice, courts have not required the government to analyze the impact of a regulation on the single entity seeking an exemption, but have expanded the inquiry to all similarly situated individuals or organizations. *See, e.g.*, *Lee*, 455 U.S. at 260; *United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001) (per curiam); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990). *O Centro* is not to the contrary, as the Court construed the scope of the requested exemption as encompassing *all* members of the plaintiff religious sect. *O Centro*, 546 U.S. at 433. The Court's warning against "slippery-slope" arguments was a rejection of arguments by analogy—that is, speculation that providing an exemption to one group will lead to exemptions for other non-similarly situated groups. It was not an invitation to ignore the reality that an exemption for a particular claimant might necessarily lead to an exemption for an entire category of similarly situated entities.

[12] Plaintiffs grossly overstate the number of individuals in grandfathered plans, and the number of grandfathered plans is significantly and steadily declining. *See* Kaiser Family Foundation and Health Research & Educational Trust, Employer Health Benefits 2012 Annual Survey at 7-8, 190, *available at* http://ehbs.kff.org/pdf/2012/8345.pdf (last visited April 29, 2013) (indicating that 58 percent of firms had at least one grandfathered health plan in 2012, down from 72 percent in 2011, and that 48 percent of covered workers were in grandfathered health plans in 2012, down from 56 percent in 2011); *see also* 75 Fed. Reg. at 34,553 (noting that, by 2012, the government's mid-range estimate is that 38 percent of employer plans will have lost grandfathered status, and that by the end of 2013, this mid-range estimate increases to 51 percent); *Korte*, 2012 WL 6553996, at *7 n.12.

[13] The same is true of the temporary enforcement safe harbor for certain non-profit organizations with religious objections to contraceptive coverage.

long recognized that balance must be struck between the values of the comprehensive social security system . . . and the consequences of allowing religiously based exemptions.").[14]

Second, 26 U.S.C. § 4980H(c)(2) does *not*, as plaintiffs assert, 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.[15] *See* 26 U.S.C. § 4980H(c)(2). Employees of these small businesses can get health insurance through other ACA provisions, primarily premium tax credits and health insurance exchanges, and the coverage they receive will include all preventive services, including contraception.[16] In addition, small businesses that 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

[14] Plaintiffs also argue that the government's compelling interest is somehow diminished because the government has not opposed the plaintiffs' motion for a preliminary injunction in several cases in the Seventh and Eighth Circuits. Contrary to plaintiffs' suggestion, however, defendants' actions say nothing about the government's undoubtedly compelling interest and reflect only sound motions practice based on a clear-eyed assessment of the current legal landscape with respect to the various lawsuits challenging the preventive services coverage regulations.

In each of the cases that plaintiffs identify, the government did not oppose the plaintiffs' motion for a preliminary injunction because of the rulings of multiple motions panels in the Seventh and Eighth Circuits in which the plaintiffs' motions for a preliminary injunction were filed granting the plaintiffs' motion for injunctive relief pending appeal. The same concerns do not apply here, of course, because this Court does not lie within either the Seventh or Eighth Circuits. Indeed, in *Autocam*, a motions panel for the *Sixth Circuit* indicated that the plaintiffs had "not demonstrated more than a possibility of relief," and denied the plaintiffs emergency motion for a preliminary injunction pending appeal. Order. at 2. Thus, whereas in the cases that plaintiffs identify, the relevant circuit authority suggests that a preliminary injunction pending appeal is likely to be granted—at least until the cases can be considered fully on the merits—here, the Sixth Circuit has already denied an analogous motion in a case that is factually similar and that raises identical issues.

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

[16] For this reason, even if there were some connection between the preventive services coverage provision and the employer responsibility provision, excluding small employers from the employer responsibility provision would not undermine the government's compelling interest in ensuring that employees have access to recommended preventive services. As noted, employees of small employers that do not provide health coverage will be able to obtain health coverage through health insurance exchanges, and, if eligible, receive premium tax credits and cost-sharing reductions to assist them in affording such coverage. *See* 42 U.S.C. § 18021; *id.* § 18031(d)(2)(B)(i). Because the preventive services coverage requirement applies to the health plans being offered through the exchanges, the coverage individuals buy there will necessarily cover recommended contraceptive services. *Id.* § 300gg-13(a).

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.

Third, although 26 U.S.C. § 5000A(d)(2) exempts from the minimum coverage provision of the ACA "member[s] of a recognized religious sect or division thereof" who, on the basis of their religion, are opposed to the concept of health insurance and members of health care sharing ministries, this provision is entirely unrelated to the preventive services coverage regulations. *See also id.* § 1402(g)(1). The minimum coverage provision will require certain individuals who fail to maintain a minimum level of health insurance to pay a tax penalty beginning in 2014. It provides no exemption from the preventive services coverage regulations, as it only excludes certain *individuals* from the requirement to obtain health coverage and says nothing about the requirement that non-grandfathered group health plans provide preventive services coverage to their participants. It is also clearly an attempt by Congress to *accommodate* religion and, unlike the broad exemption sought by plaintiffs, is sufficiently narrow so as not to undermine the larger administrative scheme. *See Lee*, 455 U.S. at 260-61.[17]

The only true exemption from the preventive services coverage regulations cited by plaintiffs is the exemption for "religious employer[s]," 45 C.F.R. § 147.130(a)(1)(iv)(B). But there is a rational distinction between the narrow exception currently in existence and the expansion plaintiffs seek. A "religious employer" is an employer that, among other things, has the "inculcation of religious values" as its purpose and "primarily employs persons who share the religious tenets of the organization." *Id*. Thus, the exception does not undermine the government's compelling interests. It anticipates that the impact on employees of exempted

[17] Furthermore, exempting these discrete and "readily identifiable," *id.*, classes of individuals from the minimum coverage provision is unlikely to appreciably undermine the compelling interests motivating the preventive services coverage regulations. By definition, a woman who is "conscientiously opposed to acceptance of the benefits of any private or public insurance which . . . makes payments toward the cost of, or provides services for, medical care," 26 U.S.C. § 1402(g)(1), or is a member of a health care sharing ministry described in 26 U.S.C. § 5000A(d)(2)(B)(ii) would not utilize health coverage—including contraceptive coverage—even if it were offered.

organizations will be minimal, given that any religious objections of the exempted organizations are presumably shared by most of the individuals actually making the choice of whether to use contraceptive services. *See* 77 Fed. Reg. at 8728.

The same is not true for MMC, which does not and cannot discriminate based upon religious beliefs in hiring, and therefore almost certainly employs many individuals who do not share the Mersinos' religious beliefs. If courts were to grant plaintiffs' request to extend the protections of RFRA to any employer whose owners or shareholders object to the regulations, it is difficult to see how the regulations could continue to function or be enforced in a rational manner. *See O Centro*, 546 U.S. at 435. We are a "cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld*, 366 U.S. at 606; *see also S. Ridge Baptist Church*, 911 F.2d at 1211, and many people object to countless medical services. If any organization, no matter the high degree of attenuation between the mission of that organization and the exercise of religious belief, were able to seek an exemption from the operation of the preventive services coverage regulations, it is hard to imagine how defendants could administer the regulations in a manner that would achieve Congress's goals of improving the health of women and children and equalizing the coverage of preventive services for women. *See United States v. Israel*, 317 F.3d 768, 772 (7th Cir. 2003). Indeed, women who receive their health coverage through corporations like MMC would face negative health and employment outcomes because they had obtained employment with a company that imposes its owners' religious beliefs on their health care needs. *See id.* at 772; 77 Fed. Reg. at 8728.

b. The regulations are the least restrictive means of advancing the government's compelling 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.*, *United States v. Wilgus*, 638 F.3d 1274, 1289-95 (10th Cir. 2011). The government is not required "to do the

impossible – refute each and every conceivable alternative regulation scheme." *Id*. at 1289. Instead, the government need only "refute the alternative schemes offered by the challenger." *Id.*

Instead of explaining how MMC and similarly situated secular companies could be exempted from the regulations without significant damage to the government's compelling interests, plaintiffs conjure up several new statutory and regulatory schemes they claim would be less restrictive. 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), plaintiffs would have the system turned upside-down to accommodate the individual plaintiffs' 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; *Adams v. Comm'r of Internal Revenue*, 170 F.3d 173, 180 n.8 (3d Cir. 1999) ("A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down.'" (quotations omitted)).

In effect, plaintiffs want 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. 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. *See, e.g.*, *New Life Baptist Church Acad. v. Town of E. Longmeadow*, 885 F.2d 940, 947 (1st Cir. 1989) (Breyer, J.); *Graham*, 822 F.2d at 852. In determining whether a proposed alternative scheme is feasible, courts often consider the additional administrative and fiscal costs of the scheme. *See, e.g.*, *United States v. Lafley*, 656 F.3d 936, 942 (9th Cir. 2011); *New Life Baptist*, 885 F.2d at 947. Plaintiffs' alternatives would impose considerable new costs and other burdens on the government and would otherwise be impractical. *See Lafley*, 656 F.3d at 942; *New Life Baptist*, 885 F.2d at 947.[18]

[18] Furthermore, the ACA 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

(continued on next page…)

Nor would the proposed alternatives be equally effective in advancing the government's compelling interests. As noted 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. The anticipated benefits of the challenged regulations are attributable in part to the fact that recommended contraceptive services will be available through the existing employer-based system of health coverage, through which women will face minimal obstacles to receiving coverage of their care. Plaintiffs' alternatives, on the other hand, would require establishing entirely new government programs and infrastructures, and would almost certainly require women to take steps to learn of and sign up for the new benefit, thereby ensuring that fewer women would take advantage of it. Nor do plaintiffs offer any suggestion as to how their proposals could be integrated with the employer-based system or effectuated in practice. Because plaintiffs' proposals are less likely to achieve the compelling interests furthered by the regulations, they are not reasonable less restrictive means.

B. Plaintiffs' Free Exercise Claim Is Without Merit

Plaintiffs' Free Exercise claim fails at the outset because, as explained above, a for-profit, secular employer like MMC does not engage in any exercise of religion protected by the First Amendment. But even if it did, the regulations do not violate the Free Exercise Clause because—as numerous courts have held—the regulations are neutral laws of general applicability.[19] 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. *Emp't Dvi., Dep't of Human Res. Of Or. v. Smith*, 494 U.S. 872, 879 (1990); *see also Lukumi*, 508 U.S. at 520. The challenged regulations are neutral

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wanted to adopt one of plaintiffs' non-employer-based alternatives, they would be constrained by the statute from doing so.

[19] *See Eden Foods*, Order at 10-12; *Conestoga*, 2013 WL 1277419, at *2; *Briscoe*, 2013 WL 755413, at *6-7; *Conestoga*, 2013 WL 140110, at *8-9; *Grote*, 2012 WL 6725905, at *7-8; *Autocam*, 2012 WL 6845677, at *5; *Korte*, 2012 WL 6553996, at *7-8; *Hobby Lobby*, 870 F. Supp. 2d at 1289-90; *O'Brien*, 2012 WL 4481208, at *7-9; *see also Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468-69 (N.Y. 2006); *Catholic Charities of Sacramento*, 85 P.3d at 81-87. *But see Sharpe Holdings*, 2012 WL 6738489, at *5.

and generally applicable because they "do[] not target a particular religion or religious practice or have as [their] objective the interference with a particular religion or religious practice." *Autocam*, 2012 WL 6845677 at *5. Rather, the regulations "appl[y] to all non-exempt, non-grandfathered plans," and, to the extent the regulations burden on plaintiffs' religious exercise, they do so only "incidentally." *Id.*

Plaintiffs maintain that the regulations are not generally applicable because they contain certain categorical exceptions. But the existence of categorical exemptions "does not mean that the law does not apply generally." *Autocam*, 2012 WL 6845677 at *5; *see also Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004). And indeed, the regulations and the exemptions are categorical and are neutral with respect to religion. To warrant strict scrutiny, a system of exemptions must be so individualized so as to enable the government to engage in subjective, case-by-case inquiries, and the government must utilize that system to grant exemptions only for secular reasons and not for religious reasons. *Smith*, 494 U.S. at 884. Plaintiffs point to no such system with respect to the challenged regulations, and there is none. Rather, the regulations "appl[y] to all non-grandfathered, non-exempt plans, regardless of employers' religious persuasions, and this is enough to create a neutral law of general application." *Autocam*, 2012 WL 6845677 at *5.[20]

II. AN INJUNCTION WOULD INJURE THE GOVERNMENT AND THE PUBLIC

Enjoining the regulations as to for-profit, secular companies 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 MMC's employees (and their families)—who may not share the Mersinos' religious beliefs—the benefits of the preventive services coverage regulations. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

[20] 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* at 12-19.

For the foregoing reasons, defendants respectfully ask that the Court deny plaintiffs' motion for a temporary restraining order and preliminary injunction.

Respectfully submitted this 23rd day of May, 2013,

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CERTIFICATE OF SERVICE

I certify that, on May 23, 2013, 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:

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