IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

HOBBY LOBBY STORES, INC., et al.,	)	
Plaintiffs,	)	Civil Action No. CIV-12-1000-HE
v.	)	
KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services, et al.,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTE

FEDERAL STATUTES

FEDERAL REGULATIONS

LEGISLATIVE MATERIALS

MISCELLANEOUS

INTRODUCTION

Plaintiffs ask this Court to preliminarily enjoin, as to plaintiffs, regulations that are intended to help ensure that women have access to health coverage, without cost-sharing, for certain preventive services that medical experts have deemed necessary for women's health and well-being. The preventive services coverage regulations that plaintiffs challenge require all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain recommended preventive services without cost-sharing (such as a copayment, coinsurance, or a deductible).[1] As relevant here, except as to group health plans of certain non-profit religious employers (and group health insurance coverage sold in connection with those plans), the preventive services that must be covered include all Food and Drug Administration ("FDA")-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider.

The plaintiffs in this case are Hobby Lobby Stores, Inc., a for-profit, Oklahoma corporation that operates retail craft stores throughout the country; Mardel, Inc., a for-profit, bookstore and educational supply company headquartered in Oklahoma; and five owners and/or officers of the companies.[2] "Recently, after learning about the nationally prominent HHS mandate controversy, Hobby Lobby re-examined its insurance policies," discovered that its policies covered certain contraceptive services, and proceeded to exclude those services. Compl. ¶ 55, ECF No. 1. Plaintiffs now assert that their religious beliefs prohibit them from providing coverage for certain contraceptive services.

---

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

[2] The individual plaintiffs will be referred to collectively as "the Greens."

Plaintiffs' challenge rests largely on the theory that a for-profit, secular corporation established to sell art and craft supplies can claim to 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 owners of a for-profit, secular corporation eliminate the legal separation provided by the corporate form, which the owners have chosen because it benefits them, to impose their personal religious beliefs on the corporate entity's employees. To hold otherwise would permit for-profit, secular corporations 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, plaintiffs' motion for preliminary injunction 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, none of the plaintiffs can show, as each must, that the preventive services coverage regulations impose a substantial burden on their religious exercise. Hobby Lobby is a for-profit, secular

employer, and a secular entity by definition does not exercise religion. Even if a secular entity could exercise religion within the meaning of RFRA, the preventive services coverage regulations still do not substantially burden the company's or its owners' exercise of religion for an independent reason: any burden caused by the regulations is simply too attenuated to qualify as a *substantial* burden. Indeed, the first court to address the merits of a challenge to the preventive services coverage regulations dismissed the plaintiffs' RFRA claim for this reason. *See O'Brien v. HHS*, No. 4:12-cv-476 (CEJ), 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012) (appeal filed). Just as Hobby Lobby's employees have always retained the ability to choose whether to procure contraceptive services by using the salaries Hobby Lobby pays them or by using some combination of their salaries and the insurance Hobby Lobby provided, 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. Hobby Lobby remains free to advocate against their use of contraceptive services (or any other services). Ultimately, an employee's health care choices remain those of the employee, not Hobby Lobby.

The Greens' allegations of a substantial burden on their own individual religious exercise fare no better, as the regulations that purportedly impose such a burden apply only to group health plans and health insurance issuers. The Greens themselves are neither. Nor is Mardel, Inc., which participates in the health plan offered by Hobby Lobby. A corporation and its owners are wholly separate entities, and the Court should not permit the Greens to eliminate that legal separation to impose their personal religious beliefs on the corporate entity or its employees. The Greens cannot use the corporate form alternatively as a shield and a sword, depending on which suits them in any given circumstance. Moreover, even if the challenged regulations were deemed to impose a

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

Plaintiffs' First Amendment claim is 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, the *O'Brien* court dismissed a Free Exercise challenge identical to that brought by plaintiffs here. *See* 2012 WL 4481208, at *7-9. Likewise, the highest courts of California and New York have upheld similar state laws against similar free exercise challenges.

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 Hobby Lobby. Independently, plaintiffs cannot show irreparable harm because they waited more than a year after the challenged regulations were issued before filing suit and, until recently, provided the health coverage to which they object. In contrast, entering a preliminary injunction would harm both the government and the public. The 13,612 employees of Hobby Lobby and Mardel, Inc., who were hired without regard to

their faith and thus may not share the Greens' religious beliefs, would be denied the benefits of receiving a health plan through their employer that covered, until recently, the full range of recommended contraceptive services. This would perpetuate, rather than mitigate, the public health and gender equality problems the government tried to solve through promulgation of the challenged regulations.

BACKGROUND

I. STATUTORY BACKGROUND

Before the enactment of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010),[3] 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://cnsnews.com/sites/default/files/documents/PREVENTIVE%20SERVICES-IOM%20REPORT_0.pdf (last visited Oct. 3, 2012). Section 1001 of the ACA – which includes the preventive services coverage provision that is relevant here – seeks to cure this problem by making recommended preventive care affordable and accessible for many more Americans. Specifically, that 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).

[3] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

Research shows that cost-sharing requirements can pose barriers to preventive care and result in reduced use of preventive services, particularly for women. IOM REP. at 109; 155 Cong. Rec. S12019, S12026-27 (daily ed. Dec. 1, 2009) (statement of Sen. Mikulski) ("We want to either eliminate or shrink those deductibles and eliminate that high barrier, that overwhelming hurdle that prevents women from having access to [preventive care]."). Indeed, a 2010 survey showed that less than half of women are up to date with recommended preventive care screenings and services. IOM REP. at 19. By requiring coverage for recommended preventive services and eliminating cost-sharing requirements, Congress sought to increase access to and utilization of recommended preventive services. 75 Fed. Reg. 41,726, 41,728 (July 19, 2010). Increased use of preventive services will benefit the health of individual Americans and society at large: individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of disease, healthier workers will be more productive with fewer sick days, and increased utilization will result in savings due to lower health care costs. *Id*. at 41,728, 41,733; IOM REP. at 20.

Defendants 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")[4] with "review[ing] what preventive services are necessary for women's health and well-being" and developing recommendations for comprehensive guidelines to implement the Women's Health Amendment. IOM REP. at 2. IOM conducted an extensive science-based review and, on July 19, 2011, published a report of its analysis and recommendations. *Id*. at 20-26. The report recommended that HRSA guidelines include, among other things, well-woman visits; breastfeeding support; domestic violence screening; and, as relevant here, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id*. at 10-12. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices ("IUDs"). FDA, Birth Control Guide, *available at* http://www.fda.gov/ForConsumers/ ByAudience/ForWomen/ucm118465.htm (last visited Oct. 3, 2012).

Many women do not utilize contraceptive methods or sterilization procedures because they are not covered by their health plan or they require costly copayments, coinsurance, or deductibles. IOM REP. at 19, 109; Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services And Supplies Without Cost-Sharing*, 14 GUTTMACHER POL'Y REV. 7, 10 (2011), *available at* http://www.guttmacher.org/ pubs/gpr/14/1/gpr140107.pdf (last visited Oct. 3, 2012) (citing 2010 study that found women with private insurance that covered prescription drugs paid 53 percent of the cost of their oral contraceptives). IOM determined that coverage, without cost-sharing, for FDA-approved contraceptive methods, sterilization procedures, and patient education and

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

counseling is necessary to increase the use of these services, 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.

According to a national survey, in 2001, an estimated 49 percent of all pregnancies in the United States were unintended. *Id*. at 102. When compared to intended pregnancies, unintended pregnancies are more likely to result in poorer health outcomes for mothers and children. Women with unintended pregnancies are more likely than those with intended pregnancies to receive later or no prenatal care, to smoke and consume alcohol during pregnancy, to be depressed during pregnancy, and to experience domestic violence during pregnancy. *Id*. at 103. Children born as the result of unintended pregnancies are at increased risk of preterm birth and low birth weight as compared to children born as the result of intended pregnancies. *Id*. The use of contraception also allows women to avoid short interpregnancy intervals, which have been associated with low birth weight, prematurity, and small-for-gestational-age births. *Id*. at 102-03. Moreover, women with certain chronic medical conditions may need contraceptive services to postpone pregnancy, or to avoid it entirely, and thereby reduce risks to themselves or their children.[5] *Id*. at 103-04.

On August 1, 2011, HRSA adopted IOM's recommendations, subject to an exemption relating to certain religious employers authorized by an amendment to the

[5] The IOM noted that contraception is also highly cost-effective because the costs associated with pregnancy greatly exceed the costs of contraceptive services. IOM REP. at 107-08. In 2002, the direct medical cost of unintended pregnancy in the United States was estimated to be nearly $5 billion, with the cost savings due to contraceptive use estimated to be $19.3 billion. *Id*. at 107. Moreover, it has been estimated to cost employers 15 to 17 percent more to not provide contraceptive coverage in their health plans than to provide such coverage, after accounting for both the direct medical costs of pregnancy and indirect costs such as employee absence and the reduced productivity associated with such absence. Sonfield, *supra*, at 10.

interim final regulations. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Oct. 3, 2012). 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). To qualify for the exemption, 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.
>
> (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). The religious employer exemption was modeled after the method of religious accommodation used in several states that already required health insurance issuers to provide coverage for contraception.[6] 76 Fed. Reg. at 46,623.

In February 2012, defendants adopted in final regulations the definition of religious employer contained in the amended interim final regulations while also creating a temporary enforcement safe harbor for plans sponsored by certain non-profit

[6] At least 28 states have laws requiring health insurance policies that cover prescription drugs to also provide coverage for FDA-approved contraceptives. *See* Guttmacher Institute, State Policies in Brief: Insurance Coverage of Contraceptives (Oct. 1, 2012), *available at* http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf (last visited Oct. 3, 2012).

organizations with religious objections to contraceptive coverage. 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012). Under the safe harbor, as clarified on August 15, 2012, defendants will not take any enforcement action against an employer, group health plan, or group health insurance issuer with respect to a non-grandfathered group health plan that fails to cover some or all recommended contraceptive services and that is established or maintained by an organization that meets all of the following criteria:

(1) The organization is organized and operates as a non-profit entity.

(2) From February 10, 2012 onward, the group health plan established or maintained by the organization has consistently not provided all or the same subset of the contraceptive coverage otherwise required at any point, consistent with any applicable state law, because of the religious beliefs of the organization.

(3) The group health plan sponsored by the organization (or another entity on behalf of the plan, such as a health insurance issuer or third-party administrator) provides to plan participants a prescribed notice indicating that some or all contraceptive coverage will not be provided under the plan for the first plan year beginning on or after August 1, 2012.

(4) The organization self-certifies that it satisfies the three criteria above, and documents its self-certification in accordance with prescribed procedures.[7]

The enforcement safe harbor will be in effect until the first plan year that begins on or after August 1, 2013. Guidance, *supra*, at 3. During that time, defendants intend to finalize amendments to 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. Defendants began this process on March 21, 2012, when they published an Advance Notice of Proposed

[7] HHS, Guidance on the Temporary Enforcement Safe Harbor ("Guidance"), at 3 (Aug. 15, 2012), *available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf (last visited Oct. 3, 2012).

Rulemaking ("ANPRM") in the Federal Register. 77 Fed. Reg. 16,501 (Mar. 21, 2012).[8]

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 Hobby Lobby makes available to its employees and the employees of Mardel, Inc., to cover certain recommended contraceptive services. Plaintiffs moved for a preliminary injunction on September 12, 2012. *See* Pls.' Mot. for Prelim. Inj. And Opening Br. in Supp. ("Pls.' Mot."), Sept. 12, 2012, ECF No. 6. In support of their preliminary injunction motion, plaintiffs rely solely on their RFRA and free exercise claims.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy, and [] it should not be issued unless the movant's right to relief is clear and unequivocal." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) (quotation omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). Because Hobby Lobby's employees enjoyed coverage of certain contraceptive services until recently, when Hobby Lobby dropped that coverage in response to the "nationally prominent HHS mandate controversy," this motion for preliminary injunction in substance is an attempt to change rather than maintain the status quo.

Plaintiffs contend they are not required to show a likelihood of success on the

[8] The accommodations defendants are considering are not constitutionally or statutorily required; rather, they stem from defendants' commitment to work with, and respond to, stakeholders' concerns. *See* 77 Fed. Reg. at 16,503.

merits if the Court determines that the remaining three factors strongly favor plaintiffs. Pls.' Mot. at 6-7. Instead, plaintiffs assert, they may obtain a preliminary injunction by demonstrating that the case presents issues "so serious, substantial, difficult, and doubtful as to make the[m] ripe for litigation and deserving of more deliberate investigation." *Id*. Plaintiffs are incorrect for two reasons.

First, in cases where the alleged injury is a deprivation of First Amendment rights, the merits and irreparable injury prongs merge together. In this respect, plaintiffs cannot show irreparable injury without also showing a likelihood of success on the merits. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012) ("Because McNeilly does not have a likelihood of success on the merits . . . his argument that he is irreparably harmed by the deprivation of his First Amendment rights also fails.").[9] Second, the Tenth Circuit has made clear that the modified test does not apply where "a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme." *Heideman*, 348 F.3d at 1189 (quotation omitted); *see also Isbell v. City of Okla. City*, No. CIV-11-1423-D, 2011 WL 6152852, at *3 (W.D. Okla. Dec. 12, 2011). That is exactly the relief plaintiffs seek in this case. *See Aid For Women v. Foulston*, 441 F.3d 1101, 1115 n.15 (10th Cir. 2006) ("[W]e presume that all governmental action pursuant to a statutory scheme is 'taken in the public interest.'").[10]

---

[9] Furthermore, it is not clear that the modified test that plaintiffs cite survives the Supreme Court's decision in *Winter*. The Tenth Circuit has mentioned this "modified test" only once in the context of a preliminary injunction post-*Winter*, and, in that case, the court did not actually apply the modified test or explicitly address the viability of the test in light of *Winter*. *See Roda Drilling Co. v. Siegal*, 552 F.3d 1203, 1208-09 n.3 (10th Cir. 2009). Because the modified test is inconsistent with *Winter*, this Court should apply the standard set forth in *Winter* – the Supreme Court's most recent guidance on the issue.

[10] The modified test also does not apply because plaintiffs have not shown that the equities strongly favor them. *See infra* pp. 39-40.

ARGUMENT

I. PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS

A. Plaintiffs' Religious Freedom Restoration Act Claim Is Without 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 the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-1, *et seq.*) in response to *Employment Division v. Smith*, 494 U.S. 872 (1990). RFRA was intended to reinstate the pre-*Smith* compelling interest test for evaluating legislation that substantially burdens the free exercise of religion. 42 U.S.C. § 2000bb-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 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).

Here, plaintiffs have not shown that the regulations substantially burden their religious exercise. Plaintiffs claim that Hobby Lobby "exercise[s] . . . religion" within the meaning of RFRA. *Id*. But that position cannot be reconciled with Hobby Lobby'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) ("[T]he practice[] at issue

must be of a religious nature."); *see also Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 83 (D.D.C. 2002), *aff'd on other grounds*, 333 F.3d 156 (rejecting an organization's RFRA claim because "nowhere in Plaintiff's Complaint does it contend that it is a religious organization. Instead, [Plaintiff] defines itself as a 'non-profit charitable corporation,' without any reference to its religious character or purpose.").

Hobby Lobby is plainly secular. The company's pursuits and products are not religious; it operates a chain of retail businesses that sell "a variety of art and craft supplies, home décor, and holiday decorations." Compl. ¶ 34. The company was not organized for carrying out a religious purpose; its Articles of Incorporation makes no reference at all to any religious purpose. *See* Hobby Lobby Stores, Inc., Amended and Restated Certificate of Incorporation at 2, Oct. 1, 2003, Ex. 1. 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; indeed, quite the opposite. *See* Compl. ¶ 51 (alleging that the company "welcomes employees of all faiths or no faith"). In short, there is no escaping the conclusion that Hobby Lobby is a secular company. The government is aware of no case in which a for-profit, secular employer with Hobby Lobby's characteristics prevailed on a RFRA claim.

Because Hobby Lobby 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 "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 Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (stating that the Court's precedent "radiates . . . a spirit of freedom for *religious* organizations, an independence from secular control or manipulation") (emphasis added); *Hosanna-Tabor*, 132 S. Ct. at 706 (Free Exercise Clause "protects a *religious* group's right to shape its own faith and mission") (emphasis added); *Werft v. Desert Sw. Annual Conf. of United Methodist Ch.*, 377 F.3d 1099, 1102 (9th Cir. 2004) ("The Free Exercise Clause protects . . . *religious* organizations. . .") (citations and quotation marks omitted) (emphasis added). This case should begin and end with the undisputed facts that show that Hobby Lobby is a secular employer.

Indeed, no court has ever held that a for-profit, secular corporation is a "religious corporation" for purposes of federal law. For this reason, secular companies cannot permissibly 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 Hobby Lobby does not qualify as a "religious corporation"; it is for-profit, it is not affiliated with a formally religious entity, it sells secular products, and the company's Articles of Incorporation mention no religious purpose. *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007).

It would be extraordinary to conclude that Hobby Lobby is not a "religious corporation" under Title VII (and it clearly is not) and thus cannot discriminate on the basis of religion in hiring or firing or otherwise establishing the terms and conditions of

employment, 42 U.S.C. § 2000e-1(a), but nonetheless "exercise[s] . . . religion" within the meaning of RFRA, *id*. § 2000bb-1(b).[11] To reach 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 (including Title VII). 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 abstinence from coffee, tea, alcohol, and tobacco." *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330 n.4 (1987). These consequences show why the Free Exercise Clause, RFRA, and Title VII distinguish between secular and religious organizations, with only the latter receiving special protection.[12]

It is significant that Hobby Lobby 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.*

---

[11] 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 as a religious organization under Title VII could simply bring a claim under RFRA to obtain an exemption from Title VII's prohibition against discrimination in employment. *See, e.g.*, *Franklin v. United States*, 992 F.2d 1492, 1502 (10th Cir. 1993) ("[E]ven where two statutes are not entirely harmonious, courts must, if possible, give effect to both, unless Congress clearly intended to repeal the earlier statute.") (citation omitted).

[12] For this reason, plaintiffs' reliance on cases like *Sherbert v. Verner*, 374 U.S. 398 (1963), *Thomas v. Review Bd. of the Ind. Emp't Security Div.*, 450 U.S. 707 (1981), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *see* Pls.' Mot. at 8, 10, is misplaced. Those cases involved *individual* plaintiffs. None of the plaintiffs were for-profit, secular corporations.

Sports and 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 (many of whom may not share, or even know of, the owners' beliefs). In this respect, "[v]oluntary commercial activity does not receive the same status accorded to directly religious activity." *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) (interpreting the Free Exercise Clause of the Alaska Constitution). Any burden is therefore caused by the company's "choice to enter into a commercial activity." *Id. Cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 635-36 (1984) (O'Connor, J., concurring).[13]

Furthermore, Hobby Lobby alleges that, until learning of the "nationally prominent HHS mandate controversy," it provided health coverage to its employees that included emergency contraception. Compl. ¶ 55. Plaintiffs' motion therefore in substance seeks to change rather than maintain the status quo. Furthermore, although plaintiffs indicate that this contraceptive coverage was "not included knowingly or deliberately," *id*., the company's failure to monitor its health coverage to ensure that it does not include contraceptive coverage that is inconsistent with its alleged religious beliefs undermines the claim that providing such coverage imposes a substantial burden on the company's religious exercise – even assuming the company could exercise religion.

The preventive services coverage regulations also do not substantially burden the Greens' religious exercise. By their terms, the regulations apply to group health plans and

[13] An employer like Hobby Lobby 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.").

health insurance issuers. 42 U.S.C. § 300gg-91(a)(1); 26 C.F.R. § 54.9815-2713T; 29 C.F.R. § 2590.715-2713; 45 C.F.R. § 147.130. The Greens are neither.[14] The Greens nonetheless claim that the regulations substantially burden *their* religious exercise because the regulations require the group health plans sponsored by their for-profit secular *company* to provide health insurance that includes contraceptive coverage. But a plaintiff cannot establish a substantial burden on his religious exercise by invoking this type of trickle-down theory; to constitute a substantial burden within the meaning of RFRA, the burden must be imposed on the plaintiff himself. "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). Here, any burden on the Greens' religious exercise results from obligations that the preventive services

[14] For similar reasons, the regulations do not apply to – and thus do not substantially burden any religious exercise of – Mardel, Inc., which does not maintain its own group health plan. *See* Compl. ¶ 49. In any event, Mardel, like Hobby Lobby, is a secular corporation and thus cannot exercise religion. Although Mardel sells Christian-themed materials, *id*. ¶ 37, it is not a religious organization because it is for-profit, its Articles of Incorporation make no reference to any religious purpose, *see* Mardel, Inc., Amended and Restated Certificate of Incorporation, Ex. 2, it is not affiliated with or managed by a formally religious entity, and it does not purport to employ persons of a particular faith. *See LeBoon*, 503 F.3d at 226. Indeed, the government is not aware of any case in which a court concluded that a for-profit corporation was a religious organization for purposes of Title VII's exemption, even if the corporation produced or sold religious materials.

coverage regulations impose on a legally separate, secular entity.[15] 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.*, *Potter v. Dist. of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524 (1993). Not so here, where the preventive services coverage regulations apply to the group health plans sponsored by Hobby Lobby, not to the Greens themselves.

The Greens' theory boils down to the claim that what's done to the company (or the group health plans sponsored by the company) is also done to its owners. But, as a legal matter, that is simply not so. The Greens have voluntarily chosen to enter into commerce and elected to do so by establishing a for-profit corporation that is a "separate and distinct legal entit[y]" from its owners. *Seitsinger v. Dockum Pontiac Inc.*, 894 P.2d 1077, 1079-80 (Okla. 1995); *see also Sautbine v. Keller*, 423 P.2d 447, 451 (Okla. 1966) ("[E]ven a family corporation is a separate and distinct legal entity from its shareholders."). Indeed, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). As an Oklahoma corporation with a "perpetual" term of existence, Hobby Lobby has broad powers; it may, among other things, conduct business, sue and be sued, hold and transact property, and enter into contracts. Okla. Stat. Ann. tit. 18, § 1016. In the company's employment relationships, Hobby Lobby – not its officers or shareholders – "is the employing party." *Sipma v.*

[15] 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, Hobby Lobby is a legally separate entity from the Greens.

Mass. Cas. Ins. Co., 256 F.3d 1006, 1010 (10th Cir. 2001). The company's owners and officers in turn are generally not liable for the corporation's debts. *See Puckett v. Cornelson*, 897 P.2d 1154, 1155-56 (Okla. Civ. App. 1995). In short, "[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." *Cedric Kushner Promotions*, 533 U.S. at 163. The Greens should not be permitted to eliminate that legal separation only when it suits them to impose their personal religious beliefs on the corporate entity's group health plans or its more than 13,000 employees.

Although the preventive services coverage regulations do not require the Greens to provide contraceptive services directly, their complaint appears to be that, through their company's group health plans and the benefits they provide to employees, the Greens 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 Greens have no right to control the choices of their company's employees, many of whom (having been concededly hired without regard to their religious views) may not share the Greens' religious beliefs, when making use of their benefits. These employees have a legitimate interest in access to the preventive services coverage made available under the challenged regulations. More generally, if an owner's or shareholder's religious beliefs were automatically imputed to the company, any secular company with a religious owner or shareholder would be permitted to discriminate against the company's employees on the basis of religion in establishing the terms and conditions of employment. 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 hiring or firing its employees or otherwise establishing the terms and conditions of their employment, 42 U.S.C. § 2000e-1(a).[16]

2. Alternatively, any burden imposed by the preventive services coverage regulations is too attenuated to constitute a substantial burden

Even assuming that Hobby Lobby or Mardel exercises religion within the meaning of RFRA and that the legal separation created by the corporate form can be pierced when the corporation or its owners want it to be, the regulations still do not substantially burden plaintiffs' religious exercise for another reason. Any burden imposed by the regulations is too attenuated to satisfy RFRA's *substantial* burden requirement.

Indeed, the first court to decide the merits of a challenge to the preventive services coverage regulations under RFRA concluded as much. *See O'Brien*, 2012 WL 4481208, at *4-7. Like plaintiffs here, the plaintiffs in *O'Brien* were a for-profit, secular company

[16] Defendants expect that plaintiffs will rely, in their reply brief, on *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), and *EEOC v. Townley Engineering and Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988), to argue that the preventive services coverage regulations impose a substantial burden on plaintiffs' religious exercise. Both cases, however, expressly declined to decide whether "a for-profit corporation can assert its own rights under the Free Exercise Clause." *Stormans*, 586 F.3d at 1119; *see also Townley*, 859 F.2d at 619, 620. Instead, *Stormans* held that a particular corporation had standing to raise the rights of its owner. *Stormans*, 586 F.3d at 1119-22. But this case does not present that standing question, as the Greens themselves are also plaintiffs here. As for the question that this case *does* present – whether a burden on a corporation is also a burden on its owners – *Stormans* had absolutely nothing to say. Indeed, while the case discussed whether the challenged rules were neutral and generally applicable, *see id.* at 1130-37, it did not address the substantial burden prong at all. Similarly, nothing in *Townley* suggests that a burden on a corporation is also a burden on its owners. Although the court allowed Townley (the company) to assert the rights of its owners, *see Townley*, 859 F.2d at 619-20 & n.15, it did not find that Title VII imposed a substantial burden on the owners' religious exercise. Rather, *Townley* acknowledged that the challenged statute "to some extent would adversely affect [plaintiffs'] religious practices," and then proceeded to uphold Title VII on compelling interest grounds. In short, neither case supports the proposition that the preventive services coverage regulations impose a substantial burden on Hobby Lobby or the Greens. 859 F.2d at 620.

and an owner who held religious beliefs against contraception. *Id*. at *1. Assuming, but not deciding, that the company could exercise religion, the court 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. 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. And cases presenting the test that RFRA was intended to restore – *Sherbert* and *Yoder* – confirm this "common-sense conclusion." *O'Brien*, 2012 WL 4481208, at *5. The plaintiff in *Sherbert*, the court explained, "'was forced to 'choose between following the precepts of her religion [by resting, and not working, on her Sabbath] and forfeiting [unemployment] benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other.'" *O'Brien*, 2012 WL 4481208, at *5 (quoting *Sherbert*, 374 U.S. at 404). Similarly, in *Yoder*, the compulsory-attendance law "affirmatively compel[led] [plaintiffs], under threat of criminal sanction to perform acts undeniably at odds with the fundamental tenets of their religious beliefs." *O'Brien*, 2012 WL 4481208, at *5 (quoting *Yoder*, 406 U.S. at 218).

In contrast to the direct and substantial burdens imposed in those cases, the court in *O'Brien* determined that the preventive services coverage regulations result in only an indirect and *de minimis* impact on the plaintiffs. *Id*. at *6-7.

> [T]he challenged regulations do not demand that plaintiffs alter their behavior in a manner that will directly and inevitably prevent plaintiffs from acting in accordance with their religious beliefs. [Plaintiff] is not prevented from keeping the Sabbath, from providing a religious upbringing for his children, or from participating in a religious ritual such as communion. Instead, plaintiffs remain free to exercise their religion, by not using contraceptives and by discouraging employees from using contraceptives. The burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [the company's] plan, subsidize *someone else's* participation in an activity

> that is condemned by plaintiffs' religion. The Court rejects the proposition that requiring indirect financial support of a practice, from which plaintiff himself abstains according to his religious principles, constitutes a substantial burden on plaintiff's religious exercise.

Id. at *6. 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.

The court also noted that adopting the plaintiffs' substantial burden argument would turn RFRA, which was meant as a shield, into a sword. *Id.* "[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." *Id*. In short, because the preventive services regulations "are several degrees removed from imposing a substantial burden on [Hobby Lobby or Mardel], and one further degree removed from imposing a substantial burden on [the Greens]," *id.* at *7, the Court should dismiss plaintiffs' RFRA claim even assuming secular companies like Hobby Lobby or Mardel can exercise religion.

3. 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

Even if plaintiffs were able to demonstrate a substantial burden on their religious exercise, they would not prevail because the regulations are justified by two compelling governmental interests, and are the least restrictive means to achieve those interests. First,

"the 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 Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir. 1998) (concluding that "public health is a compelling government interest"); *Dickerson v. Stuart*, 877 F. Supp. 1556, 1559 (M.D. Fla. 1995) ("The State . . . has a compelling interest in the health of expectant mothers and the safe delivery of newborn babies.") (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992)).

There can be no question that this compelling interest in the promotion of public health is furthered by the regulations at issue here. 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 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. Contraceptive coverage also helps to avoid "the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." *Id.* at 103. In fact, "pregnancy may be contraindicated for

women with serious medical conditions such as pulmonary hypertension . . . and cyanotic heart disease, and for women with the Marfan Syndrome." *Id.* at 103-04.

Closely tied to this interest is a related, but separate, compelling interest that is furthered by the regulations. As the Supreme Court explained in *Roberts*, 468 U.S. at 626, 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." Thus, "[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 needs 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." 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. 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 intended to equalize health care for women and men in the area of preventive care, including the provision of family planning services for women. *See, e.g.*, 155 Cong. Rec. S12265-02, S12271; *see also* 77 Fed. Reg. at 8728. Congress's attempt to equalize the provision of preventive health care services, with the resulting benefit of women being able to contribute to the same degree as men as healthy and productive

members of society, furthers a compelling governmental interest. *Cf. Catholic Charities of Sacramento v. Sup. Ct.*, 85 P.3d 67, 92-93 (Cal. 2004).

The government's interests in promoting the health of women and newborn children and furthering gender equality are compelling not just in the abstract, *see* Pls.' Mot. at 11, but also when applied to Hobby Lobby and any other for-profit, secular companies that object to the regulations on religious grounds. 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 Hobby Lobby and any other similar companies from the obligation of their health plans to cover contraceptive services without cost-sharing would remove their 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."), *overruled in part on other grounds by Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1033 (9th Cir. 2007) (en banc).

Each woman who wishes to use recommended contraceptives and who works for Hobby Lobby, Mardel, or a similarly situated company (and each woman who is a covered spouse or dependent of an employee of such a company) – or, for that matter, any woman in such a position in the future – is significantly disadvantaged when the company chooses to provide a plan that fails to cover such services without cost-sharing. *See United States v. Friday*, 525 F.3d 938, 956 (10th Cir. 2008) (noting that the government's interest is still compelling even when the impact is limited in scope). As

revealed by the IOM Report, those women 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 for 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 share the company owners' religious beliefs and might not have been aware of those beliefs when they joined the secular company. *See* Compl. ¶ 51. Plaintiffs' desire not to make available 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 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").

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.' Mot. at 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 would 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 that do not currently offer such coverage or companies that have recently eliminated such coverage, like Hobby Lobby.

Plaintiffs argue that the interests underlying the regulations cannot be considered compelling because many health plans are exempted from the regulations. Pls.' Mot. at 11-13. 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. For example, 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 id.* 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.

Second, 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.[17] *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.[18] 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.

---

[17] 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.

[18] 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).

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). 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.

Furthermore, exempting these discrete and "readily identifiable," *see id.* at 261, 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.[19]

[19] Plaintiffs also point to the temporary enforcement safe harbor, *see* Pls.' Mot. at 12, but, as the name implies, this safe harbor from enforcement, unlike the permanent exemption plaintiffs seek, is temporary. *See* Guidance, *supra*. Moreover, the safe harbor reflects defendants' attempt to accommodate the concerns raised by certain non-profit organizations with religious objections to contraceptive coverage.

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). There is a rational distinction between the narrow exception currently in existence and plaintiffs' requested expansion. 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 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 as to whether to use contraceptive services. *See* 77 Fed. Reg. at 8728.

The same is not true for Hobby Lobby, which does not (and cannot) discriminate based upon anyone's religious beliefs when hiring, and therefore almost certainly employs many individuals who do not share the Greens' religious beliefs. Should plaintiffs be permitted to extend the protections of RFRA to any employer whose owners or shareholders object to the operation of the regulations, it is difficult to see how the regulations could continue to function or be enforced in a rational manner. *See O Centro*, 546 U.S. at 435. Providing for voluntary participation among for-profit, secular enterprises would be "almost a contradiction in terms and difficult, if not impossible, to administer." *Lee*, 455 U.S. at 258. We are a "cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld*, 366 U.S. at 606, and many people object to countless medical services. If any organization, no matter the high degree of attenuation between the mission of that organization and the exercise of religious belief, were able to seek an exemption from the operation of the preventive services coverage regulations, it is difficult to see how defendants could administer the

regulations in a manner that would achieve Congress's goals of improving the health of women and children and equalizing the coverage of preventive services for women. Indeed, women who receive their health coverage through corporations like Hobby Lobby would be subject to 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* 77 Fed. Reg. at 8728.

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

The regulations, moreover, are the least restrictive means of furthering the government's dual, albeit intertwined, 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).

Instead of explaining how Hobby Lobby and similarly situated secular companies could be exempted from the preventive services coverage regulations without significant damage to the government's compelling interests in public health and gender equality, plaintiffs conjure up several new regulatory schemes and propose major alterations to the existing Title X program that they claim would be less restrictive. *See* Pls.' Mot. at 15-16.[20] Rather than suggesting modifications to the current employer-based system that

[20] The Title X family planning program receives a limited amount of funds from Congress which it awards in grants to assist a limited number of providers; it is not intended to provide benefits for an entire population. *See* Title X of the Public Health Service Act, codified at 42 U.S.C. 300 et. seq. Unlike insurance, Title X grantees provide services directly, not through reimbursement to third parties. Priority for services must be given to "low income families." 42 USC §300a-4. Patients whose income exceeds 250%

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 the Greens' 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 ("Not requiring the government to do the impossible – refute each and every conceivable alternative regulation scheme – ensures that scrutiny of federal laws under RFRA is not strict in theory, but fatal in fact." (quotation omitted)); *New Life Baptist Church Acad. v. Town of E. Longmeadow*, 885 F.2d 940, 946 (1st Cir. 1989) ("[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.'" (internal citation and quotation marks 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 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." *See, e.g.*, *New Life Baptist*, 885 F.2d at 947 (considering "in a practical way" whether proffered alternative would "threaten potential administrative difficulties, including those costs and complexities which . . . may significantly interfere with the state's ability to achieve its . . . objectives"); *Graham*, 822 F.2d at 852 ("To allow an exception for Scientologists is, we think, possible; but it is not feasible."). In

---

of the federal poverty level must pay the reasonable cost of any services they receive. 42 C.F.R. 59.5(a)(8).

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) (rejecting proffered alternative because it "would place an unreasonable burden" on the government); *New Life Baptist*, 885 F.2d at 947 ("[T]he Court has made clear that administrative considerations play an important role in determining whether or not the state can follow its preferred means."). 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; *see also Gooden v. Crain*, 353 F. App'x 885, 888 (5th Cir. 2009).[21]

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. The anticipated benefits of the preventive services coverage regulations are attributable not only to the fact that recommended contraceptive services will be available to women with no cost sharing – an attribute that plaintiffs' alternatives admittedly share – but also to the fact that these services will be available through the existing employer-based system of health coverage through which women will face minimal logistical and administrative obstacles to receiving coverage of their care. Plaintiffs' alternatives, on the other hand, have none of these advantages. They would require establishing entirely new government programs and infrastructures or fundamentally altering an existing one, and would almost certainly

[21] 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.

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 any 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. Thus, plaintiffs' proposals – in addition to raising myriad administrative and logistical difficulties – are less likely to achieve the compelling interests furthered by the regulations, and therefore do not represent reasonable less restrictive means.[22]

B. Plaintiffs' Free Exercise Clause Claim Is Without Merit

For the reasons explained above, a for-profit, secular employer like Hobby Lobby does not engage in any exercise of religion protected by the First Amendment. Nevertheless, even if it did, the preventive services coverage regulations do not violate the Free Exercise Clause because they are neutral laws of general applicability. That was precisely the holding in *O'Brien*, 2012 WL 4481208, at *7-9, and the highest courts of two states have also rejected free exercise claims nearly identical to the one raised by plaintiffs here in cases challenging state laws that are similar to the preventive services coverage regulations. *See 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. This Court should do the same.

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

[22] Plaintiffs rely heavily on *Newland v. Sebelius*, 2012 WL 3069154 (D. Colo. July 27, 2012) (appeal filed), in arguing that they are likely to succeed on their RFRA claim. But the court in *Newland* explicitly declined to address defendants' claim that a for-profit, secular company cannot exercise religion within the meaning of RFRA, concluding that the question needed "more deliberate investigation." *Id*. at *6. For the reasons explained above, *see supra* pp. 11-12, this Court cannot enter a preliminary injunction without addressing this issue. Moreover, defendants believe the *Newland* court's compelling interest and least restrictive means analysis is flawed for the reasons explained above.

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. Unlike such selective laws, these regulations are neutral and generally applicable. 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 O'Brien*, 2012 WL 4481208, at *7 (holding that the "regulations are neutral"). 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; *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 275 (3d Cir. 2007).

Although the regulations refer to religion in the context of exempting certain religious employers from the requirement to cover contraceptive services, this reference does not, as plaintiffs argue, *see* Pls.' Mot. at 18, destroy the regulations' neutrality. *See O'Brien*, 2012 WL 4481208, at *8. Any burden on plaintiffs' religious beliefs – and there is none – would "arise[] not from the religious terminology used in the exemption, but from the generally applicable requirement to provide coverage for contraceptives." *Catholic Charities of Sacramento*, 85 P.3d at 83. Moreover, contrary to plaintiffs' assertion, *see* Pls.' Mot. at 18, the First Amendment does not prohibit the government from distinguishing between *organizations* based on their purpose and composition; it prohibits the government from favoring one *religion*, *denomination*, or *sect* over another. *See Lukumi*, 508 U.S. at 535; *cf. Larson v. Valente*, 456 U.S. 228, 244 (1982) (explaining

that "one religious *denomination* cannot be officially preferred over another" (emphasis added)); *Gillette v. United States*, 401 U.S. 437, 450-51 (1971). Therefore, not providing an exemption for secular companies does not destroy neutrality. *See O'Brien*, 2012 WL 4481208, at *8; *cf. Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 673 (1970) (upholding tax exemption for realty owned by associations organized exclusively for *religious purposes*); *Amos*, 483 U.S. at 344 (upholding Title VII's exemption for *religious* organizations).

The regulations are also generally applicable because they do not apply "only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545. They apply to all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage and do not qualify for the religious employer exemption. *See O'Brien*, 2012 WL 4481208, at *8 ("The regulations in this case apply to all employers not falling under an exemption, regardless of those employers' personal religious inclinations."). Thus, "it is just not true . . . that the burdens of the [regulations] fall on religious organizations 'but almost no others.'" *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (quoting *Lukumi*, 508 U.S. at 536); *see United States v. Amer*, 110 F.3d 873, 879 (2d Cir. 1997).[23] And, contrary to plaintiffs' view, *see* Pls.' Mot. at 19, the existence of "express exceptions for objectively defined categories of [entities]" does not negate the regulations' general applicability. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004); *see O'Brien*, 2012 WL 4481208, at *8 (rejecting identical argument); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th

[23] This case is a far cry from *Lukumi*, 508 U.S. 520, on which plaintiffs rely, *see* Pls.' Mot. at 19. In *Lukumi*, the legislature specifically targeted the religious exercise of members of a single church (Santeria) by enacting ordinances that used terms such as "sacrifice" and "ritual," *id*. at 533-34, and prohibited few, if any, animal killings other than Santeria sacrifices, *id*. at 535-36. There is no evidence of a similar targeting of religious practice here.

Cir. 2006) (refusing to "interpret *Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption").

The regulations are no different from other neutral and generally applicable laws governing employers that have been upheld against free exercise challenges. *See United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 629 (7th Cir. 2000) (upholding federal employment tax laws because they were "not restricted to [the church] or even religion-related employers generally, and there [was] no indication that they were enacted for the purpose of burdening religious practices"); *Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 960 (9th Cir. 1991) (upholding law that required employers to verify the immigration status of their employees); *Intercommunity Ctr. for Justice & Peace v. INS*, 910 F.2d 42, 44 (2d Cir. 1990) (same). Because the regulations are neutral laws of general applicability, plaintiffs' free exercise claim is without merit.[24]

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

Plaintiffs maintain that the mere "potential" of a violation of the First Amendment or RFRA establishes irreparable harm. Pls.' Mot. at 20. But that is simply not so. 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," or violation of RFRA, for any period of time. *See also Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001). In this respect, the merits and irreparable injury prongs of the analysis merge, and plaintiffs cannot show irreparable

[24] 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. 23-35.

injury without also showing a likelihood of success on the merits, which they cannot do. *See Isbell*, 2011 WL 6152852, at *9 ("Because Plaintiffs' showing of irreparable harm is dependent on their ability to show an unreasonable restraint of a First Amendment right, [and Plaintiffs have not shown a likelihood of success on their First Amendment claim], the Court finds that Plaintiffs have failed to make a sufficient showing of irreparable injury."); *McNeilly*, 684 F.3d at 621.

In addition, two other factors counsel against a finding of irreparable harm in this case. First, the challenged regulations (and the HRSA Guidelines) were issued on August 1, 2011. Yet plaintiffs waited more than a year – until September 12, 2012 – to file this lawsuit and seek preliminary injunctive relief. Such a "delay in seeking preliminary relief cuts against finding irreparable injury," particularly where the delay has gone unexplained by plaintiffs. *Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Social and Rehab. Servs.*, 31 F.3d 1536, 1543–44 (10th Cir. 1994). Second, Hobby Lobby has provided coverage for emergency contraceptives in the past. Compl. ¶ 55. Although plaintiffs maintain that such coverage was "inadvertent[]," Pls.' Mot. at 3, the company's failure to monitor its plans to ensure that they do not include contraceptive coverage that is inconsistent with its religious beliefs undermines plaintiffs' claim that providing such coverage again, beginning in January 2014, would cause irreparable harm.

Alternatively, issuing a preliminary injunction would harm both the government and the public. "[T]here is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008). Enjoining the regulations as to a for-profit, secular company 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 so that women who choose to do so can be a part of the workforce on an equal playing field with men.

It would also be contrary to the public interest to deny the 13,612 employees of Hobby Lobby and Mardel (and their families) the benefits of the preventive services coverage regulations. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Because these companies are for-profit, secular employers, and they "welcome[] employees of all faiths or no faith," Compl. ¶ 51, many of their employees do not share the Greens' religious beliefs. Those employees should not be denied the benefits of receiving a plan through their employer that covers recommended contraceptive services – a benefit they have received in the past. The female employees of Hobby Lobby and Mardel (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; *see also Stormans*, 586 F.3d at 1139 (vacating preliminary injunction and noting that "[t]here is a general public interest in ensuring that all citizens have timely access to lawfully prescribed medications"). Any potential harm to plaintiffs resulting from Hobby Lobby'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.[25]

[25] Plaintiffs rely heavily on the *Newland* court's determination that the equities tipped in favor of the plaintiffs in that case. Pls.' Mot. at 20-22. The *Newland* court, however, based its assessment of the equities on the "potential" or "possible" violation of plaintiffs' RFRA rights. 2012 WL 3069154, at *4. As explained above, *see supra* p. 11-12, that was error. In addition, the company plaintiff in *Newland* had 265 full-time employees, and there was no indication that it had ever provided health coverage for contraceptive services in the past. The equities are different with respect to companies that employ 13,612 full-time workers and that have provided such coverage recently.

CONCLUSION

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

Respectfully submitted this 22nd day of October, 2012,

STUART F. DELERY
Acting Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

SANFORD COATS
United States Attorney

JENNIFER RICKETTS
Director

SHEILA M. LIEBER
Deputy Director

s/ Michelle R. Bennett
MICHELLE R. BENNETT (CO Bar No. 37050)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W. Room 7310
Washington, D.C. 20530
Tel: (202) 305-8902
Fax: (202) 616-8470
Email: michelle.bennett@usdoj.gov

Attorneys for Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2012, a copy of the foregoing was filed electronically with the Clerk of the Court to be served upon the following:

Charles E. Geister , III
cgeister@hartzoglaw.com

Derek B. Ensminger
densminger@hartzoglaw.com

Eric S. Baxter
ebaxter@becketfund.org

Lori H. Windham
lwindham@becketfund.org

Stuart K. Duncan
kduncan@becketfund.org

s/ Michelle R. Bennett
MICHELLE R. BENNETT