IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HOBBY LOBBY STORES, INC., et al.,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, Secretary of Health and Human Services, et al.,

Defendants-Appellees

No. 12-6294

OPPOSITION TO PLAINTIFFS' MOTION FOR AN INJUNCTION PENDING APPEAL

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INTRODUCTION AND SUMMARY

The federal government respectfully submits this response in opposition to plaintiffs' motion for an injunction pending appeal. Plaintiffs are the for-profit corporations Hobby Lobby Stores, Inc., and Mardel, Inc., (collectively, "Hobby Lobby") and the owners of those corporations (collectively, "the Greens"). Hobby Lobby operates hundreds of retail stores throughout the nation and has more than 13,000 full-time employees. These employees are not hired on the basis of their religion and thus do not necessarily share the religious beliefs of the Greens.

Hobby Lobby employees and their families receive health insurance through the corporation's self-insured group health plan. "Recently," "Hobby Lobby re-examined its insurance policies," discovered that its policies covered certain contraceptive services, and proceeded to exclude those services. Complaint ¶ 55. Now, plaintiffs contend that the Hobby Lobby plan should be exempted from the federal regulatory requirement that certain group health plans cover contraceptive services. Plaintiffs claim that they are entitled to such an exemption under the Religious Freedom Restoration Act ("RFRA"). The district court denied plaintiffs' motion for a preliminary injunction, finding, *inter alia*, that plaintiffs are not likely to succeed on the merits of their RFRA claim.

Plaintiffs' motion does not satisfy the prerequisites for an injunction pending appeal. Although plaintiffs assert that an injunction would not injure third parties, they ignore the harm that an injunction would cause to Hobby Lobby's 13,000 employees and their families, who would be denied the health insurance coverage required by federal law.

On the merits, the district court correctly held that plaintiffs are not likely to succeed on their RFRA claim. RFRA is not implicated unless a regulation imposes a substantial burden on a person's exercise of religion. *See* 42 U.S.C. § 2000bb-1(a). It is common ground that a *religious* organization can engage in the exercise of religion, and other federal statutes authorize religious organizations to deny their

employees certain protections of federal law. But Hobby Lobby is a for-profit, secular corporation—not a religious organization. The challenged health insurance requirement thus cannot burden any exercise of religion by the corporation.

Nor do the religious beliefs of the owners of a for-profit, secular corporation provide a basis to deny the corporation's employees the protections of federal law. The obligation to cover contraceptive services lies with the Hobby Lobby group health plan, which, like Hobby Lobby itself, is a legal entity separate and distinct from the corporation's owners. Neither the Supreme Court nor any court of appeals has ever held that that the regulation of a corporation imposes a substantial burden on an owner's personal exercise of religion. Plaintiffs' position here would confer on secular corporations the very prerogatives that Congress reserved to religious organizations alone. That is not a permissible interpretation of RFRA.

STATEMENT

A. Statutory and Regulatory Background

Congress has long regulated certain terms of group health plans, and the Patient Protection and Affordable Care Act establishes additional minimum standards for such plans. Congress provided that a non-grandfathered plan must cover certain preventive health services without cost-sharing. These preventive health services include immunizations recommended by the Advisory Committee on Immunization Practices, *see* 42 U.S.C. § 300gg-13(a)(2); items or services that

have an "A" or "B" rating from the U.S. Preventive Services Task Force, *see id*. § 300gg-13(a)(1); preventive care and screenings for infants, children and adolescents as provided in guidelines of the Health Resources and Services Administration ("HSRA"), a component of the Department of Health and Human Services ("HHS"), *see id*. § 300gg-13(a)(3); and certain additional preventive services for women as provided in HRSA guidelines, *see id*. § 300gg-13(a)(4).

Collectively, these preventive health services provisions require coverage of an array of recommended services including immunizations, blood pressure screening, mammograms, cervical cancer screening, and cholesterol screening.[1] As relevant here, pursuant to HRSA's Women's Preventive Services guidelines, coverage is required for "'[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed by a provider." 77 Fed. Reg. 8725 (Feb. 15, 2012). That requirement takes effect starting in the first plan year that begins on or after August 1, 2012. *Id*. at 8725-26.

The regulations that implement the contraceptive-coverage requirement authorize an exemption for the health plan of any organization that qualifies as a religious employer. The regulations define a religious employer as an organization that has as its purpose the inculcation of religious values, that primarily hires and

[1] *See, e.g.*, U.S. Preventive Services Task Force "A" and "B" Recommendations, *available at* http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm.

serves persons who share the religious tenets of the organization, and that is a nonprofit organization as described in Internal Revenue Code provisions applicable to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. *See* 45 C.F.R. § 147.130(a)(1)(iv)(B). In addition, the agencies charged with enforcing the contraceptive-coverage requirement established a temporary enforcement safe harbor for health plans that are sponsored by certain nonprofit organizations that have religious objections to providing contraceptive coverage. *See* 77 Fed. Reg. at 8727; HHS, Guidance on the Temporary Enforcement Safe Harbor (Aug. 15, 2012).[2]

B. Factual Background and District Court Proceedings

Plaintiffs 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. Hobby Lobby Stores, Inc., operates more than 500 retail stores in more than 40 states and has more than 13,000 full-time employees. *See* Complaint ¶ 2. Mardel, Inc., operates 35 stores in 7 states and has 372 full-time employees. *See id*. ¶ 3. Hobby Lobby's employees are hired without regard to their religious beliefs. *See id*. ¶ 51 ("Hobby Lobby welcomes employees

[2] *Available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf.

of all faiths or no faith"). Thus, the employees do not necessarily share the religious beliefs of Hobby Lobby's owners.

"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. Complaint ¶ 55. Plaintiffs now contend that the Hobby Lobby group health plan should be exempted from the requirement that certain group health plans cover contraceptive services. They allege that the contraceptive-coverage requirement violates their rights under RFRA and the First Amendment. The district court denied plaintiffs' motion for a preliminary injunction, finding that plaintiffs failed to establish a likelihood of success on their claims.

ARGUMENT

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). "To obtain a preliminary injunction," a plaintiff "must show that four factors weigh in his favor: '(1) [he] is substantially likely to succeed on the merits; (2) [he] will suffer irreparable injury if the injunction is denied; (3) [his] threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest.'" *Awad v. Ziriax*,

670 F.3d 1111, 1125 (10th Cir. 2012) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)) (other citations omitted).

A. The Relief That Plaintiffs Seek Would Cause Irreparable Harm to Hobby Lobby Employees and Their Families.

Plaintiffs cannot satisfy the prerequisites for a preliminary injunction. Although they assert that an injunction would cause no harm to third parties, their motion ignores the adverse impact that an injunction would have on the more than 13,000 full-time Hobby Lobby employees and their families, who would be denied the health insurance coverage that is required by federal law.

Moreover, until recently, the Hobby Lobby plan covered the contraceptive services that plaintiffs now seek to exclude. *See* Complaint ¶ 55. Indeed, because the Hobby Lobby group health plan covered the contraceptive services at issue here until recently, this Court appropriately could apply the "more strenuous preliminary injunction test" that governs an injunction that would change the status quo. *Awad*, 670 F.3d at 1125. This Court need not decide that question, however, because plaintiffs do not satisfy the less demanding standard. The harm that an injunction would cause to the 13,000 full-time Hobby Lobby employees and their families forecloses plaintiffs' contention that the balance of equities tips decidedly in their favor. *See* Pl. Mot. 18. Thus, to justify an injunction, plaintiffs must show that they are likely to succeed on the merits—a showing they cannot make.

B. Plaintiffs Cannot Establish a Likelihood of Success on the Merits.

1. It is common ground that corporations enjoy certain First Amendment rights. *See* Pl. Mot. 13 n.11 (citing, *e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (freedom of speech)). But, whereas 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).

That special solicitude is reflected in Acts of Congress that give religious organizations latitude to deny their employees certain protections of federal law. Although Title VII of the Civil Rights Act of 1964 generally prohibits an employer from engaging in employment discrimination on the basis of religion, the Act exempts a "religious corporation, association, educational institution, or society" from this prohibition. 42 U.S.C. § 2000e-1(a). Moreover, because the line between a religious organization's religious and secular activities may be difficult to discern, the Title VII exemption applies regardless of whether a court would find particular activities to be religious in nature. *See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335-36 & n.14 (1987). Thus, in *Amos*, the Supreme Court held that a non-profit gymnasium run by the Mormon Church was free to fire a janitor who failed to

observe the Church's standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco. *See id*. at 330 & n.4.

Similarly, a church-operated educational institution is exempt from the jurisdiction of the National Labor Relations Board, and even lay faculty members of such an institution cannot invoke the collective bargaining and other rights conferred by the National Labor Relations Act. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

2. Hobby Lobby is not a religious organization. By plaintiffs' own account, Hobby Lobby is a for-profit corporation that operates hundreds of retail stores throughout the country. *See* Complaint ¶¶ 2-3, 23-24. Because Hobby Lobby is not a religious organization, it cannot invoke the special statutory provisions that allow religious employers to deny their employees certain protections of federal law. Indeed, plaintiffs do not claim that Hobby Lobby qualifies for the Title VII exemption, and plaintiffs acknowledge that Hobby Lobby's employees are hired without regard to their religious beliefs. *See id*. ¶ 51 ("Hobby Lobby welcomes employees of all faiths or no faith").[3]

[3] No court has found a for-profit corporation to be a religious organization for purposes of federal law. The Supreme Court stressed that the activities in *Amos* were not conducted on a for-profit basis, *see Amos*, 483 U.S. at 339, and other courts have emphasized that this characteristic provides an objective way to distinguish a secular company from a potentially religious organization. *See, e.g.*, *Spencer v. World Vision, Inc*., 633 F.3d 723, 724 (9th Cir. 2011) (per curiam); *University of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002).

RFRA cannot properly be interpreted in a way that would undermine the established dichotomy between religious and secular employers. As discussed above, this dichotomy is rooted in the Free Exercise Clause, *see Hosanna-Tabor*, 132 S. Ct. at 706, and embodied in other federal statutes. When Congress enacted RFRA in 1993, it did so against the backdrop of the federal statutes that grant religious employers alone the prerogative to rely on religion as a reason to deny employees protections of federal law. Plaintiffs' interpretation of RFRA would effectively override the distinctions drawn by Congress in those other statutes.

3. Plaintiffs contend that the distinctions between religious and secular employers should be disregarded on the ground that the contraceptive-coverage requirement imposes a substantial burden on the free exercise rights of Hobby Lobby's owners, the Greens. But the obligation to cover preventive health services is imposed on group health plans and issuers of health insurance policies, and the Greens are neither.[4]

A group health plan is a legally separate entity from the corporation that sponsors it. *See* 29 U.S.C. § 1132(d). And Hobby Lobby is a legally separate entity from its owners. Although plaintiffs seek to collapse these distinctions, "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

[4] *See* 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.

who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). The principle that a corporation is a "separate and distinct" legal entity, *Seitsinger v. Dockum Pontiac Inc.*, 894 P.2d 1077, 1079-80 (Okla. 1995), applies regardless of whether the corporation is closely held or publicly owned. *See, e.g.*, *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.").

As an Oklahoma corporation with a "perpetual" term of existence, Hobby Lobby has broad powers; it may, for example, conduct business, sue and be sued, hold and transact property, and enter into contracts. Okla. Stat. Ann. tit. 18, § 1016. In the corporation's employment relationships, Hobby Lobby—not its officers or shareholders—"is the employing party." *Sipma v. Mass. Cas. Ins. Co.*, 256 F.3d 1006, 1010 (10th Cir. 2001). Significantly, by engaging in commerce through a corporation, the Greens protect themselves from liability for the corporation's debts. *See Puckett v. Cornelson*, 897 P.2d 1154, 1155-56 (Okla. Civ. App. 1995). Both Hobby Lobby and the Greens thus benefit from the legal separation inherent in the formation of a corporation, and the Greens cannot now insist that the corporation and its owners are one and the same.

The Supreme Court cases that plaintiffs cite did not hold that the regulation of a corporation may be regarded as imposing a substantial burden on the personal

free exercise rights of a corporate officer or owner. Indeed, those cases did not involve the regulation of a corporation. For example, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Supreme Court upheld the free exercise claim of an individual who was denied unemployment benefits because her religious beliefs prohibited her from working on a Saturday. In *Thomas v. Review Board*, 450 U.S. 707 (1981), the Court upheld the free exercise claim of an individual who was denied unemployment benefits because his religious beliefs prohibited him from participating in the production of armaments. And, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that a state compulsory school-attendance law substantially burdened the religious exercise of Amish parents who refused to send their children to high school.

Although plaintiffs declare that "the Supreme Court has twice allowed commercial proprietors to assert religious exercise claims against regulations impacting their businesses," Pl. Mot. 14, neither case addressed the regulation of a corporation, and, in both cases, the Court rejected the free exercise claims. In *United States v. Lee*, 455 U.S. 252 (1982), the Court considered the free exercise claim of an individual Amish farmer who claimed that he should not be required to pay social security taxes for his several employees. Even with respect to that individual employer, the Court rejected the free exercise claim. The Court explained 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." *Id*. at 261. Similarly, in *Braunfeld v. Brown*, 366 U.S. 599 (1961), the claimants were individuals who faced criminal penalties if they operated their retail stores on a Sunday, and the Court rejected their free exercise claims. Although plaintiffs also rely on this Court's decision in *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010), the claimant in that case was a prison inmate whose request for a "halal diet" had been denied by state prison officials. *See id*. at 1306. The case provides no support for plaintiffs' contention that the regulation of a corporation is equivalent to the regulation of a private individual.

Plaintiffs assert that, "[b]y denying that the Greens' religious exercise could be substantially burdened by regulation of their closely-held businesses, the district court overlooked two squarely on-point cases from the Ninth Circuit." Pl. Mot. 13. But, as plaintiffs acknowledge, those two cases merely held that "'a corporation has *standing* to assert the free exercise right of its owners.'" *Ibid*. (quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009) (citing *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988))) (emphasis added). The injury in fact that is necessary to establish standing need not be large; an "identifiable trifle" is enough. *Chicano Police Officers Ass'n v. Stover*, 526

F.2d 431, 436 (10th Cir. 1975) (quoting *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973)), *vacated on other grounds*, 426 U.S. 944 (1976). By contrast, RFRA is not implicated unless a federal regulation "substantially burden[s]" a person's exercise of religion. 42 U.S.C. § 2000bb-1(a). Neither *Stormans* nor *Townley* held that the regulation of a corporation imposed a substantial burden on an owner's free exercise rights. *Stormans* did not address the issue, and *Townley* stated only that the challenged statute "to some extent would adversely affect [the owners'] religious practices." *Townley*, 859 F.2d at 620.[5]

As the district court explained, "RFRA's provisions do not apply to *any* burden on religious exercise, but rather to a 'substantial' burden on that exercise." Op. 22 (emphasis in original). "[R]egulatory requirements applicable to a general business corporation" do not impose a substantial burden on the personal free exercise rights of the corporation's owners or officers. *Id*. at 21. "The mandate in question applies only to Hobby Lobby and Mardel, not to its officers or owners." *Id*. at 23. "Further, the particular 'burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [Hobby Lobby's] plan, subsidize *someone else's* participation in an activity that is

[5] As the district court noted, this case does not present the question whether a corporation has standing to assert the rights of its owner, because the Greens have appeared as plaintiffs to assert their own rights. *See* Op. 11 n.10.

condemned by plaintiff's religion.'" *Id*. at 23 (quoting *O'Brien v. United States Dep't of Health and Human Servs.*, ___ F. Supp. 2d ___, 2012 WL 4481208, at *8 (E.D. Mo. 2012) (rejecting an analogous RFRA challenge to the contraceptive-coverage requirement), *appeal pending*, No. 12-3357 (8th Cir.)) (emphasis in *O'Brien*). If this type of indirect and attenuated burden were regarded as substantial burden on the free exercise rights of a corporation's owner or officer, then for-profit, secular corporations could demand religion-based exemptions from all manner of corporate regulations that further the general welfare.[6]

The implications of plaintiffs' position are far-reaching. Because Hobby Lobby is not a religious employer, Hobby Lobby is not exempt from Title VII's ban on religious employment discrimination, and Hobby Lobby thus cannot hire or fire an employee or establish the terms and conditions of her employment on the basis of the employee's religious practices or beliefs. But, under plaintiffs' reasoning, RFRA would allow Hobby Lobby to do exactly that if the Greens sincerely believe that their religion prohibits them from paying a salary or providing a benefit to an employee who, for example, fails to observe church

[6] Plaintiffs note that, in *Tyndale House Publishers v. Sebelius*, __ F. Supp. 2d __, 2012 WL 5817323 (D.D.C. Nov. 16, 2012), the district court held that a corporation has "standing to assert the free exercise rights of its owners." Pl. Mot. 14 (quoting *Tyndale*, 2012 WL 5817323, *7 (quoting *Stormans*, 586 F.3d at 1120)). As discussed above, the issue of standing is distinct from the issue of substantial burden. To the extent that *Tyndale* collapsed the distinction between a corporation and its owner for purposes of addressing the merits of a RFRA claim, its analysis was incorrect for the reasons discussed in the text.

standards in such matters as regular church attendance, tithing, or, as relevant here, use of contraception. *Cf. Amos*, 483 U.S. at 330 n.4. Indeed, plaintiffs emphasize that "it is not the province of the court to tell plaintiffs what their religious beliefs are." Pl. Mot. 9 (citation omitted). On plaintiffs' reasoning, *any* federal regulation of a for-profit, secular corporation must be subject to strict scrutiny—"the most demanding test known to constitutional law," Pl. Mot. 16 (citation omitted)—if the regulation does not accord with the religious beliefs of the corporation's owners.

That is not a permissible interpretation of RFRA. Plaintiffs' position would extend to for-profit, secular employers the very prerogatives that Congress—and the Constitution—have reserved for religious employers alone, and it would undermine a wide array of measures that protect the general welfare through corporate regulation.

4. Because the contraceptive-coverage requirement does not impose a substantial burden on plaintiffs' exercise of religion, plaintiffs fail to state a claim under RFRA, and there is no reason to consider whether such a burden would be justified as the least restrictive means of furthering a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1(b). In any event, plaintiffs are not likely to succeed on that secondary issue either.

Plaintiffs cannot deny the importance of ensuring that employees and their families have access to recommended preventive health services without cost-

sharing. They contend, however, that the interests furthered by such access cannot be compelling because grandfathered plans are "exempted" from the requirement to cover preventive health services. Pl. Mot. 16 n.13 (quoting *Newland*, 2012 WL 3069154, at *7-8). This argument reflects a basic misunderstanding of the Affordable Care Act's grandfathering provision, 42 U.S.C. § 18011, the effect of which is not to give a grandfathered plan the type of *permanent* exemption from the coverage requirement that plaintiffs demand in this lawsuit. Instead, the grandfathering provision is transitional in effect, and it is expected that a majority of plans will lose their grandfathered status by 2013. *See* 75 Fed. Reg. 34,538, 34,552 (June 17, 2010). Certain changes to a group health plan such as the elimination of certain benefits, an increase in cost-sharing requirements, or a decrease in employer contributions can cause a plan to lose its grandfathered status. *See* 45 C.F.R. § 147.140(g).[7]

Finally, plaintiffs assert that, instead of regulating the terms of group health plans, the government should "distribut[e] contraceptives directly." Pl. Mot. 16 n.13 (citing *Newland*, 2012 WL 3069154, at *17). This argument misunderstands the "least restrictive means" test, which has never been understood to require the government to establish new programs or to "subsidize private religious practices."

[7] The *Newland* court was also mistaken to suggest that group health plans offered by small employers are exempted from the requirement to cover recommended preventive health services without cost-sharing. There is no such exemption.

Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 94 (Cal. 2004) (rejecting challenge to a state-law requirement that certain health insurance plans cover prescription contraceptives).

C. The Preliminary Relief Issued In Other Cases Does Not Provide A Basis For An Injunction Here.

In a supplemental letter, plaintiffs note that courts in four other cases have granted business plaintiffs preliminary relief with respect to the contraceptive-coverage requirement. *See* Pl. 11/28/12 Letter. Contrary to plaintiffs' contention, those rulings do not provide a basis for an injunction here.

The circumstances of three of the cases are unlike the circumstances here, because the group health plans in those cases did not recently cover the contraceptive services that the plaintiffs seek to exclude.[8] Moreover, in two of those cases (*Newland* and *Legatus*), the courts did not decide whether the plaintiffs were likely to succeed on the merits, and, in the third (*Tyndale*), the court conflated the analysis of standing with the analysis of the merits. *See* n.6, *supra*.

The plan at issue in *O'Brien v. HHS*, No. 12-3357 (8th Cir.), is similar to the Hobby Lobby plan in that it covered the contraceptive services the *O'Brien* plaintiffs seek to exclude. However, the panel that recently issued a stay gave no

[8] *See Newland v. Sebelius*, __ F. Supp. 2d __, 2012 WL 3069154 (D. Colo. July 27, 2012), *appeal pending*, No. 12-1380 (10th Cir.); *Legatus v. Sebelius*, __ F. Supp. 2d __, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); *Tyndale House Publishers v. Sebelius*, __ F. Supp. 2d __, 2012 WL 5817323 (D.D.C. Nov. 16, 2012).

explanation for the order, which was issued over the dissent of Judge Arnold. *See* Pl. 11/28/12 Letter, Exhibit A (stay order). Moreover, the business plaintiff in *O'Brien* has 87 employees, *see id*., Exhibit B, at 6, whereas Hobby Lobby has more than 13,000 full-time employees across the nation. Indeed, although Hobby Lobby's letter emphasizes that its group health plan is self-insured, it is the very magnitude of Hobby Lobby's business operations that makes self-insurance feasible. Hobby Lobby's motion simply ignores the harm that an injunction would cause to the corporation's thousands of employees and their families.

CONCLUSION

Plaintiffs' motion for an injunction pending appeal should be denied.

Respectfully submitted,

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November 30, 2012

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2012, I filed and served the foregoing opposition on counsel of record through this Court's CM/ECF system.

/s Alisa B. Klein
_____
Alisa B. Klein