No. 12-2673

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AUTOCAM CORPORATION; AUTOCAM MEDICAL, LLC; JOHN KENNEDY; PAUL KENNEDY; JOHN KENNEDY, IV; MARGARET KENNEDY; THOMAS KENNEDY,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SETH D. HARRIS, in his official capacity as Acting Secretary of Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, in his official capacity as Secretary of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN (No. 1:12-CV-1096) (Hon. Robert J. Jonker)

SUPPLEMENTAL BRIEF FOR THE APPELLEES

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STATEMENT OF THE ISSUES

Plaintiffs allege that, under the Religious Freedom Restoration Act ("RFRA"), the group health plan sponsored by Autocam Corporation and Autocam Medical, LLC, must be exempted from the requirement to cover Food and Drug Administration ("FDA")-approved contraceptives, as prescribed by a health care provider. Pursuant to this Court's May 3, 2013 order, this supplemental brief addresses the following issues:

1. Whether Autocam Corporation, a for-profit Michigan corporation, and Autocam Medical, LLC, a for-profit Michigan limited liability corporation (collectively, "Autocam"), have standing, independent of the rights of their corporate shareholders, to assert the RFRA claim alleged in the complaint.[1]

2. Whether the individual plaintiffs have standing to assert the RFRA claim alleged in the complaint.

3. Whether Autocam Corporation and Autocam Medical, LLC, have standing to assert the free exercise rights of their shareholders, and whether the Supreme Court's associational standing decisions in *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303 n.26 (1985), and *NAACP v.*

[1] We address this issue first because we believe that the corporations (but not the shareholders) have standing to challenge the contraceptive-coverage requirement.

Alabama ex rel. Patterson, 357 U.S. 449, 458-459 (1958), are relevant to this question.

4. Whether the Anti-Injunction Act, 26 U.S.C. § 7421(a), affects the Court's jurisdiction to entertain this suit at this time.

BACKGROUND

The Affordable Care Act generally provides that "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for" certain specified preventive health services. 42 U.S.C. § 300gg-13(a). These include certain preventive health services recommended by the United States Preventive Services Task Force, *see id*. § 300gg-13(a)(1), certain immunizations, *see id*. § 300gg-13(a)(2), and, "with respect to women, such additional preventive care and screenings . . . provided for in the comprehensive guidelines supported by the Health Resources and Services Administration [("HRSA")]," *id*. § 300gg-13(a)(4). HRSA is a component of the Department of Health and Human Services.

Pursuant to this statutory delegation, HRSA has recommended coverage of, among other health services, "'[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed by a

provider." *Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act*, 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012). Accordingly, subject to certain exceptions, non-grandfathered group health plans and health insurance issuers are required to include coverage for these services without cost-sharing for plan years beginning on or after August 1, 2012. *See id*. at 8725-8726.

ARGUMENT

A. The Autocam Corporations Have Standing To Assert The RFRA Claim Alleged In The Complaint.

Plaintiffs seek to challenge the federal requirement that the group health plan sponsored by Autocam Corporation and Autocam Medical, LLC, include coverage of FDA-approved contraceptives, as prescribed by a health care provider. The Autocam corporations have standing to challenge this contraceptive-coverage requirement because the corporations are required to ensure that the plan provides the coverage and the corporations' funds are used to help pay for the plan.

Our brief explains that the Autocam corporations fail to state a claim under RFRA because (inter alia) for-profit, secular corporations are not persons engaged in the exercise of religion. *See* Gov. Br. 17-22. That is a reason to reject the Autocam corporations' claim on the merits, rather than to dismiss their claim for lack of standing.

B. The Individual Shareholders Do Not Have Standing To Assert The RFRA Claim Alleged In The Complaint.

1. The individual shareholders do not have standing to assert the RFRA claim alleged in the complaint. The obligation to provide contraceptive coverage lies with the group health plan sponsored by the corporations—not with the shareholders in their personal capacities—and the funds used to help pay for the plan belong to the corporations, not to the shareholders. *See* Gov. Br. 22-25. The contraceptive-coverage requirement does not cause the shareholders any injury that could establish their standing to challenge that requirement under RFRA.

"A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). The Supreme Court has emphasized that "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).

Accordingly, "the circuits are consistent in holding that 'an action to redress injuries to a corporation . . . cannot be maintained by a stockholder in his own name.'" *Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc.*, 862 F.2d 597, 602-603 (6th Cir. 1988) (citing cases). This shareholder standing rule "remains fully applicable even where . . . the individual who seeks redress for corporate

injuries is the corporation's sole shareholder." *B&V Distributing Co., Inc. v. Dottore Companies, LLC*, 278 Fed. App'x 480, 485 (6th Cir. 2008) (unpub.) (citing *Canderm Pharmacal, Ltd.*, 862 F.2d at 603).[2]

"Indeed, in one sense the rule may be more rigid in a sole shareholder situation." *Kush v. American States Ins. Co.*, 853 F.2d 1380, 1384 (7th Cir. 1988). If an individual chooses "to operate his business in corporate form," that form gives him "several advantages over operations as an unincorporated sole proprietorship, not the least of which was limitation of liability." *Ibid*. An individual "may not move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms." *Ibid*. "The derivative injury rule holds that a shareholder (even a shareholder in a closely-held corporation) may not sue for personal injuries that result directly from injuries to the corporation." *In re Kaplan*, 143 F.3d 807, 811-812 (3d Cir. 1998) (Alito, J.).

"While this rule, which recognizes that corporations are entities separate from their shareholders in contradistinction with partnerships or other

[2] *Accord, e.g., Diva's Inc. v. City of Bangor*, 411 F.3d 30, 42 (1st Cir. 2005); *In re Kaplan*, 143 F.3d 807, 811-812 (3d Cir. 1998) (Alito, J.); *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1318 (4th Cir. 1994); *Schaffer, et al. v. Universal Rundle Corp.*, 397 F.2d 893, 896 (5th Cir. 1968); *Kush v. American States Ins. Co.*, 853 F.2d 1380, 1384 (7th Cir. 1988); *Potthoff v. Morin*, 245 F.3d 710, 716 (8th Cir. 2001); *Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969); *The Guides, Ltd. v. Yarmouth Group Property Management, Inc.*, 295 F.3d 1065, 1070, 1071-73 (10th Cir. 2002).

unincorporated associations, is regularly encountered in traditional business litigation, it also has been uniformly applied on the infrequent occasions it has arisen in suits against the state for statutory or constitutional violations." *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1317 (4th Cir. 1994). For example, in *Diva's Inc. v. City of Bangor*, 411 F.3d 30, 35, 42 (1st Cir. 2005), the First Circuit held that the sole shareholder of a corporation that operated an adult entertainment bar lacked standing to claim that local officials had denied the corporation a special amusement permit in violation of her rights under the First and Fourteenth Amendments. In *Potthoff v. Morin*, 245 F.3d 710, 717-718 (8th Cir. 2001), the Eighth Circuit dismissed a sole shareholder's First Amendment claim on standing grounds because the termination of the corporation's leasing agreement did not cause the shareholder any "cognizable injury" that was "distinct from the harm" to the corporation rather than derivative of that harm. In *The Guides, Ltd. v. Yarmouth Group Property Management, Inc.*, 295 F.3d 1065, 1070, 1071-73 (10th Cir. 2002), the Tenth Circuit held that a sole shareholder lacked standing to assert a race discrimination claim that derived from the defendants' failure to contract with the corporation. And in *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311 (4th Cir. 1994), the Fourth Circuit dismissed a sole shareholder's claim under the Privileges and Immunities Clause because the shareholder did "not show

the type of individualized harm that is necessary to support such a claim." *Id.* at 1317. "Instead, all injury is merely 'derivative' of the injury to the corporation, which is not constitutionally cognizable under the Privileges and Immunities Clause." *Ibid*. The Fourth Circuit emphasized that, although the shareholder wished "to discard the separate entity doctrine in this instance, such an action would vitiate the established rule against corporate standing in its entirety, while disregarding settled theory of corporate law." *Id*. at 1317-1318 (followed in *Chance Management, Inc. v. State of South Dakota*, 97 F.3d 1107, 1115 (8th Cir. 1996)).[3]

These tenets of corporate law foreclose the contention that the shareholders are proper plaintiffs in this action. This suit challenges a corporate regulation, and the proper plaintiffs are the corporations themselves, rather than their shareholders.

2. In response to the Tenth Circuit's supplemental briefing order in *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir.), the *Hobby Lobby* plaintiffs argued that the contraceptive-coverage requirement causes the shareholders

[3] *See also, e.g.*, *Flynn v. Merrick*, 881 F.2d 446, 450 (7th Cir. 1989) ("Filing suit under 42 U.S.C. § 1983 does not diminish the requirement that the shareholder suffer some individual, direct injury."); *Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981) (extending shareholder standing rule to civil rights actions under § 1983); *Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969) (finding "nothing in the Civil Rights Act" that would permit a plaintiff-stockholder to circumvent the rule that, "even though a stockholder owns all, or practically all, of the stock in a corporation, such a fact of itself does not authorize him to sue as an individual").

Article III injury, and they further argued that "prudential standing does not apply to a RFRA claim." *Hobby Lobby* Pl. Supp. Br. 11. Neither argument is correct.

First, the contraceptive-coverage requirement does not cause shareholders Article III injury. "As a general matter, shareholders suffer injury in the Article III sense when the corporation incurs significant harm, reducing the return on their investment and lowering the value of their stockholdings." *Grubbs v. Bailes*, 445 F.3d 1275, 1280 (10th Cir. 2006) (citing *Franchise Tax Bd. of Cal. v. Alcan Aluminium, Ltd.*, 493 U.S. 331, 335-36 (1990)). No such claim has been made by the shareholders in the contraceptive-coverage cases and no such claim could be substantiated. "As the [Autocam] Plaintiffs took pains to point out, their objection is *not* based on the out-of-pocket costs of compliance [for a corporation], which are relatively minimal." Pl. Br. 16 (plaintiffs' emphasis). "Actuaries, economists, and insurers estimate that providing contraceptive coverage is at least cost neutral, and may result in cost-savings when taking into account all costs and benefits for the insurer." 78 Fed. Reg. 8456, 8463 (Feb. 6, 2013) (citation omitted). Thus, the shareholders do not contend and could not show that a corporation's compliance with the contraceptive-coverage requirement would "lower[] the value of their stockholdings." *Grubbs*, 445 F.3d at 1280.

Instead, the shareholders' assertion of personal injury rests entirely on their contention that the regulation of a corporation is tantamount to the regulation of the

shareholders in their personal capacities. That argument is foreclosed by the tenets of corporate law discussed above.

Second, the *Hobby Lobby* plaintiffs are also mistaken to assert that the doctrine of prudential standing does not apply to a RFRA claim. That argument reflects a misunderstanding of the RFRA provision on which the plaintiffs rely, which states that "[s]tanding to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution." 42 U.S.C. § 2000bb-1(c). As the D.C. Circuit explained, "[t]he Senate Report makes clear that Congress included the provision in order to emphasize that RFRA should not 'have [the] unintended consequence[ ]' of 'unsettl[ing]' standing law." *Jackson v. District of Columbia*, 254 F.3d 262, 267 (D.C. Cir. 2001) (quoting S. Rep. No. 103-111, at 12-13 (1993)). Prior to the enactment of RFRA, courts "interpreted the Constitution's article III standing provision to preclude taxpayers from attaining standing to challenge on free exercise grounds the tax-exempt status of religious institutions." S. Rep. No. 103-111, at 13. Congress included the standing provision in RFRA to make clear that "these issues continue to be resolved under article III standing rules and establishment clause jurisprudence." *Ibid.* Thus, "[t]he act would not provide a basis for standing in situations where standing to bring a free exercise claim is absent." *Ibid.*

"Although it may be unusual for Congress to include language in a statute merely to emphasize its intention not to change a particular aspect of existing law," that is "precisely what Congress did here." *Jackson*, 254 F.3d at 267. Clearly, RFRA did not override the bedrock principle that "a shareholder (even a shareholder in a closely-held corporation) may not sue for personal injuries that result directly from injuries to the corporation." *In re Kaplan*, 143 F.3d 807, 811-812 (3d Cir. 1998) (Alito, J.).[4]

C. The Corporations Do Not Have Standing To Assert A RFRA Claim On Their Shareholders' Behalf.

1. The principles of associational standing that are reflected in the Supreme Court's decisions in *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303 n.26 (1985), and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-459 (1958), do not permit the Autocam corporations to assert a RFRA claim on their shareholders' behalf. It is well established that, "[e]ven in the absence of injury to itself, an association may have standing solely as the

[4] The *Hobby Lobby* plaintiffs also argued that the issue of prudential standing was waived. This Court has held that prudential standing requirements cannot be waived. *See Community First Bank v. National Credit Union Administration*, 41 F.3d 1050, 1053 (6th Cir. 1994) (holding that standing "is a qualifying hurdle that plaintiffs must satisfy even if raised *sua sponte* by the court" and finding "no authority for the plaintiffs' argument that prudential standing requirements may be waived by the parties"). In any event, no issues have been waived in this case, which, like *Hobby Lobby*, is before the Court on plaintiffs' appeal from the denial of a preliminary injunction.

representative of its members." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342 (1977) (internal quotation marks and citations omitted). "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id*. at 343.

The Supreme Court's decisions in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985), are illustrative. In *NAACP*, the Supreme Court held that the NAACP, which is a nonprofit membership corporation, 357 U.S. at 451, could "assert, on behalf of its members, a right personal to them to be protected from compelled disclosure by the State of their affiliation with the Association as revealed by the membership lists." *Id*. at 458.

Similarly, in *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985), the Court held that the Tony and Susan Alamo Foundation, which "is a nonprofit religious organization incorporated under the laws of California," *id*. at 292, had standing to assert a Free Exercise Clause claim on behalf of its "'associates,' most of whom were drug addicts, derelicts, or criminals before their conversion and rehabilitation by the Foundation." *Ibid*. The Foundation argued

that the receipt of wages required by the Fair Labor Standards Act ("FLSA") "would violate the religious convictions of the associates," *id*. at 303, some of whom had "vigorously protested the payment of wages, asserting that they considered themselves volunteers who were working only for religious and evangelical reasons." *Id*. at 293. The Supreme Court held that the Foundation "has standing to raise the free exercise claims of the associates, who are members of the religious organization as well as employees under the Act." *Id*. at 303 n.26 (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-459 (1958)). The Court rejected the claim on the merits because the FLSA's minimum wage requirement does not "interfere with the associates' right to freely exercise their religious beliefs." *Id*. at 304-305.

These principles do not permit the corporate plaintiffs in this case to assert a RFRA claim on behalf of their shareholders. We are unaware of any Supreme Court decision that has applied the doctrine of associational standing in the context of a for-profit corporation. But, even assuming that the doctrine of associational standing would extend to that context, the doctrine does not apply here because the shareholders do not "have standing to sue in their own right." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Therefore, this prerequisite for associational standing is not satisfied, and the corporations cannot assert a RFRA claim on the shareholders' behalf.

2. We note that, in *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619-620 & n.15 (9th Cir. 1988), and *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120-21 & n.9 (9th Cir. 2009), the Ninth Circuit held that for-profit corporations had standing to assert Free Exercise Clause claims on behalf of their shareholders. These standing rulings are incorrect and should not be followed here.

The Ninth Circuit declared that a closely held corporation "is merely the instrument through and by which" the shareholders "express their religious beliefs," and that such a corporation "presents no rights of its own different from or greater than its owners' rights." *Townley*, 859 F.2d at 619-620. Citing the Supreme Court's decision in *Tony and Susan Alamo Foundation*, 471 U.S. at 303 n.26, the *Townley* court stated that the corporation "has standing to assert [the shareholders'] Free Exercise rights." *Id*. at 620 n.15; *see also Stormans*, 586 F.3d at 1120 (following *Townley*).

This reasoning cannot be reconciled with "incorporation's basic purpose," which 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). *See Conestoga Wood Specialties Corp. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 140110, *7-8 (E.D. Pa. Jan. 11, 2013) (declining to follow *Townley* and *Stormans* for this reason), *appeal pending*, No. 13-1144 (3d Cir.); *see also*

Conestoga Wood Specialties Corp. v. Sebelius, slip op. 3 (3d Cir. Feb. 7, 2013) (Garth, J., concurring) (explaining that the shareholders are, "'in both law and fact, separated by multiple steps from both the coverage that the company health plan provides and from the decisions that individual employees make in consultation with their physicians as to what covered services they will use'") (quoting *Grote v. Sebelius*, 708 F.3d 850, 858 (2013) (Rovner, J., dissenting)).

In effect, the *Townley* and *Stormans* courts pierced the corporate veil without finding that the prerequisites for veil-piercing were met. As our brief explained, a court cannot pierce the veil for the limited purpose of allowing shareholders to challenge corporate regulations. *See* Gov. Br. 23-25. "So long as the business's liabilities are not the [Kennedys'] liabilities—which is the primary and 'invaluable privilege' conferred by the corporate form, *Torco Oil Co. v. Innovative Thermal Corp.*, 763 F. Supp. 1445, 1451 (N.D. Ill. 1991) (Posner, J., sitting by designation)—neither are the business's expenditures the [Kennedys'] own expenditures." *Grote v. Sebelius*, 708 F.3d at 858 (Rovner, J., dissenting). The money used to help pay for coverage under the Autocam group health plan "belongs to the company, not to the" Kennedys. *Ibid*.

D. The Anti-Injunction Act Does Not Divest The Court Of Jurisdiction To Entertain This Suit At This Time.

The Anti-Injunction Act provides, with statutory exceptions inapplicable here, that "no suit for the purpose of restraining the assessment or collection of any

tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). "This statute protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2582 (2012). "Because of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund." *Ibid*. (citing *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7–8 (1962)); *see also Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974). When the Anti-Injunction Act applies, it divests a court of subject-matter jurisdiction. *See Williams Packing*, 370 U.S. at 5.[5]

The fact that the Court is in a position where it could issue an injunction that would affect the assessment and collection of a tax is highly unusual. In most circumstances, the Anti-Injunction Act would deprive the Court of jurisdiction to hear the suit. The district court stated that, if the assessment authorized by 26 U.S.C. § 4980D is a tax, "then this Court would lack power to enjoin it, preliminarily or permanently, before its collection." R.42, Page ID ##756 (opinion and order). We respectfully submit that the Anti-Injunction Act does not apply

[5] The Declaratory Judgment Act also excepts from its ambit suits for declaratory relief "with respect to Federal taxes." 28 U.S.C. § 2201. That exception "is at least as broad as the Anti-Injunction Act." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 n.7 (1974).

here, however, because of the unique statutory structure of 42 U.S.C. § 300gg-13(a) and 26 U.S.C. § 4980D.

The contraceptive-coverage requirement is the direct result of the Affordable Care Act's express delegation of an administrative determination to HRSA, a component of the Department of Health and Human Services. Congress required that group health plans provide coverage (without cost sharing) for several categories of recommended preventive health services that Congress enumerated, such as recommended immunizations, and that "with respect to women" the requirement would extend to "such additional preventive care and screenings . . . provided for in the comprehensive guidelines supported by [HRSA]." 42 U.S.C. § 300gg-13(a)(4).

This suit effectively involves a challenge to the exercise of that delegated authority by HRSA. *See* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) ("As relevant here, the HRSA Guidelines require coverage, without cost sharing, 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."). That decision by HRSA triggers several non-tax enforcement consequences. It thus establishes a freestanding legal obligation and not just a predicate to imposition of a tax pursuant to the unique structure of 42 U.S.C. § 300gg-13(a) and 26 U.S.C. § 4980D. For example,

because the requirement is part of the Affordable Care Act's amendments to the Public Health Service Act, the requirement applies to certain insurers, which are subject to the enforcement authority of the States or the Secretary of Health and Human Services. *See* 42 U.S.C. § 300gg-22. Those insurers are not subject to the tax that is authorized by 26 U.S.C. § 4980D, and thus could assert a pre-enforcement challenge to the contraceptive-coverage requirement without facing an Anti-Injunction Act bar. *See also* 29 U.S.C. § 1132(a)(5) (authorizing enforcement by the Secretary of Labor).

The contraceptive-coverage requirement thus resulted from express delegated authority outside the Treasury Department, is enforced independently outside the Internal Revenue Code, and is subject to immediate challenge by other regulated entities. We believe these textual and structural aspects of the Affordable Care Act reflect congressional intent not to bar pre-enforcement challenges to HRSA-based requirements under the Anti-Injunction Act.

Respectfully submitted,

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MAY 2013

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2013, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein
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