No. 13-13879

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BECKWITH ELECTRIC CO., INC., and THOMAS R. BECKWITH,

Plaintiffs-Appellees,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; THOMAS E. PEREZ, in his official capacity as 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-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA (No. 8:13-cv-648) (Hon. Elizabeth A. Kovachevich)

REPLY BRIEF FOR THE APPELLANTS

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INTRODUCTION AND SUMMARY

The issue presented here is now pending before the Supreme Court. On November 26, 2013, the Supreme Court granted the petitions for writs of certiorari in *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (S. Ct.), and *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356 (S. Ct.), and consolidated the cases for oral argument. Both cases present the statutory question that is presented here: whether the Religious Freedom Restoration Act ("RFRA") allows a for-profit, secular corporation to deny its employees the health coverage of contraceptives to which they are entitled by federal law, based on the religious beliefs of the corporation's owners. *Conestoga Wood* also presents a challenge to the contraceptive-coverage requirement under the Free Exercise Clause of the First Amendment, but that issue is not before this Court on this appeal.

This Court may wish to defer consideration of this appeal pending the Supreme Court's decisions in *Hobby Lobby* and *Conestoga Wood*, which will be heard this Term and which should control here. The RFRA claims in this case fail for the same reasons that the claims fail in *Hobby Lobby* and *Conestoga*. First, RFRA does not grant rights to for-profit corporations. Second, RFRA does not authorize claims that disregard background tenets of American corporate law. Third, the particular burden about which plaintiffs complain is too attenuated to be substantial within the meaning of RFRA. And, fourth, the claims would fail even

if strict scrutiny were applicable because the contraceptive-coverage requirement is the least restrictive means to advance compelling governmental interests.

A. RFRA Does Not Grant Rights To For-Profit Corporations

Plaintiff Beckwith Electric Co., Inc., is a "secular, for-profit corporation." R.39 at 2 (district court opinion). Beckwith Electric's claim fails because RFRA does not grant rights to for-profit corporations.

RFRA was enacted to restore the Supreme Court's free exercise jurisprudence as it stood before *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990), not to create new rights that the Supreme Court had not previously recognized. Our opening brief showed that, in the two hundred years between the adoption of the First Amendment and Congress's enactment of RFRA, the Supreme Court never held or even suggested that for-profit corporations have religious beliefs or free exercise rights. RFRA's legislative history is filled with references to individuals and churches but contains no mention of for-profit corporations. There is no "plausible basis for inferring that Congress intended or could have anticipated that for-profit corporations would be covered by RFRA." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1168 (10th Cir. 2013) (en banc) (Briscoe, C.J., concurring in part and dissenting in part).

The Supreme Court cases on which plaintiffs rely addressed free exercise claims of individuals or churches, not for-profit corporations. *See* Pl. Br. 27-31.

Their "attempt to fill this void by relying on freedom of speech cases, most notably *Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010), is unavailing." *Autocam Corp.* v. *Sebelius*, 730 F.3d 618, 627-28 (6th Cir. 2013). "*Citizens United* represents the culmination of decades of Supreme Court jurisprudence recognizing that all corporations speak." *Gilardi* v. *U.S. Dep't of Health & Human Srvcs.*, No. 13-5069, 2013 WL 5854246, *5 (D.C. Cir. Nov. 1, 2013) (citing *Conestoga Wood Specialties Corp.* v. *Secretary of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 384 (3d Cir. 2013)). "When it comes to the free exercise of religion, however, the Court has only indicated that people and churches worship." *Ibid*. "Given that the Supreme Court has never recognized that secular corporations have free exercise rights," "there is no reason to think Congress meant to take the novel step of extending free exercise rights to such corporations when it enacted RFRA." *Korte* v. *Sebelius*, Nos. 12-3841 & 13-1077 (7th Cir. Nov. 8, 2013), 2013 WL 5960692, *35 (Rovner, J., dissenting).

Plaintiffs incorrectly contend that Congress's use of the term "person" in RFRA compels the conclusion that the statute grants rights to for-profit corporations. Pl. Br. 27. They rely on the Dictionary Act, which states that the term "person" in a federal statute includes corporations unless "the context indicates otherwise." 1 U.S.C. § 1. For the reasons just discussed, the context of RFRA does in fact indicate that for-profit corporations are not covered. More to

the point, the "focus on personhood is too narrow; instead, [a court] must construe the term 'person' together with the phrase 'exercise of religion.'" *Gilardi*, 2013 WL 5854246, *2. The Dictionary Act does not address the question whether for-profit corporations are "person[s]" that engage in the "exercise of religion" in the sense that Congress intended in RFRA. *See* 42 U.S.C. §§ 2000bb-1(a), 2000bb-1(c). That question must be resolved by reference to the Supreme Court's free exercise cases, which, as discussed above, never extended free exercise rights to for-profit corporations. *See Gilardi*, 2013 WL 5854246, *2. Accordingly, Beckwith Electric cannot state a claim under RFRA.

B. RFRA Does Not Authorize Claims That Disregard Background Principles of American Corporate Law.

1. A court cannot properly attribute the religious beliefs of a controlling shareholder to the corporation itself.

The RFRA claims in this case also fail for the independent reason that they disregard background principles of American corporate law. Thomas Beckwith is the controlling shareholder and chief executive officer of Beckwith Electric. In accordance with his Southern Baptist faith, he believes that life begins at the moment of conception. *See* R.10-1 ¶ 11 (declaration of Thomas Beckwith).

The corporation, however, is a distinct legal entity, and a court cannot properly attribute the religious beliefs of Mr. Beckwith to the corporation itself. "[I]ncorporation'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); *see also Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474 (2003). "One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public." *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 437 (1946).

Nothing in RFRA overrides this background corporate law principle, which the Supreme Court regularly relies upon in interpreting federal law. *See*, *e.g.*, *Cedric Kushner*, 533 U.S. at 163 (interpreting the federal RICO statute); *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470, 477 (2006) (interpreting 42 U.S.C. § 1981); *Schenley*, 326 U.S. at 436-437 (interpreting the Interstate Commerce Act). Mr. Beckwith chose to "conduct business through [a corporation], thereby obtaining both the advantages and disadvantages of the corporate form." *Conestoga Wood*, 724 F.3d at 388. He cannot deny that Beckwith Electric is 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*, 533 U.S. at 163.

Plaintiffs urge this Court to follow the Ninth Circuit's reasoning in *EEOC v. Townley Engineering & Manufacturing Company*, 859 F.2d 610 (9th Cir. 1988), and *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), which held that for-profit corporations have third-party standing to represent their owners' free exercise rights. Pl. Br. 29. But "the *Townley/Stormans* theory . . . rests on erroneous assumptions regarding the very nature of the corporate form." *Conestoga*, 724 F.3d at 387. The *Townley* court declared that a closely held corporation is "merely the instrument through and by which [its owners] express their religious beliefs," and that the corporation "presents no rights of its own different from or greater than its owners' rights." 859 F.2d at 619, 620; *see also Stormans*, 586 F.3d at 1120 (following *Townley*). That pronouncement contradicts the corporate law principles discussed above, which the Ninth Circuit did not mention. Accordingly, the Third Circuit and the D.C. Circuit rejected the *Townley/Stormans* theory. *See Conestoga*, 724 F.3d at 387; *Gilardi*, 2013 WL 5854246, *6 ("we decline the Freshway companies' invitation to accept *Townley*'s ipse dixit that closely held corporations can vindicate the rights of their owners").

Plaintiffs also rely on *McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985), but, there, a state hearing examiner "pierced the 'corporate veil'" to make the individual owners of the stock and assets of a corporation "liable for the illegal actions of" the corporation. *McClure*, 370 N.W.2d at 850-51 & n.12.

Mr. Beckwith does not suggest that a court could pierce the corporate veil to make him personally liable for the actions or debts of Beckwith Electric. In any event, the *McClure* court rejected the free exercise claim because the corporate plaintiff was "not a religious corporation—it is a Minnesota business corporation engaged in business for profit." *Id*. at 853.[1]

2. Mr. Beckwith cannot obtain relief that would exempt Beckwith Electric from regulation.

Mr. Beckwith's own RFRA claim runs afoul of the same corporate law principles that are discussed above. Federal law does not require Mr. Beckwith personally to provide health coverage or any other form of compensation to the employees of Beckwith Electric. It is Beckwith Electric that sponsors the group health plan, and "it is that health plan which is now obligated by the Affordable Care Act and resulting regulations to provide contraceptive coverage." *Grote v. Sebelius*, 708 F.3d 850, 857 (7th Cir. 2013) (Rovner, J., dissenting from grant of injunction pending appeal); *see* 29 U.S.C. § 1132(d)(1) (a group health plan is a distinct legal entity under ERISA).

[1] Other cases cited by plaintiffs are inapposite. *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194 (2d Cir. 2012), rejected a free exercise challenge to a state law that regulated kosher food labels. In *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 116-17 & n.10 (D.D.C. Nov. 16, 2012), the court relied on the "unique corporate structure" of the plaintiff, which was 96.5% owned by a non-profit, religious organization.

Mr. Beckwith chose to create a corporation as a distinct legal entity. He cannot rely on his personal religious beliefs as a reason to exempt the corporation from federal law. No pre-*Smith* case ever suggested that a corporation could be exempted from regulation at the behest of its controlling shareholder.

It makes no difference that Mr. Beckwith "manages the day-to-day operations of Beckwith Electric." Pl. Br. 38. A *manager's* religion has never provided a basis to exempt the *corporation* from regulation. If a manager's responsibilities conflict with his religious beliefs, he may seek an accommodation under Title VII of the Civil Rights Act of 1964. *See Hobby Lobby*, 723 F.3d at 1189 (Matheson, J., concurring in part and dissenting in part). It is long settled, however, that such an accommodation cannot come at the expense of other employees. *See* Opening Br. 22-23 (discussing *Trans World Airlines, Inc*. v. *Hardison*, 432 U.S. 63 (1977)). No corporate manager could obtain the type of religious accommodation that Mr. Beckwith seeks here, which would deny the corporation's employees the benefits to which they are entitled by federal law.

C. The Particular Burden About Which Plaintiffs Complain Is Too Attenuated To Be Substantial Within the Meaning of RFRA.

Even apart from these threshold defects in plaintiffs' RFRA claims, the claims fail because the requirement that a group health plan include coverage of contraceptives is not a substantial burden on an employer's religious beliefs. A group health plan "covers many medical services, not just contraception," and the

decision as to which "services will be used is left to the employee and her doctor." *Grote*, 708 F.3d at 865 (Rovner, J., dissenting). An "employer, by virtue of paying (whether in part or in whole) for an employee's health care, does not become a party to the employee's health care decisions: the employer acquires no right to intrude upon the employee's relationship with her physician and participate in her medical decisions, nor, conversely, does it incur responsibility for the quality and results of an employee's health care if it is not actually delivering that care to the employee." *Ibid*. Moreover, "the Privacy Rule incorporated into the regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") imposes a wall of confidentiality between an employee's health care decisions (and the plan's financial support for those decisions) and the employer." *Id*. at 858 "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." *O'Brien* v. *HHS*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012), *appeal docketed*, No. 12-3357 (8th Cir. Oct. 1, 2012).

The free exercise claim that plaintiffs assert here is analogous to the free exercise claim that the Supreme Court rejected in the taxpayer context. In *Tilton* v. *Richardson*, 403 U.S. 672 (1971), taxpayers claimed that "the Free Exercise Clause is violated because they are compelled to pay taxes, the proceeds of which in part

finance grants" to religiously-affiliated colleges and universities. *Id*. at 689. This Court rejected the free exercise claim because the taxpayers were "unable to identify any coercion directed at the practice or exercise of their religious beliefs." *Ibid*. Similarly in *Doremus* v. *Board of Ed. of Hawthorne*, 342 U.S. 429 (1952), the Supreme Court "'rejected a state taxpayer's claim of standing to challenge a state law authorizing public school teachers to read from the Bible because 'the grievance which [the plaintiff] sought to litigate * * * is not a direct dollars-and-cents injury but is a religious difference.'" *Hein* v. *Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 600-601 (2007) (plurality op.) (quoting *Doremus*, 342 U.S. at 434). The Court reasoned that "'the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure.'" *Hein*, 551 U.S. at 600 (quoting Doremus, 342 U.S. at 433). And, in *Hein*, the plurality reaffirmed that there is "no taxpayer standing to sue under the Free Exercise Clause." *Id*. at 609-610.

In other words, the requirement that a taxpayer contribute to a pool of funds that may be used in ways that offend his religious beliefs does not establish a cognizable burden on his exercise of religion, much less a substantial burden. By the same reasoning, the requirement that a corporation contribute to a comprehensive health plan that may be used to pay for services that offend the

owners' religious beliefs is not a cognizable burden on religious exercise, much less a substantial burden. Plaintiffs make no attempt to reconcile their contrary position with the reasoning of the Supreme Court's tax cases, which their brief does not discuss.

D. Plaintiffs' RFRA Claim Would Fail Even If The Contraceptive-Coverage Requirement Were Subject To Strict Scrutiny.

1. There would be no basis for the exemption that plaintiffs demand here even if the contraceptive-coverage requirement were subject to strict scrutiny. The contraceptive-coverage requirement advances compelling governmental interests and is the least restrictive means to achieve them.

Subject to limited exceptions, the Affordable Care Act requires that all group health plans and all health insurers offering coverage in the individual and group markets cover a wide array of preventive-services without cost sharing. "Compelling government interests in both preventive health care and gender equality support the inclusion of contraceptives within the mandated coverage that insurance plans—including employer-sponsored plans—must provide without copayment by the insured." *Korte*, 2013 WL 5960692, *61 (Rovner, J., dissenting).

The promotion of public health is unquestionably a compelling governmental interest. *E.g.*, *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C.), *aff'd sub nom*. *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *cert. denied*, 133

S. Ct. 63 (2012). And there are few "'matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" *Korte*, 2013 WL 5960692, *63 (Rovner, J., dissenting) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). "A woman's ability to control whether and when she will become pregnant has highly significant impacts on her health, her child's health, and the economic well-being of herself and her family." *Id*. at *62. Unintended pregnancies "pose risks to both mother and fetus in that a woman, neither planning to be pregnant nor realizing that she is, may both delay prenatal care and continue practices (including smoking and drinking) that endanger the health of the developing fetus." *Ibid*. (citation omitted). "Pregnancy is contraindicated altogether for women with certain health conditions." *Ibid*. (citation omitted). "Intervals between pregnancies also matter, as pregnancies commencing less than eighteen months after a prior delivery pose higher risks of pre-term births and low birth weight." *Ibid*. (citation omitted). And unintended pregnancies "account for the lion's share of induced abortions." *Ibid*. Nearly half (49%) of all pregnancies in the United States are unintended, and "roughly 40 percent of those pregnancies (22 percent of all pregnancies) end in abortion, resulting in more than 1.2 million abortions annually as of 2008." *Ibid*. (citation omitted).

The contraceptive-coverage requirement also advances the government's distinct compelling interest in assuring that women have equal access to health-

care services. 78 Fed. Reg. 39,870, 39,872, 39,887 (July 2, 2013). Congress enacted the women's preventive-services coverage requirement because the legislative record showed that "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein); *see* IOM Report 18. "Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. at 29,070 (statement of Sen. Feinstein). Women often find that copayments and other cost sharing for important preventive services "are so high that they avoid getting [the services] in the first place." 155 Cong. Rec. at 29,302 (statement of Sen. Mikulski); *see* IOM Report 19-20. The Supreme Court recognized in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), that there is a fundamental "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." *Id*. at 626. "Assuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests." *Ibid*.

2. Contrary to plaintiffs' assertion, the compelling interests served by the Affordable Care Act's preventive-health services coverage requirement are not called into question by the specific provisions they cite. *See* Pl. Br. 47-48. We discuss each provision in turn.

Under 26 U.S.C. § 5000A(d)(2)(A)(i) and (ii), an individual will not owe a tax penalty for failing to maintain health coverage if the individual qualifies for the religious conscience or health care sharing ministry exemptions in that provision. This narrow exemption does not apply to employers and does not allow a plan to exclude coverage of particular items or services.

Plans offered by small employers are not exempt from the preventive-services coverage requirement. That requirement applies without regard to the size of the employer. 42 U.S.C. § 300gg-13. Employers with fewer than 50 full-time-equivalent employees are not subject to a *different* provision that imposes tax liability on certain large employers that fail to offer full-time employees (and their dependents) adequate health coverage. 26 U.S.C. § 4980H(c)(2)(A). But "[s]mall businesses that do elect to provide health coverage—as many do in order to offer more competitive benefits to employees and to receive tax benefits—must provide coverage that complies with" the preventive-services coverage requirement. *Gilardi*, 2013 WL 5854246, *33 (Edwards, J., dissenting).

The Affordable Care Act's "grandfathering" provision, *see* 42 U.S.C. § 18011, 45 C.F.R. § 147.140(g), has the effect of postponing compliance with a number of statutory requirements, including the preventive-services coverage requirement, until a plan makes a specified change such as an increase in cost-sharing requirements, a decrease in employer contributions, or the elimination of

certain benefits. The impact of this "exemption for grandfathered plans is thus temporary, intended to be a means for gradually transitioning employers into mandatory coverage." *Gilardi*, 2013 WL 5854246, *32 (Edwards, J., dissenting). The compelling nature of an interest is not diminished merely because the government declines to make a regulation immediately effective in order to avoid the disruption that doing so could cause. *Cf. Heckler v. Mathews*, 465 U.S. 728, 746-748 (1984) (noting that "protection of reasonable reliance interests is . . . a legitimate governmental objective" that Congress may permissibly advance through phased implementation of regulatory requirements).

The exemption from the contraceptive-coverage requirement for plans offered by religious employers cannot form the basis for exempting plans offered by for-profit, secular corporations. As discussed in our opening brief, there is a long tradition of religious exemptions for churches and other religious non-profit institutions, but those exemptions have never been extended to any commercial employer. "In choosing to use labor for financial gain, [a] corporation and its owners submit themselves to legislation—such as Title VII, the Fair Labor Standards Act, the Americans with Disabilities Act, and the Affordable Care Act—designed to protect the health, safety, and welfare of employees." *Gilardi*, 2013 WL 5854246, *34 (Edwards, J., concurring in part and dissenting in part). They

"cannot voluntarily capitalize on labor but invoke their personal religious values to deny employees the benefit of laws enacted to promote employee welfare." *Ibid*. The Supreme Court made clear before RFRA was enacted 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) (emphasis added).

3. Plaintiffs contend that, instead of establishing minimum standards for group health plans, "the government could subsidize contraception itself and give it to employees at exempt entities." Pl. Br. 55. On that theory, the government should have subsidized social security benefits itself for Lee's employees, rather than requiring that Lee contribute to those employee benefits over his religious objection. That was not the holding of *Lee*.

Plaintiffs' alternative proposals reflect their fundamental misunderstanding of the "least restrictive means" test, which has never been interpreted to require the government to create or expand programs in order to "subsidize private religious practices." *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 policies cover prescription contraceptives).[2]

CONCLUSION

The preliminary injunction should be reversed.

Respectfully submitted,

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[2] For the reasons discussed in our opening brief, plaintiffs also fail to satisfy the other preliminary injunction factors. *See* Opening Br. 17-18.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,790 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Alisa B. Klein
Alisa B. Klein

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 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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