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)

BRIEF FOR THE APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, the undersigned counsel certifies that, to the best of our knowledge, the following persons, firms, and associations may have an interest in the outcome of this case:

ACLU of Florida

Association of Christian Schools International

Association of Gospel Rescue Missions

Beckwith Electric Co., Inc.

Beckwith, Thomas R.

Brinkmann, Beth C.

C12 Group

Christian Legal Society

Delery, Stuart F.

Ethics & Religious Liberty Commission of the Southern Baptist Convention

Fowler White Boggs P.A.

Gannam, Roger K.

Gershengorn, Ian Heath

Institutional Religious Freedom Alliance

Jed, Adam C.

Kayanan, Maria

Kenneth, Michael

Kovachevich, Elizabeth A. (district court judge)

Klein, Alisa B.

Lew, Jacob J., as Secretary of the Treasury

Lieber, Sheila

Lindell & Farson, P.A.

MacMillan, Yvette Acosta

Mersino, Erin Elizabeth

National Association of Evangelicals

O'Neill, Robert E.

Perez, Thomas E., as Secretary of Labor

Pizzo, Mark A. (magistrate judge)

Pizzo, Paul R.

Pollack, Michael C.

Prison Fellowship Ministries

Richards, Scott

Ricketts, Jennifer

Sebelius, Kathleen, as Secretary of Health & Human Services

State of Florida, Office of the Attorney General

Stern, Mark B.

Thomas More Law Center

Thompson, Richard

United States Department of Health & Human Services

United States Department of Justice

United States Department of Labor

United States Department of the Treasury

Winship, Blaine H.

/s/ Alisa B. Klein
Alisa B. Klein
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STATEMENT REGARDING ORAL ARGUMENT

This appeal presents the same legal issue that has been decided by three other circuits: whether RFRA allows a for-profit, secular corporation to deny its employees the health coverage to which they are entitled by federal law, based on the religious objection of the corporation's controlling shareholder. The Sixth Circuit and Third Circuit rejected such claims, *see Autocam Corp. v. Sebelius*, __ F.3d __, 2013 WL 5182544 (6th Cir. Sept. 17, 2013); *Conestoga Wood Specialties Corp. v. Secretary of HHS*, 724 F.3d 377 (3d Cir. 2013); whereas the Tenth Circuit accepted them, *see Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc). Petitions for writs of certiorari are pending before the Supreme Court in all three of these cases. *See Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (S. Ct.); *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356 (S. Ct.); *Autocam Corp. v. Sebelius*, No. 13-482 (S. Ct.). Given the importance of the issue, the government respectfully requests oral argument.

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STATEMENT OF JURISDICTION

The district court has jurisdiction under 28 U.S.C. § 1331. The district court issued a preliminary injunction on June 25, 2013. The government filed a notice of appeal on August 22, 2013. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the Religious Freedom Restoration Act ("RFRA") allows a for-profit, secular corporation to deny its employees the health coverage to which they are otherwise entitled by federal law, based on the religious objection asserted by the corporation's controlling shareholder.

STATEMENT OF THE CASE

This appeal presents the same legal issue that has been decided by three other circuits: whether RFRA allows a for-profit, secular corporation to deny its employees the health coverage to which they are entitled by federal law, based on the religious objection of the corporation's controlling shareholder. The Sixth Circuit and Third Circuit rejected such claims, *see Autocam Corp. v. Sebelius*, __ F.3d __, 2013 WL 5182544 (6th Cir. Sept. 17, 2013); *Conestoga Wood Specialties Corp. v. Secretary of HHS*, 724 F.3d 377 (3d Cir. 2013); whereas the Tenth Circuit accepted them, *see Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc). Petitions for writs of certiorari are pending before the Supreme

Court in all three of these cases. *See Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (S. Ct.); *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356 (S. Ct.); *Autocam Corp. v. Sebelius*, No. 13-482 (S. Ct.).

Plaintiff Beckwith Electric Co., Inc., is a for-profit corporation that manufactures micro-processor-based technology for generators, transformers, and power lines. R.1 ¶¶ 32, 34-35 (complaint). The corporation has 168 full-time employees. *See id*. ¶ 39. People employed by the corporation receive health coverage through the Beckwith Electric group health plan, as part of their compensation packages. *See id*. ¶¶ 36, 49.

Thomas Beckwith is a 93% voting shareholder and chief executive officer of Beckwith Electric Co., Inc. *See id*. ¶ 28. Mr. Beckwith believes that life begins at the moment of conception, and he regards as sinful those contraceptives that may prevent the implantation of a fertilized egg in a woman's uterus. *See id*. ¶¶ 24, 132. The corporation, however, does not hire employees on the basis of their religion, and the employees are not required to share Mr. Beckwith's religious beliefs.

In this action, Beckwith Electric and Mr. Beckwith contend that the requirement that Beckwith Electric group health plan cover all forms of Food and Drug Administration ("FDA")-approved contraceptives violates RFRA, which provides that the federal government "shall not substantially burden a person's

exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. § 2000bb-1(a), (b). Plaintiffs argue that the Beckwith Electric group health plan must be exempted from the contraceptive-coverage requirement because Mr. Beckwith has asserted a religious objection to the plan's coverage of certain contraceptives (copper intrauterine devices ("IUDs") and the emergency contraceptive drugs Plan B and Ella).

The district court entered a preliminary injunction. *See* R.39. The court recognized that the obligation to provide contraceptive coverage lies with Beckwith Electric, which is a "secular, for-profit corporation." *Id*. at 2. However, the court treated the corporation and Mr. Beckwith as indistinguishable, reasoning that "Beckwith Electric is merely the instrument through and by which [Thomas] Beckwith expresses his religious beliefs." *Id*. at 26. The court further held that the contraceptive-coverage requirement is "a 'substantial burden' on Beckwith Electric," *id*. at 29, and that the interests served by the contraceptive-coverage requirement cannot be compelling because certain plans are not subject to that requirement while they retain grandfathered status. *Id*. at 32-34.

STATEMENT OF FACTS

A. Statutory and Regulatory Background

1. Most Americans with private health coverage obtain it through an employment-based group health insurance plan. Congressional Budget Office, *Key*

Issues in Analyzing Major Health Insurance Proposals 4 & Tbl. 1-1 (2008). The cost of such employment-based health coverage is typically covered by a combination of employer and employee contributions. *Id*. at 4.

The federal government heavily subsidizes group health plans and has also established certain minimum coverage standards for them. For example, in 1996, Congress required such plans to cover certain benefits for mothers and newborns. 42 U.S.C. § 300gg-4 (Supp. II 1996); 26 U.S.C. § 9811 (Supp. III 1997); 29 U.S.C. § 1185 (Supp. II 1996). In 1998, Congress required coverage of reconstructive surgery after covered mastectomies. 42 U.S.C. § 300gg-6 (Supp. IV 1998); 29 U.S.C. § 1185b (Supp. IV 1998).

2. In the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 ("Affordable Care Act" or "Act"),[1] Congress provided for additional minimum standards for group health plans (and health insurers offering coverage in both the group and individual markets).

a. As relevant here, the Act requires non-grandfathered group health plans to cover certain preventive-health services without cost sharing—that is, without requiring plan participants and beneficiaries to make copayments or pay deductibles or coinsurance. 42 U.S.C. § 300gg-13 (Supp. V 2011) ("preventive-

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

services coverage requirement"). "Prevention is a well-recognized, effective tool in improving health and well-being and has been shown to be cost-effective in addressing many conditions early." Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 16 (2011) ("IOM Report"). Nonetheless, the American health-care system has "fallen short in the provision of such services" and has "relied more on responding to acute problems and the urgent needs of patients than on prevention." *Id*. at 16-17. To address this problem, the Act requires coverage of preventive services without cost sharing in four categories.

First, group health plans must cover items or services that have an "A" or "B" rating from the U.S. Preventive Services Task Force (Task Force). 42 U.S.C. § 300gg-13(a)(1) (Supp. V 2011). The Task Force is composed of independent health-care professionals who "review the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services for the purpose of developing recommendations for the health care community." 42 U.S.C. § 299b-4(a) (Supp. V 2011). Services rated "A" or "B" are those for which the Task Force has the greatest certainty of a net benefit for patients. 75 Fed. Reg. 41,733 (July 19, 2010). The Task Force has awarded those ratings to more than 40 preventive services, including cholesterol screening,

colorectal cancer screening, and diabetes screening for those with high blood pressure. *Id*. at 41,741-41,744.

Second, the Act requires coverage of immunizations recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention. 42 U.S.C. § 300gg-13(a)(2) (Supp. V. 2011). The Committee has recommended routine vaccination to prevent a variety of vaccine-preventable diseases that occur in children and adults. 75 Fed. Reg. at 41,740, 41,745-41,752.

Third, the Act requires coverage of "evidence-informed preventive care and screenings" for infants, children, and adolescents as provided for in guidelines supported by the Health Resources and Services Administration ("HRSA"), which is a component of the Department of Health and Human Services ("HHS"). 42 U.S.C. § 300gg-13(a)(3) (Supp. V 2011). The relevant HRSA guidelines were developed "by multidisciplinary professionals in the relevant fields to provide a framework for improving children's health and reducing morbidity and mortality based on a review of the relevant evidence." 75 Fed. Reg. at 41,733. They include a schedule of examinations and screenings. *Id*. at 41,753-41,755.

Fourth, and as particularly relevant here, the Act requires coverage "with respect to women, [of] such additional preventive care and screenings" (not covered by the Task Force's recommendations) "as provided for in comprehensive guidelines supported" by HRSA. 42 U.S.C. § 300gg-13(a)(4) (Supp. V 2011).

Congress included this provision in response to a legislative record showing 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. In particular, "[w]omen 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). And 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." *Id*. at 29,302 (statement of Sen. Mikulski); *see* IOM Report 19-20.

Because HRSA did not have relevant guidelines at the time of the Act's enactment, HHS requested that the Institute of Medicine (Institute or IOM) develop recommendations for it. 77 Fed. Reg. 8726 (Feb. 15, 2012); IOM Report 1. The Institute is part of the National Academy of Sciences, a "semi-private" organization Congress established "for the explicit purpose of furnishing advice to the Government." *Public Citizen v. Department of Justice*, 491 U.S. 440, 460 & n.11 (1989) (citation omitted); *see* IOM Report iv.

To formulate recommendations, the Institute convened a group of experts, "including specialists in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines." IOM Report 2. The Institute defined preventive services as measures "shown to improve well-being, and/or

decrease the likelihood or delay the onset of a targeted disease or condition." Id. at 3. Based on the Institute's review of the evidence, it then recommended a number of preventive services for women, such as screening for gestational diabetes for pregnant women, screening and counseling for domestic violence, and at least one well-woman preventive care visit a year. *Id*. at 8-12.

The Institute also recommended coverage for the "full range" of "contraceptive methods" approved by the Food and Drug Administration (FDA), as well as "sterilization procedures" and "patient education and counseling for all women with reproductive capacity." IOM Report 10; *see id*. at 102-110. FDA-approved contraceptive methods include oral contraceptive pills, diaphragms, injections and implants, emergency contraceptive drugs, and intrauterine devices (IUDs). FDA, Birth Control: Medicines To Help You, http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last visited Oct. 21, 2013) ("Birth Control Guide").

In making that recommendation, the Institute noted that nearly half of all pregnancies in the United States are unintended and that unintended pregnancies have adverse health consequences for both mothers and children. IOM Report 102-103 (discussing consequences, including inadequate prenatal care, higher incidence of depression during pregnancy, and increased likelihood of preterm birth and low birth weight). In addition, the Institute observed, use of

contraceptives leads to longer intervals between pregnancies, which "is important because of the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." *Id*. at 103. The Institute also noted that greater use of contraceptives lowers abortion rates. *Id*. at 105. Finally, the Institute explained that "contraception is highly cost-effective," as the "direct medical cost of unintended pregnancy in the United States was estimated to be nearly $5 billion in 2002." *Id*. at 107.

HRSA adopted guidelines consistent with the Institute's recommendations, including a coverage requirement for all FDA-approved "contraceptive methods [and] sterilization procedures," as well as "patient education and counseling for all women with reproductive capacity," as prescribed by a health-care provider. HRSA, HHS, Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines/ (last visited Oct. 21, 2013). The relevant regulations adopted by the three Departments implementing this portion of the Act (HHS, Labor, and Treasury) require coverage of, among other preventive services, the contraceptive services recommended in the HRSA guidelines. 45 C.F.R. § 147.130(a)(1)(iv) (HHS); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. § 54.9815-2713(a)(1)(iv) (Treasury) (collectively referred to in this brief as the "contraceptive-coverage requirement").

b. The implementing regulations authorize an exemption from the contraceptive-coverage requirement for the group health plan of an organization that qualifies as a "religious employer." 45 C.F.R. § 147.131(a). A religious employer is defined as a non-profit organization described in the Internal Revenue Code provision that refers to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. *Ibid*. (cross-referencing 26 U.S.C. § 6033(a)(3)(A)(i) and (iii)).

The implementing regulations also establish certain religion-related accommodations for group health plans established or maintained by "eligible organization[s]." 45 C.F.R. § 147.131(b). An accommodation is available to a non-profit religious organization that has religious objections to providing coverage for some or all contraceptive services. *Ibid*. If a non-profit religious organization is eligible for such an accommodation, the women who participate in its plan will have access to contraceptive coverage without cost sharing though an alternative mechanism established by the regulations. 78 Fed. Reg. 39,870, 39,872, 39,874-39,886 (July 2, 2013).

"Consistent with religious accommodations in related areas of federal law, such as the exemption for religious organizations under Title VII of the Civil Rights Act of 1964," the definition of an organization eligible for an accommodation "does not extend to for-profit organizations." 78 Fed. Reg. at

39,875. The Departments that issued the preventive-services coverage regulations explained that they were "unaware of any court granting a religious exemption to a for-profit organization, and decline[d] to expand the definition of eligible organization to include for-profit organizations." *Ibid*.

B. Factual Background and District Court Proceedings

Beckwith Electric Co., Inc., is a for-profit corporation that manufactures microprocessor-based technology for generators, transformers, and power lines. R.1 ¶¶ 32, 34-35 (complaint). The corporation has 168 full-time employees. *See id*. ¶ 39. People employed by the corporation receive health coverage through the Beckwith Electric group health plan, as part of their compensation packages that include wages and non-cash benefits. *See id*. ¶¶ 36, 49.

Thomas Beckwith is a 93% voting shareholder and chief executive officer of Beckwith Electric. *See id*. ¶ 28. Mr. Beckwith believes that life begins at the moment of conception and regards as sinful those contraceptives that may prevent the implantation of a fertilized egg in a woman's uterus. *See id*. ¶¶ 24, 132. The corporation, however, does not hire employees on the basis of their religion, and the employees are not required to share Mr. Beckwith's religious beliefs.

In this action, Beckwith Electric and Mr. Beckwith contend that the requirement that Beckwith Electric group health plan cover all forms of Food and Drug Administration ("FDA")-approved contraceptives violates RFRA, which

provides that the federal government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. § 2000bb-1(a), (b). Plaintiffs argue that the Beckwith Electric group health plan must be exempted from the contraceptive-coverage requirement because Mr. Beckwith has asserted a religious objection to the plan's coverage of certain contraceptives (copper IUDs and the emergency contraceptive drugs Plan B and Ella).[2]

The district court entered a preliminary injunction. *See* R.39. The court recognized that the obligation to provide contraceptive coverage lies with Beckwith Electric, which is a "secular, for-profit corporation." *Id*. at 2. The court treated the corporation and Mr. Beckwith as indistinguishable, however, opining that "Beckwith Electric is merely the instrument through and by which [Thomas] Beckwith expresses his religious beliefs." *Id*. at 26. The court further held that the contraceptive-coverage requirement is "a 'substantial burden' on Beckwith Electric," *id*. at 29, and that the interests served by the contraceptive-coverage

[2] Although plaintiffs describe these FDA-approved devices and drugs as "abortifacients," they are not abortifacients within the meaning of federal law because they have no effect if a woman is pregnant. *See* 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997) ("Emergency contraceptive pills are not effective if the woman is pregnant; they act by delaying or inhibiting ovulation, and/or altering tubal transport of sperm and/or ova (thereby inhibiting fertilization), and/or altering the endometrium (thereby inhibiting implantation)."); 45 C.F.R. § 46.202(f) ("Pregnancy encompasses the period of time from implantation until delivery.").

requirement cannot be compelling because certain plans are not subject to that requirement while they retain grandfathered status. *Id*. at 32-34.

SUMMARY OF ARGUMENT

Beckwith Electric is a for-profit, secular corporation that manufactures microprocessor-based technology for generators, transformers, and power lines. The corporation has 168 full-time employees. People employed by the corporation receive health coverage through the Beckwith Electric group health plan, as part of their compensation packages. Mr. Beckwith is the controlling shareholder and chief executive officer of Beckwith Electric. He alleges that certain contraceptives are contrary to his religious beliefs. The corporation, however, does not hire employees on the basis of their religion, and the employees are not required to share Mr. Beckwith's religious beliefs.

In this action, plaintiffs seek an exemption from the federal requirement that the Beckwith Electric plan cover all forms of FDA-approved contraceptives, as prescribed by a health care provider, because Mr. Beckwith has asserted a religious objection to the plan's coverage of certain contraceptives. They contend that this exemption is required by RFRA, which provides that the federal government shall not "shall not substantially burden a person's exercise of religion" unless application of that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. § 2000bb-1(a), (b). Plaintiffs' challenge to the

contraceptive-coverage requirement fails to satisfy this statutory standard in multiple respects.

First, Beckwith Electric is a "for-profit, secular corporation." R.39 at 2 (district court opinion). As such, it is not a "person" engaged in the "exercise of religion" within the meaning of RFRA. Congress enacted RFRA to restore the Supreme Court's free exercise jurisprudence as it stood before the Court's decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). In the 200-year span between adoption of the First Amendment and RFRA's passage, the Supreme Court consistently treated free exercise rights as confined to individuals and non-profit religious organizations such as churches. The Court never held or even suggested that the Free Exercise Clause would permit a for-profit corporation to obtain an exemption from generally applicable corporate regulation.

Second, the district court erred by interpreting RFRA to conflict with pre-existing federal statutes, which protect the rights of employees by limiting the availability of religious exemptions in the context of employment. The exemption that plaintiffs demand here would come at the expense of Beckwith Electric's employees, who would be denied the health coverage to which they are entitled by federal law. The Supreme Court has cautioned that "courts must take adequate account of the burdens a requested accommodation may impose on non-

beneficiaries," *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005), and that principle informed the Court's pre-RFRA interpretation of religious accommodations in the context of employment. Under these pre-existing federal statutes, religious exemptions for employers are available only to churches or other non-profit religious organizations, and an employee cannot obtain a religious accommodation that would come at the expense of other employees.

Third, RFRA does not authorize claims that disregard bedrock tenets of American corporate law. The obligation to provide contraceptive coverage lies with Beckwith Electric, not with Mr. Beckwith personally. The district court attributed the personal religious beliefs of Mr. Beckwith (who believes that life begins at conception) to the corporation and declared that the contraceptive-coverage requirement is a substantial burden on Beckwith Electric. R.39 at 29. But as the Third Circuit and Sixth Circuit explained in rejecting analogous RFRA claims, 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 the corporation.

Fourth, the particular burden about which plaintiffs complain is too attenuated to be substantial within the meaning of RFRA. The Supreme Court has held that the requirement that an individual contribute taxes that will be used in ways that are inconsistent with his religious beliefs is not a cognizable burden on

his religious exercise, much less a substantial burden. Likewise, the requirement that a corporation contribute funds towards a comprehensive insurance plan that may be used in ways that are inconsistent with Mr. Beckwith's religious beliefs is not a cognizable burden on his exercise of religion, much less a substantial burden.

Finally, plaintiffs' demand for an exemption would fail even if the contraceptive-coverage requirement were subject to strict scrutiny. Even if Mr. Beckwith were an individual employer, his free exercise claim would fail under the reasoning of *United States v. Lee*, 455 U.S. 252 (1982). There, an individual employer sought to deny his employees benefits to which they were entitled by federal law, based on his personal religious beliefs. The Supreme Court rejected his free exercise claim, emphasizing that exempting an individual employer from the obligation to pay Social Security taxes "operates to impose the employer's religious faith on the employees," *id*. at 261, who would be denied the benefits to which they were entitled by federal law if their employer were exempted. The Supreme Court held: "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." *Ibid*. (emphasis added). That holding applies equally here and forecloses plaintiffs' RFRA claim.

STANDARD OF REVIEW

This Court reviews a preliminary injunction for an abuse of discretion but reviews *de novo* any legal rulings on which a preliminary injunction is based. *See Odebrecht Construction, Inc. v. Secretary, Florida Department of Transportation*, 715 F.3d 1268, 1273 (11th Cir. 2013).

ARGUMENT

I. Plaintiffs Cannot Show Irreparable Harm, and The Balance Of Equities And Public Interest Preclude A Preliminary Injunction.

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "A plaintiff 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 the equities tips in his favor, and that an injunction is in the public interest." *Id*. at 20.

For the reasons set out below, plaintiffs cannot establish a likelihood of success on the merits. Accordingly, plaintiffs cannot demonstrate irreparable harm. *See, e.g., McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012) ("Because [plaintiff] 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.").

The balance of harms and public interest also preclude a preliminary injunction. The religious exemption that plaintiffs seek would come at the expense of Beckwith Electric's employees, who would be denied health coverage for the full range of FDA-approved contraceptives. The employees' compelling interests in receiving the health coverage to which they are entitled by federal law far outweighs whatever burden Mr. Beckwith may feel from being associated with a corporation that provides such coverage.

II. RFRA Does Not Allow A For-Profit Corporation To Deny Its Employees The Benefits To Which They Are Entitled By Law.

RFRA provides that the federal government "shall not substantially burden a person's exercise of religion" unless application of that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. § 2000bb-1(a), (b). Plaintiffs' challenge to the contraceptive-coverage requirement fails to satisfy this statutory standard in multiple respects.

A. A For-Profit, Secular Corporation Is Not a Person Engaged in the Exercise of Religion Within the Meaning of RFRA.

Beckwith Electric is a "for-profit, secular corporation." R.39 at 2. As such, it is not a "person" engaged in the "exercise of religion" within the meaning of RFRA. Congress enacted RFRA to codify the Supreme Court's free-exercise jurisprudence as it stood before *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). *See Gonzales v. O Centro Espirita*

Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006) (*O Centro*). When interpreting RFRA, the statutory inquiry therefore must be guided by the decisions issued during the "200-year span between the adoption of the First Amendment and RFRA's passage." *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). During that long period, the Supreme Court "consistently treated free exercise rights as confined to individuals and non-profit religious organizations." *Ibid*. Accordingly, there is no "plausible basis for inferring that Congress intended or could have anticipated that for-profit corporations would be covered by RFRA." *Id*. at 1170 (internal quotation marks and citation omitted); *accord Autocam*, 2013 WL 5182544, at *7-*9.

Under the pre-*Smith* case law, individuals could seek exemptions in certain circumstances from generally applicable regulations that interfered with their exercise of religion. The two cases cited in RFRA itself are illustrative. *See* 42 U.S.C. § 2000bb(b)(1) (citing *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). In *Sherbert*, the Court held that a state government could not deny unemployment compensation to an individual who lost her job because her religious beliefs prevented her from working on a Saturday. 374 U.S. at 399-410. And, in *Yoder*, the Court held that a state government could

not compel Amish parents to send their children to high school. 406 U.S. at 234-235.

The pre-RFRA case law also allowed churches to assert free-exercise claims on behalf of their members. For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), a church successfully challenged a local ordinance that made it unlawful for its members to perform the ritual animal sacrifice that is part of the Santeria religion. *Id*. at 531-540, 542-547. Accordingly, when the Supreme Court later applied RFRA in *O Centro*, it likewise held that RFRA allowed a religious sect to obtain an exemption on behalf of its members from a federal law (the Controlled Substances Act) that prevented them from receiving communion in the form of a sacramental tea. 546 U.S. at 427-439.

In contrast, no pre-*Smith* case held—or even suggested—that a for-profit corporation could obtain exemptions from corporate regulation on the basis of religion. The cases on which the Tenth Circuit relied for the contrary proposition (*Braunfeld v. Brown*, 366 U.S. 599 (1961), and *United States v. Lee*, 455 U.S. 252 (1982)), *rejected* free-exercise claims raised by *individuals*. In *Braunfeld*, the Court rejected the free-exercise claim asserted by Orthodox Jewish individuals who faced criminal prosecution if they sold their goods on Sundays, even though the Sunday closing law placed substantial pressure on them "to give up their [Saturday] Sabbath observance, a basic tenet of the Orthodox Jewish faith." 366

U.S. at 602 (plurality opinion). In *Lee*, the Court rejected an Amish farmer's claim that he had a free-exercise right to be exempted from the requirement to pay Social Security taxes on behalf of his employees. 455 U.S. at 256-261.

Lee undermines, rather than supports, plaintiffs' position here. The Court in *Lee* emphasized that exempting the employer from the obligation to pay Social Security taxes "operates to impose the employer's religious faith on the employees," 455 U.S. at 261, who would be denied the benefits to which they were entitled by federal law if their employer were exempted. Even with respect to the *individual* employer at issue in *Lee*, the Supreme Court held: "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." *Ibid*.

Accordingly, when Congress enacted RFRA to codify pre-*Smith* free-exercise jurisprudence, it would have understood that for-profit corporations could not rely on RFRA to escape generally applicable regulation. The "limitation of RFRA's applicability to individuals and non-profit religious organizations is reinforced by examining the legislative history of RFRA." *Hobby Lobby Stores*, 723 F.3d at 1168 (Briscoe, C.J., concurring in part and dissenting in part). The committee reports, hearings, and debates are replete with references to individuals

and religious institutions, but "[e]ntirely absent from the legislative history . . . is any reference to for-profit corporations." *Id*. at 1169.

B. RFRA Does Not Authorize Exemptions That Conflict With Pre-Existing Federal Employment Statutes.

The district court also erred by interpreting RFRA in a way that is inconsistent with pre-existing religious accommodations in federal employment statutes. The district court allowed Mr. Beckwith's religious beliefs to trump the rights of the corporation's 168 full-time employees (and their family members) to receive the health coverage to which they are entitled by federal law. The court declared that an "individual" does not "lose the right to exercise religion merely by changing hats and becoming the *employer* instead of *employee*." R.39 at 25.

Contrary to the district court's assumption, an employee of Beckwith Electric could not obtain the type of religious exemption that Mr. Beckwith demands in this suit. The Supreme Court has cautioned that "courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries," *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005), and that principle informed the Court's pre-RFRA interpretation of religious accommodations in the context of employment. Thus, in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the Court held that Title VII of the Civil Rights Act of 1964 (Title VII), Pub. L. No. 88-352, 78 Stat. 253, does not allow an employee to obtain a religious accommodation that would come "at the expense of" other employees or result in

"more than a de minimis cost" to the employer. 432 U.S. at 81, 84. When Congress enacted RFRA, Congress specified that nothing in RFRA should be construed as affecting the religious accommodation in Title VII. *See* S. Rep. No. 103-111, at 13 (1993).

The district court noted that there is an exemption to the contraceptive-coverage requirement for non-profit organizations that qualify as "religious employers." R.39 at 6. But as the Departments that issued the regulations explained, religious exemptions of this sort have never been extended to for-profit corporations. 78 Fed. Reg. at 39,875. For example, Title VII exempts from its prohibition against discrimination based on religion "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities." 42 U.S.C. § 2000e-1(a); *see also* 42 U.S.C. § 12113(d)(1) (Supp. V 2011) (parallel exemption in Americans with Disabilities Act of 1990). A "religious corporation" is a "special class of nonprofit corporation[]" that is "designed to provide the congregants with an orderly procedural framework in order for them to freely exercise their religion." 1A *Fletcher Cyclopedia of the Law of Corporations* § 80, at 61 (perm. ed., rev. vol. 2010); *see also EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619 (9th Cir. 1988) ("hav[ing] no

difficulty" in concluding that "for profit" manufacturer of mining equipment was ineligible for Title VII exemption notwithstanding its owners' religious beliefs).

In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), the Supreme Court rejected the claim that Title VII's religious-employer exemption impermissibly advances religion in violation of the Establishment Clause. *Id*. at 334-339. The Court reasoned that, by expanding the Title VII exemption to reach all of a religious organization's non-profit activities, rather than just its specifically religious activities, Congress avoided entangling governmental inquiries into whether particular activities should be categorized as religious or secular. *Id*. at 336. The Court explained that "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." *Ibid*.

The *Amos* Court emphasized, however, that the case before it concerned only "the nonprofit activities of religious employers," 483 U.S. at 339, and the concurring opinions stressed the same point.[3] Moreover, the *Amos* Court's

[3] *See Amos*, 483 U.S. at 340 (Brennan, J., concurring) ("I write separately to emphasize that my concurrence in the judgment rests on the fact that these cases involve a challenge to the application of § 702's categorical exemption to the activities of a *nonprofit* organization."); *id*. at 349 (O'Connor, J., concurring) ("Because there is a probability that a nonprofit activity of a religious organization will itself be involved in the organization's religious mission, in my view the objective

Continued on next page.

reasoning, by its terms, does not extend to for-profit corporations. "As the *Amos* Court noted, it is hard to draw a line between the secular and religious activities of a religious organization." *University of Great Falls v. NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002). By contrast, "it is relatively straight-forward to distinguish between a non-profit and a for-profit entity." *Ibid*.; *accord Spencer v. World Vision, Inc.*, 633 F.3d 723, 734 (9th Cir.) (O'Scannlain, J., concurring). Under RFRA, as under pre-existing federal employment statutes, a corporation's non-profit or for-profit status provides an objective means of differentiation that does not require "trolling through a person's or institution's religious beliefs." *University of Great Falls*, 278 F.3d at 1341-1342 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)).

C. RFRA Does Not Authorize Claims That Disregard Bedrock Tenets of American Corporate Law.

The district court compounded these errors by disregarding fundamental tenets of American corporate law. It is Mr. Beckwith who believes that "life begins at the very moment of conception," R.1 ¶ 24, yet the district court declared that the contraceptive-coverage requirement is "a 'substantial burden' on Beckwith Electric." R.39 at 29. The court thus conflated the corporation with its controlling shareholder.

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observer should perceive the Government action as an accommodation of the exercise of religion rather than as a Government endorsement of religion.").

As the Third Circuit explained in its decision rejecting a for-profit corporation's analogous RFRA claim, "[i]t is a fundamental principle 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' the corporation." *Conestoga Wood Specialties Corp. v. Secretary of HHS*, 724 F.3d 377, 388 (July 26, 2013) (quoting *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). And it is equally clear that "[o]ne 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).

As the Supreme Court's *Cedric Kushner* decision illustrates, the tenet that a corporation is distinct from its shareholders applies even when, as here, the corporation has only a single shareholder. That case "focuse[d] upon a person who [was] the president and sole shareholder of a closely held corporation" and rested its holding on the fact that he was "distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." *Cedric Kushner*, 533 U.S. at 160, 163.

Federal law does not require Mr. Beckwith personally to provide health coverage of any kind to Beckwith Electric employees, or to satisfy other legal obligations of the corporation. *Autocam Corp. v. Sebelius*, __ F.3d __, 2013 WL 5182544, *5 (6th Cir. Sept. 17, 2013). Mr. Beckwith is likewise not personally liable for paying the employees' salaries. *See generally Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006) ("[I]t is fundamental corporation and agency law—indeed, it can be said to be the whole purpose of corporation and agency law—that the shareholder and contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts."). Those obligations lie with the corporation itself. It is Beckwith Electric that acts as the employing party; it is Beckwith Electric that sponsors a group health plan for the corporation's employees (and their family members); 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).

Mr. Beckwith "chose to incorporate and conduct business through [Beckwith Electric], thereby obtaining both the advantages and disadvantages of the corporate form." *Conestoga Wood*, 724 F.3d at 388. He cannot "move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms." *Id*. at 389 (internal quotation marks and

citation omitted). Indeed, "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 Pharm., Inc.*, 862 F.2d 597, 602-603 (6th Cir. 1988) (citation omitted); *see Autocam*, 2013 WL 5182544, at *4-*5.[4] The Supreme Court has repeatedly interpreted federal statutes to reflect the tenet that a corporation is distinct from its controlling shareholder, and nothing in RFRA authorizes claims that disregard the same background principle.

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

Even apart from these threshold defects in plaintiffs' RFRA claim, the claim fails because the particular burden about which they complain is too attenuated to qualify as "substantial" within the meaning of the statute. 42 U.S.C. 2000bb-1(a). A group health plan "covers many medical services, not just contraception." *Grote*, 708 F.3d at 865 (Rovner, J., dissenting). The decision as to which specific "services will be used is left to the employee and her doctor." *Ibid*. "No

[4] *See also Diva's Inc.* v. *City of Bangor*, 411 F.3d 30, 35, 42 (1st Cir. 2005) (dismissing sole shareholder's First Amendment claim for lack of standing); *The Guides, Ltd.* v. *Yarmouth Grp. Prop. Mgmt., Inc.*, 295 F.3d 1065, 1070, 1071-1073 (10th Cir. 2002) (race discrimination claim); *Smith Setzer & Sons, Inc.* v. *South Carolina Procurement Review Panel*, 20 F.3d 1311, 1317 (4th Cir. 1994) (Privileges and Immunities Clause claim); *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").

individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer's] decision or action." *Ibid*.

The connection to the controlling shareholder is more attenuated still. Mr. Beckwith is, "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." *Grote*, 708 F.3d at 858 (Rovner, J., dissenting). "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 pending*, No. 12-3357 (8th Cir.).

The religious objection that plaintiffs assert here closely resembles the religious objection that the Supreme Court has found to be non-cognizable in the taxpayer context. 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 *Doremus* Court held 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). The *Hein* plurality confirmed that there is "no taxpayer standing to sue under the Free Exercise Clause." *Id*. at 609-610. [5]

In other words, a taxpayer's claim that his funds will be used in ways that are contrary to his religious beliefs does not establish a cognizable burden on his free exercise of religion, much less a substantial burden. Likewise, the claim that Beckwith Electric funds will be used to contribute to a comprehensive group health plan that may be used by employees in ways that are inconsistent with Mr. Beckwith's personal beliefs does not establish a cognizable burden on his exercise of religion, much less a substantial burden.

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

For the reasons discussed above, RFRA does not make corporate regulations subject to strict scrutiny based on the personal religious beliefs of a corporation's

[5] "Justice Alito's plurality opinion in *Hein* 'is controlling because it expresses the narrowest position taken by the Justices who concurred in the judgment.'" *Laskowski v. Spellings*, 546 F.3d 822, 827 (7th Cir. 2008) (citations omitted).

controlling shareholder. In any event, there would be no basis for the exemption that plaintiffs demand even if the contraceptive-coverage requirement were subject to heightened scrutiny under RFRA.

Even if Mr. Beckwith were an individual employer, rather than the controlling shareholder of a legally separate corporation, his claim would fail under the reasoning of *United States v. Lee*, 455 U.S. 252 (1982). As discussed above, in *Lee*, an individual employer sought to deny his employees benefits to which they were entitled by federal law, based on his personal religious beliefs. The Supreme Court rejected his free exercise claim, emphasizing that exempting an individual employer from the obligation to pay Social Security taxes "operates to impose the employer's religious faith on the employees," 455 U.S. at 261, who would be denied the benefits to which they were entitled by federal law if their employer were exempted. The Supreme Court held: "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." *Ibid*. (emphasis added). Accordingly, even if Mr. Beckwith were an individual employer, his personal religious objection to contraceptive coverage would *not* be a basis for him to deny his employees the health coverage to which they are entitled by federal law.

The Affordable Care Act and its preventive-services coverage provision establish a "comprehensive insurance system with a variety of benefits available to all participants." *Id*. at 258. The district court's reasoning, by contrast, would permit a series of ad hoc exemptions to coverage of various preventive-services based on an individual employer's personal religious beliefs. As the Supreme Court emphasized, "'we are a cosmopolitan nation made up of people of almost every conceivable religious preference.'" *Id*. at 259 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)). A system that is comprehensive in its coverage of recommended preventive-health services, yet subject to ad hoc opt-outs by employers outside of clearly drawn categories, "would be almost a contradiction in terms." *Ibid.* The district court made no attempt to reconcile its reasoning with the Supreme Court's decision in *Lee*, which the district court acknowledged with only a "But see" citation. *See* R.39 at 21.

The contraceptive-coverage requirement also furthers the government's compelling interests in public health and gender equality. The promotion of public health is unquestionably a compelling governmental interest. *See*, *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). The preventive-services requirement furthers that compelling interest by "expanding access to and utilization of recommended preventive services for women." 78 Fed. Reg. at 39,887. The primary benefit of

the preventive-services coverage requirement as a general matter is that such services improve health by "decreas[ing] the likelihood or delay[ing] the onset of a targeted disease or condition." IOM Report 3; *see* 75 Fed. Reg. at 41,733. Increased access to FDA-approved contraceptive services in particular is a key component of the measures intended to produce those predicted health outcomes, as a lack of contraceptive use has proven in many cases to have negative health consequences for both women and children. 78 Fed. Reg. at 39,872; *see* pp.8-9, *supra* (discussing IOM's findings on health benefits of access to contraception).

Closely tied to that interest is the separate compelling interest in assuring that women have equal access to health-care services. 78 Fed. Reg. at 39,872, 39,887. As the Supreme Court explained in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), 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. Thus, "[a]ssuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests." *Ibid*. By including the women's preventive-services coverage requirement in the Affordable Care Act, Congress ensured that the goals and benefits of effective preventive health care would apply equally to women, who might otherwise be excluded from

such benefits if their unique health-care needs were not taken into account. See pp. 6-7, *supra* (discussing record before Congress).

The district court acknowledged that the "interest in promoting public health and equality of health care for women is certainly compelling in a broad, general sense." R.39 at 31. The court nonetheless opined that the interests served by the Affordable Care Act's preventive-services coverage requirement cannot be compelling because plans are not subject to that requirement while they retain grandfathered status. *See id*. at 32-33. This reasoning reflects a basic misunderstanding of the Act's grandfathering provision, 42 U.S.C. 18011 (Supp. V 2011), which does not give plans the type of permanent exemption from a coverage requirement that plaintiffs demand here. Instead, the grandfathering provision is transitional in effect (applying to a variety of Act provisions, not just the preventive-services coverage requirement) and is intended to minimize disruption to existing coverage as the Affordable Care Act is implemented. Plans lose their grandfathered status when they made run-of-the-mill changes such as an increase in cost-sharing requirements, a decrease in employer contributions, or the elimination of certain benefits. *See* 45 C.F.R. § 147.140(g). The Beckwith Electric plan is not grandfathered because it increased the percentage that plan participants must pay in cost sharing. *See* R.1 ¶ 115 (Complaint). It is expected that a majority of plans will lose their grandfathered status by the end of 2013. *See*

75 Fed. Reg. 34,538, 34,552 (June 17, 2010).[6] The compelling nature of an interest is not diminished merely because the government declines to make a regulation advancing that interest immediately effective in order to avoid the disruption doing so might 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 district court also suggested the exemption plaintiffs demand here would not be inconsistent with Congress's objectives because plaintiffs seek to exclude only certain forms of FDA-approved contraceptives from the Beckwith Electric plan (copper IUDs and the emergency contraceptive drugs Plan B and Ella). *See* R.39 at 32; *see also id*. at 4 n.2. Contrary to the district court's belief, the various forms of FDA-approved contraceptives are not fungible. Pharmaceutical companies go through the time and expense of obtaining FDA approval because different types of contraceptives serve different needs. Moreover, some forms of contraception are contraindicated for women with certain

[6] *See also* Kaiser Family Foundation and Health Research & Educational Trust, Employer Health Benefits 2012 Annual Survey at 7-8, 190, *available at* http://ehbs.kff.org/pdf/2012/8345.pdf (last visited February 23, 2013) (indicating that 58 percent of firms had at least one grandfathered health plan in 2012, down from 72 percent in 2011, and that 48 percent of covered workers were in grandfathered health plans in 2012, down from 56 percent in 2011).

medical conditions and risk factors. IOM Report 105. The Institute thus recommended coverage of all FDA-approved contraceptive methods. *Id*. at 10, 104-110. Such comprehensive coverage ensures that a woman and her physician—not her employer—will decide which form of contraception is most appropriate for her.

CONCLUSION

The preliminary injunction should be reversed.

Respectfully submitted,

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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 8,055 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 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.

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