

Nos. 13-1092 & 13-1093

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEGATUS; WEINGARTZ SUPPLY COMPANY; and DANIEL WEINGARTZ, President of
Weingartz Supply Company,

Plaintiffs-Appellees/Cross-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 LEW, in his official capacity as Secretary of the
Treasury; UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN (No. 2:12-CV-12061) (Hon. Robert H. Cleland)

OPENING BRIEF FOR THE APPELLANTS

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TABLE OF CONTENTS

	<u>Page</u>
REQUEST FOR ORAL ARGUMENT	
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUE.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS	3
A. Statutory and Regulatory Background	3
B. Factual Background and District Court Proceedings	8
SUMMARY OF ARGUMENT	10
STANDARD OF REVIEW	15
ARGUMENT	15
I. The Preliminary Injunction Rests On An Error Of Law	15
II. RFRA Does Not Allow A For-Profit, Secular Corporation To Deny Employee Benefits On The Basis Of Religion.....	16
A. Weingartz Supply Company Is Not A Person Engaged In The Exercise Of Religion Within The Meaning Of RFRA	18
B. The Obligation To Cover Contraceptives Lies With The Weingartz Supply Company Group Health Plan, Not With Mr. Weingartz Personally	23
C. Decisions That Employees Make About How To Use Their Compensation Cannot Properly Be Attributed To The Corporation Or Its Shareholders	29

D. The Contraceptive-Coverage Requirement Is Narrowly Tailored To Advance Compelling Governmental Interests	34
CONCLUSION	41
CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)	
CERTIFICATE OF SERVICE	
DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS	

TABLE OF AUTHORITIES

Cases:	<u>Page</u>
<i>Annex Medical, Inc. v. Sebelius</i> , ___ F. Supp. ___, 2013 WL 101927 (D. Minn. Jan. 8, 2013), <i>appeal pending</i> , No. 13-1118 (8th Cir.)	34
<i>Autocam Corp. v. Sebelius</i> , No. 12-2673 (6th Cir. Dec. 28, 2012)	33
<i>Autocam Corp. v. Sebelius</i> , 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012), <i>appeal pending</i> , No. 12-2673 (6th Cir.)	13, 24, 25, 26, 30, 33
<i>Board of Regents of Univ. of Wis. Sys. v. Southworth</i> , 529 U.S. 217 (2000)	31, 32
<i>Briscoe v. Sebelius</i> , No. 13-285 (D. Colo. Feb. 27, 2013)	23, 34
<i>Catholic Charities of Sacramento, Inc. v. Superior Court</i> , 85 P.3d 67 (Cal. 2004).....	40
<i>Cedric Kushner Promotions, Ltd. v. King</i> , 533 U.S. 158 (2001)	25
<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993)	20
<i>Citizens United v. FEC</i> , 130 S. Ct. 876 (2010).....	18
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997)	11
<i>Conestoga Wood Specialties Corp. v. Sebelius</i> , ___ F. Supp. 2d ___, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013), <i>appeal pending</i> , No. 13-1144 (3d Cir.)	10, 26, 33

Conestoga Wood Specialties Corp. v. Sebelius,
 No. 13-1144 (3d Cir. Feb. 7, 2013)12, 22, 23, 33

*Corporation of the Presiding Bishop of the Church of Jesus Christ
 of Latter-Day Saints v. Amos*,
 483 U.S. 327 (1987)20

DeArment v. Harvey,
 932 F.2d 721 (8th Cir. 1991).....34

Dole Food Co. v. Patrickson,
 538 U.S. 468 (2003)25

Donovan v. Tony & Susan Alamo Foundation,
 722 F.2d 397 (8th Cir. 1984), *aff'd*, 471 U.S. 290 (1985).....34

EEOC v. Townley Eng’g & Mfg. Co.,
 859 F.2d 610 (9th Cir. 1988).....28, 29

Eisenstadt v. Baird,
 405 U.S. 438 (1972)35, 36

Employment Div., Dep’t of Human Resources of Ore. v. Smith,
 494 U.S. 872 (1990)17

Gilardi v. Sebelius,
 No. 13-104 (D.D.C. March 3, 2013),
appeal pending, No. 13-5069 (D.C. Cir.)10, 26, 28, 34

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,
 546 U.S. 418 (2006)20, 21

Griswold v. Connecticut,
 381 U.S. 479 (1965)35

Grote Industries, LLC v. Sebelius,
 ___ F. Supp. 2d ___, 2012 WL 6725905 (S.D. Ind. Dec. 27, 2012),
appeal pending, No. 13-1077 (7th Cir.)10, 33, 34

Grote v. Sebelius,
 ___ F.3d ___, 2013 WL 362725 (7th Cir. Jan. 30, 2013)13, 14, 24, 25
 26, 30, 32, 33

Handley v. Wyandotte Chems. Corp.,
 325 N.W.2d 447 (Mich. Ct. App. 1982).....24

Hobby Lobby Stores, Inc. v. Sebelius,
 133 S. Ct. 641 (2012) (Sotomayor, J., in chambers).....27

Hobby Lobby Stores, Inc. v. Sebelius,
 870 F. Supp. 2d 1278 (W.D. Okla. 2012),
appeal pending, No. 12-6294 (10th Cir.)10, 23, 34, 35

Hobby Lobby Stores, Inc. v. Sebelius,
 No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012)16, 33

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,
 132 S. Ct. 694 (2012).....12, 19, 21

Jones v. Caruso,
 569 F.3d 258 (6th Cir. 2009)16

Kennedy v. St. Joseph’s Ministries, Inc.,
 657 F.3d 189 (4th Cir. 2011)20

Korte v. HHS,
 ___ F. Supp. 2d ___, 2012 WL 6553996 (S.D. Ill. Dec. 14, 2012),
appeal pending, No. 12-3841 (7th Cir.)33, 39, 40

LeBoon v. Lancaster Jewish Community Center Ass’n,
 503 F.3d 217 (3d Cir. 2007)20

Living Water Church of God v. Charter Township of Meridian,
 258 Fed. App’x 729 (6th Cir. 2007)17, 18

McNeilly v. Land,
 684 F.3d 611 (6th Cir. 2012)16

Mead v. Holder,
 766 F. Supp. 2d 16 (D.D.C. 2011), *aff'd*, *Seven-Sky v. Holder*,
 661 F.3d 1 (D.C. Cir. 2011), *cert. denied*, 133 S. Ct. 63 (2012).....35

Mitchell v. Helms,
 530 U.S. 793 (2000)21

NLRB v. Catholic Bishop of Chicago,
 440 U.S. 490 (1979)20

O'Brien v. HHS,
 ___F. Supp. 2d ___, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012),
appeal pending, No. 12-3357 (8th Cir.)10, 14, 33

Obama for America v. Husted,
 697 F.3d 423 (6th Cir. 2012)15

Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County,
 450 F.3d 1295 (11th Cir. 2006)20

Roberts v. U.S. Jaycees,
 468 U.S. 609 (1984)37

Rosenberger v. Rector & Visitors of Univ. of Va.,
 515 U.S. 819 (1995)32

Sherbert v. Verner,
 374 U.S. 398 (1963)17, 27

Spencer v. World Vision, Inc.,
 633 F.3d 723 (9th Cir. 2011)20, 22

Stone v. William Beaumont Hospital,
 782 F.2d 609 (6th Cir. 1986)28

Stormans, Inc. v. Selecky,
 586 F.3d 1109 (9th Cir. 2009)28

Thomas v. Review Board,
 450 U.S. 707 (1981)28

<i>Torco Oil Co. v. Innovative Thermal Corp.</i> , 763 F. Supp. 1445 (N.D. Ill. 1991).....	13, 25
<i>United States v. Lee</i> , 455 U.S. 252 (1982)	27
<i>Universidad Central de Bayamon v. NLRB</i> , 793 F.2d 383 (1st Cir. 1985)	21
<i>University of Great Falls v. NLRB</i> , 278 F.3d 1335 (D.C. Cir. 2002).....	12, 21, 22
<i>Winter v. Natural Res. Def. Council</i> , 555 U.S. 7 (2008)	15
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	17, 27
<i>Zelman v. Simmons-Harris</i> , 536 U.S. 639 (2002)	31
Statutes:	
1 U.S.C. § 1	18
28 U.S.C. § 1292(a)(1).....	1
28 U.S.C. § 1331	1
29 U.S.C. § 201 et seq.....	3
29 U.S.C. § 1001 et seq.....	3
29 U.S.C. § 1185d.....	5
42 U.S.C. § 300gg-13.....	4, 5, 35
42 U.S.C. § 300gg-13(a)(1)	5

42 U.S.C. § 300gg-13(a)(2)5
42 U.S.C. § 300gg-13(a)(3)5
42 U.S.C. § 300gg-13(a)(4)5
42 U.S.C. § 2000c(a)(1)22
42 U.S.C. § 2000e et seq.....3, 4
42 U.S.C. § 2000e-1(a)19
42 U.S.C. § 2000bb(b)(1)17
42 U.S.C. § 2000bb-1(a)12, 16, 18, 29
42 U.S.C. § 2000bb-1(b).....16, 18, 34
42 U.S.C. § 12113(d)(1)19
42 U.S.C. § 12113(d)(2)19
42 U.S.C. § 1801138

Regulations:

45 C.F.R. § 46.202(f)9
45 C.F.R. § 147.130(a)(1)(iv)(B).....7
45 C.F.R. § 147.140(g)39
62 Fed. Reg. 8610 (Feb. 25, 1997)9
75 Fed. Reg. 34,538 (June 17, 2010)39
77 Fed. Reg. 8725 (Feb. 15, 2012)6, 37
78 Fed. Reg. 8456 (Feb. 6, 2013)7, 8, 39

Legislative Materials:

139 Cong. Rec. S14350-01 (daily ed. Oct. 26, 1993).....17

146 Cong. Rec. S7774–01 (daily ed. July 27, 2000)18

155 Cong. Rec. S12106-02 (daily ed. Dec. 2, 2009)37

REQUEST FOR ORAL ARGUMENT

This case presents the question whether, under the Religious Freedom Restoration Act, a for-profit, secular corporation may deny its employees federally required health coverage benefits, if the corporation's controlling shareholder asserts a religious objection to the corporation's provision of such employee benefits. The same issue is pending this Court in *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir.), and before other circuits. Given the importance of the issue, the government respectfully requests oral argument.

STATEMENT OF JURISDICTION

The district court has jurisdiction under 28 U.S.C. § 1331. The district court entered a preliminary injunction with the respect to the claims of Weingartz Supply Company and Daniel Weingartz on November 13, 2012. *See* R.42, Page ID #577. The court denied a preliminary injunction without prejudice with respect to the claims of Legatus. *See* R.39, Page ID #540; R.42, Page ID #577. Defendants filed a timely notice of appeal on January 14, 2013. *See* R.47, Page ID #678. Plaintiffs also filed a timely notice of appeal on January 14, 2013. *See* R.48, Page ID #681. 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 federally required employee benefits on the basis of religion.

STATEMENT OF THE CASE

1. Plaintiff Weingartz Supply Company is a for-profit Michigan corporation that sells outdoor power equipment. *See* R.13-3, Page ID #217, ¶ 2 (Weingartz decl.). The corporation has 170 employees, 110 of whom are full-time employees. *See id.* ¶ 4. “Weingartz Supply Company and its subsidiaries are for-profit, secular companies.” R.1, Page ID #13, ¶ 75 (complaint).

Plaintiff Daniel Weingartz is the president and controlling shareholder of Weingartz Supply Company. *See* R.13-3, Page ID #217, ¶¶ 3, 8 (Weingartz decl.). Mr. Weingartz regards all forms of contraception as contrary to his religious beliefs. *See id.*, Page ID #218, ¶ 16. The corporation, however, does not hire employees on the basis of their religion, and the employees are not required to share the religious beliefs of Mr. Weingartz.

People employed by Weingartz Supply Company receive health coverage for themselves and their family members through the Weingartz Supply Company group health plan, as part of their compensation packages that include wages and non-wage benefits. In this action, Weingartz Supply Company and Mr. Weingartz contend that, under RFRA, the Weingartz Supply Company group health plan is entitled to an exemption from the federal regulatory requirement to cover Food and Drug Administration (“FDA”)-approved contraceptives, as prescribed by a health care provider. They argue that this exception is required because Mr. Weingartz has asserted a religious objection to the Weingartz Supply Company plan’s coverage of contraceptives.¹

2. The district court concluded that “[n]either Plaintiffs nor the Government have shown a strong likelihood of success on the merits.” R.39, Page ID #564

¹ Plaintiffs also alleged claims under the First Amendment, but the district court did not rely on those claims in issuing a preliminary injunction.

(opinion); R.42, Page ID #577 (order). Nonetheless, the court issued a preliminary injunction with respect to Weingartz Supply Company and Mr. Weingartz because the court concluded that the balance of harms tips strongly in their favor. *See* R.39, Page ID #567 (opinion); R.42, Page ID #577 (order). That preliminary injunction is the subject of the government's appeal.

The district court denied a preliminary injunction without prejudice with respect to the non-profit organization Legatus, because the Departments that issued the challenged regulations are engaged in a rulemaking to amend those regulations, and Legatus is protected by an enforcement safe harbor during the rulemaking. *See* R.39, Page ID #548-550. That ruling is the subject of plaintiffs' cross-appeal and is not addressed in this opening brief.

STATEMENT OF FACTS

A. Statutory and Regulatory Background

1. Federal law regulates many aspects of the employer-employee relationship, including wages and non-cash benefits. In addition to regulating wages and overtime pay in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., Congress has regulated employee benefits such as group health plans, pension plans, disability benefits, and life insurance benefits through the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., and other statutes. Under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§ 2000e et seq., an employer cannot discriminate on the basis of religion in the terms or conditions of employment, including compensation, unless the employer qualifies for Title VII's religious exemption.

The federal government heavily subsidizes the form of employee compensation that is provided through employment-based group health plans. Most notably, employees typically do not pay taxes on their employer's contributions to their health coverage, which are generally excluded from taxable compensation. *See* Congressional Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 30 (2008). These federal tax subsidies totaled \$246 billion in 2007. *See id.* at 31. As a result of this longstanding federal support, employment-based group health plans are by far the predominant form of private health coverage. In 2009, employment-based plans covered about 160 million people. *See id.* at 4 & Table 1-1.

Congress has long regulated employment-based group health plans, and, in 2010, the Patient Protection and Affordable Care Act ("Affordable Care Act") established certain additional minimum standards for such plans. As relevant here, the Affordable Care Act provides that a non-grandfathered plan must cover certain preventive health services without cost-sharing, that is, without requiring plan participants and beneficiaries to make co-payments or pay deductibles. *See* 42

U.S.C. § 300gg-13. This provision applies to employment-based group health plans covered by ERISA. *See* 29 U.S.C. § 1185d.

These preventive health services include immunizations recommended by the Advisory Committee on Immunization Practices, *see id.* § 300gg-13(a)(2); items or services that have an “A” or “B” rating from the U.S. Preventive Services Task Force, *see id.* § 300gg-13(a)(1); preventive care and screenings for infants, children and adolescents as provided in guidelines of the Health Resources and Services Administration (“HRSA”), a component of the Department of Health and Human Services (“HHS”), *see id.* § 300gg-13(a)(3); and certain additional preventive services for women as provided in HRSA guidelines, *see id.* § 300gg-13(a)(4). The preventive health services coverage provision requires coverage of a wide array of recommended services such as immunizations, cholesterol screening, blood pressure screening, mammography, and cervical cancer screening.²

2. When the Affordable Care Act was enacted, there were no existing HRSA guidelines relating to preventive care and screening for women. HHS asked

² Coverage is also required for services such as colorectal cancer screening, alcohol misuse counseling, screening for iron deficiency anemia, bacteriuria screening for pregnant women, breastfeeding counseling, screening for sexually transmitted infections, depression screening for adolescents, hearing loss screening for newborns, tobacco use counseling and interventions, and vision screening for young children. *See generally* <http://www.cdc.gov/vaccines/pubs/ACIP-list.htm>; <http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm>; http://brightfutures.aap.org/pdfs/Guidelines_PDF/20-Appendices_PeriodicitySchedule.pdf.

the Institute of Medicine (“Institute” or “IOM”) to develop recommendations to help the Departments implement this aspect of the preventive health services coverage requirement. *See* Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps 2* (2011) (“IOM Report”).³

Consistent with the Institute’s recommendations, the guidelines developed by HRSA ensure coverage for annual well-woman visits, screening for gestational diabetes, human papillomavirus testing, counseling for sexually transmitted infections, HIV counseling and screening, breastfeeding support and supplies, and domestic violence counseling.⁴ In addition, the guidelines require coverage for “[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.” 77 Fed. Reg. 8725 (Feb. 15, 2012) (quoting the guidelines). FDA-approved contraceptive methods include oral contraceptive pills, diaphragms, injections and implants, emergency contraceptive drugs, and intrauterine devices.⁵

³ The Institute of Medicine, which was established by the National Academy of Sciences in 1970, is funded by Congress to provide expert advice to the federal government on matters of public health. *See* IOM Report iv.

⁴ *See* HRSA, Women’s Preventive Services: Required Health Plan Coverage Guidelines, available at <http://www.hrsa.gov/womensguidelines>.

⁵ *See* Birth Control Guide, FDA Office of Women’s Health, available at <http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM282014.pdf> (last updated Aug. 2012).

The implementing regulations authorize an exemption from the contraceptive-coverage requirement for the group health plan of any organization that qualifies as a religious employer. In their current form, the regulations define a religious employer as an organization that (1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization described in a provision of the Internal Revenue Code that refers to churches, their integrated auxiliaries, conventions or associations of churches, and to the exclusively religious activities of any religious order. *See* 45 C.F.R. § 147.130(a)(1)(iv)(B).

The Departments that issued the preventive health services coverage regulations have proposed an amendment that would simplify the exemption by eliminating the first three requirements set out above and clarify that the exemption is available to all non-profit organizations that fall within the scope of the relevant Internal Revenue Code provision. *See* 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013) (notice of proposed rulemaking). In addition, the Departments have set out proposals to accommodate religious objections to the provision of contraceptive coverage raised by other non-profit, religious organizations. *See id.* at 8461-62.

The proposed accommodations do not extend to for-profit, secular corporations such as Weingartz Supply Company. *See id.* at 8462. The

Departments explained that “[r]eligious accommodations in related areas of federal law, such as the exemption for religious organizations under Title VII of the Civil Rights Act of 1964, are available to nonprofit religious organizations but not to for-profit secular organizations.” *Ibid.* Consistent with this longstanding federal law, the Departments proposed to limit the definition of organizations eligible for the accommodations “to include nonprofit religious organizations, but not to include for-profit secular organizations.” *Ibid.*

B. Factual Background and District Court Proceedings

1. Weingartz Supply Company is a for-profit Michigan corporation that sells outdoor power equipment. *See* R.13-3, Page ID #217, ¶ 2 (Weingartz decl.). The corporation has 170 employees, 110 of whom are full-time employees. *See id.* ¶ 4. Weingartz Supply Company and its subsidiaries are “for-profit, secular companies.” R.1, Page ID #13, ¶ 75 (complaint).

Plaintiff Daniel Weingartz is the president and controlling shareholder of Weingartz Supply Company. *See* R.13-3, Page ID #217, ¶¶ 3, 8 (Weingartz decl.). Mr. Weingartz regards all forms of contraception as contrary to his religious beliefs. *See id.*, Page ID #218, ¶ 16. The corporation, however, does not hire employees on the basis of their religion, and the employees are not required to share the religious beliefs of Mr. Weingartz.

2. People employed by Weingartz Supply Company receive health coverage for themselves and their family members through the Weingartz Supply Company group health plan, as part of their compensation packages that include wages and non-wage benefits. *See* R.1, Page ID #14, ¶¶ 80-81. Plaintiffs contend that, under RFRA, the Weingartz Supply Company group health plan must be exempted from the requirement that the plan cover FDA-approved contraceptives, as prescribed by a health care provider. The exemption that plaintiffs demand would encompass all forms of FDA-approved contraceptives, sterilization procedures, and related counseling.⁶

The district court concluded that “[n]either Plaintiffs nor the Government have shown a strong likelihood of success on the merits.” R.39, Page ID #564 (opinion); R.42, Page ID #577 (order). Nonetheless, the court issued a preliminary injunction with respect to Weingartz Supply Company and Mr. Weingartz because the court concluded that the balance of harms tips strongly in their favor. *See* R.39, Page ID #567 (opinion); R.42, Page ID #577 (order).

⁶ Although plaintiffs describe certain forms of FDA-approved contraceptives as abortifacients, *see* R.1, Page ID #25, ¶ 147, these drugs are not abortifacients within the meaning of federal law. *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.”).

SUMMARY OF ARGUMENT

Weingartz Supply Company is a for-profit corporation that sells outdoor power equipment. Weingartz Supply Company and its subsidiaries are “for-profit, secular companies,” R.1, Page ID #13, ¶ 75 (complaint), and they do not hire employees on the basis of their religion. People employed by Weingartz Supply Company receive health coverage for themselves and their family members through the Weingartz Supply Company group health plan, as part of their compensation packages that include wages and non-wage benefits.

In this suit, plaintiffs contend that the Weingartz Supply Company group health plan must be exempted from the federal regulatory requirement to cover FDA-approved contraceptives, as prescribed by a health care provider. Plaintiffs argue that this exemption is mandated by RFRA because the corporation’s president and controlling shareholder, Mr. Weingartz, has asserted a religious objection to the plan’s coverage of contraceptives. Comparable claims have been asserted in other litigation by for-profit corporations engaged in a wide variety of secular pursuits, such as the manufacture and sale of wood cabinets, vehicle safety systems, arts and crafts supplies, and mineral and chemical products, and fresh produce.⁷ The plaintiffs’ theory in these cases is that, if the controlling shareholder

⁷ See, e.g., *Conestoga Wood Specialties Corp. v. Sebelius*, ___ F. Supp. 2d ___, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013), *appeal pending*, No. 13-1144 (3d Cir.)

Continued on next page.

of a for-profit, secular corporation asserts a religious objection to a federal law that regulates the corporation, then the law must be subjected to strict scrutiny. On this reasoning, for-profit, secular corporations would have the “right to ignore anti-discrimination laws, refuse to pay payroll taxes, violate OSHA requirements, etc. in the name of religious freedom,” unless the requirements pass strict scrutiny, which is “the most demanding test known to constitutional law.” *Korte v. Sebelius*, No. 12-3841 (7th Cir.), Pl. Br. 46, 47 (filed 1/28/13) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)).

Congress, however, was careful to avoid that result. Congress has long distinguished between religious organizations and for-profit, secular corporations, and, in a series of statutes, Congress has granted religious organizations alone the latitude to discriminate on the basis of religion in setting the terms and conditions of employment. No court has ever found a for-profit company to be a religious organization for purposes of federal law. To the contrary, courts have emphasized that an entity’s for-profit status is an objective criterion that allows courts to

(wood cabinets); *Grote Industries, LLC v. Sebelius*, ___ F. Supp. 2d ___, 2012 WL 6725905 (S.D. Ind. Dec. 27, 2012), *appeal pending*, No. 13-1077 (7th Cir.) (vehicle safety systems); *O’Brien v. HHS*, ___ F. Supp. 2d ___, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012), *appeal pending*, No. 12-3357 (8th Cir.) (mineral and chemical products); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012), *appeal pending*, No. 12-6294 (10th Cir.) (arts and crafts supplies); *Gilardi v. Sebelius*, No. 13-104 (D.D.C. March 3, 2013), *appeal pending*, No. 13-5069 (D.C. Cir.) (fresh produce).

distinguish a secular company from a potentially religious organization, without conducting an intrusive inquiry into the entity's religious beliefs. *See, e.g., University of Great Falls v. NLRB*, 278 F.3d 1335, 1343-44 (D.C. Cir. 2002) (organization qualifies for a religious exemption if, among other things, it is “organized as a ‘nonprofit’” and holds itself out as religious).

RFRA, which was enacted against the background of these federal employment statutes, carried forward this distinction between non-profit, religious organizations and for-profit, secular companies by requiring a plaintiff to demonstrate a substantial burden on “a person's exercise of religion.” 42 U.S.C. § 2000bb-1(a). “[F]or-profit corporate entities, unlike religious non-profit organizations, do not—and cannot—legally claim a right to exercise or establish a ‘corporate’ religion under the First Amendment or the RFRA.” *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, slip op. 6 (3d Cir. Feb. 7, 2013) (Garth, J., concurring) (emphases omitted). The distinction between non-profit, religious organizations and for-profit, secular companies is rooted in “the text of the First Amendment,” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012), and embodied in federal law.

Plaintiffs cannot circumvent this distinction by asserting that the contraceptive-coverage requirement is a substantial burden on Mr. Weingartz's personal exercise of religion. The contraceptive-coverage requirement does not

require Mr. Weingartz as an individual to do anything. *See Autocam Corp. v. Sebelius*, 2012 WL 6845677, *7 (W.D. Mich. Dec. 24, 2012), *appeal pending*, No. 12-2673 (6th Cir.). “It is only the legally separate” Weingartz Supply Company that has “any obligation under the mandate.” *Ibid.* It is the corporation that acts as the employing party; it is the corporation that sponsors the group health plan for 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*, __ F.3d __, 2013 WL 362725, *6 (7th Cir. Jan. 30, 2013) (Rovner, J., dissenting). “So long as the business’s liabilities are not [Mr. Weingartz’s] 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 [Mr. Weingartz’s] own expenditures.” *Ibid.* The money used to pay for health coverage under the Weingartz Supply Company group health plan “belongs to the company, not to” Mr. Weingartz. *Ibid.*

Moreover, even apart from this central flaw in plaintiffs’ argument, their RFRA claim fails because an employee’s decision to use her health coverage to pay for a particular service cannot properly be attributed to her employer, much less to the corporation’s controlling shareholder. In other First Amendment

contexts, the Supreme Court has held that a person or entity that provides a source of funding may not be deemed responsible for the decisions that another person makes in using those funds. Weingartz Supply Company provides employees with a compensation package that includes both wages and non-wage benefits. Just as a Weingartz Supply Company employee may choose to use her wages to pay for contraceptives, she also may choose to use her health coverage to pay for contraceptives. “To the extent [Mr. Weingartz himself is] funding anything at all—and . . . one must disregard the corporate form to say that” he is—he is “paying for a plan that insures a comprehensive range of medical care that will be used in countless ways” by participants in the Weingartz Supply Company plan. *Grote*, 2013 WL 362725, *13 (Rovner, J., dissenting). “No 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 [Mr. Weingartz’s] decision or action.” *Ibid*. “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*, __F. Supp. 2d __, 2012 WL 4481208, *6 (E.D. Mo. Sept. 28, 2012), *appeal pending*, No. 12-3357 (8th Cir.).

STANDARD OF REVIEW

This Court reviews a preliminary injunction for an abuse of discretion and reviews questions of law de novo. *See Obama for America v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012).

ARGUMENT

I. The Preliminary Injunction Rests On An Error Of Law.

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.” *Obama for America*, 697 F.3d at 428 (quoting *Winter*, 555 U.S. at 20).

The district court issued a preliminary injunction even though it concluded that neither plaintiffs nor the government had shown a strong likelihood of success on the merits. *See* R.42, Page ID #577 (order). The preliminary injunction thus rests on an error of law. Even assuming that the “balancing of factors” approach cited by the district court survives *Winter*, *see* R.39, Page ID #545, plaintiffs are required to demonstrate a likelihood of success on the merits here because they seek “to stay governmental action taken in the public interest pursuant to a

statutory or regulatory scheme,” *Hobby Lobby Stores, Inc. v. Sebelius*, 2012 WL 6930302, *2 (10th Cir. Dec. 20, 2012), and because their asserted harm (a substantial burden on religious exercise) depends on their likelihood of success on the merits. *See 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.”); *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009) (“when a party seeks a preliminary injunction on the basis of a potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor”).

II. RFRA Does Not Allow A For-Profit, Secular Corporation To Deny Employee Benefits On The Basis Of Religion.

RFRA 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 contend that, in enacting this statute, Congress gave for-profit, secular corporations the right to demand religion-based exemptions from federal laws that regulate the corporations. On plaintiffs’ reasoning, if the controlling shareholder of a for-profit, secular corporation asserts a religious objection to a federal law that regulates the corporation, then that objection conclusively establishes a substantial burden on a person’s religious exercise, and the corporate regulation must be subjected to strict scrutiny.

Congress, however, took pains to avoid that result. First, by requiring a plaintiff to show that a regulation substantially burdens “a person’s exercise of religion,” Congress carried forward the existing distinction between non-profit, religious organizations, which may engage in the exercise of religion, and for-profit, secular corporations, which may not. Second, by amending the initial version of RFRA to add the word “substantially,” Congress “ma[de] it clear that the compelling interest standard[] set forth in the act” applies “only to Government actions [that] place a substantial burden” on a person’s exercise of religion. 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *ibid.* (text of Amendment No. 1082). Third, by restoring the legal framework “set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972),” 42 U.S.C. § 2000bb(b)(1), Congress made clear that courts should look to these and other Supreme Court cases that pre-date *Employment Div., Dep’t of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), to determine whether a regulation substantially burdens a person’s religious exercise. *See* 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy) (“The amendment we will offer today is intended to make it clear that the pre-*Smith* law is applied under the RFRA in determining whether” a governmental burden on religion “must meet the test.”); *see also Living Water Church of God v. Charter Township of Meridian*, 258 Fed.

App'x 729, 733-34 (6th Cir. 2007) (under the parallel language of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), “[t]he term “substantial burden” . . . is not intended to be given any broader interpretation than the Supreme Court’s articulation of the concept of substantial burden or religious exercise”) (quoting 146 Cong. Rec. S7774–01, 7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy)). No pre-*Smith* case ever held—or even suggested—that the regulation of for-profit, secular corporations is subject to strict scrutiny.

A. Weingartz Supply Company Is Not A Person Engaged In The Exercise Of Religion Within The Meaning Of RFRA.

1. RFRA requires a plaintiff to show, as a threshold matter, that a challenged regulation is a substantial burden on “a person’s exercise of religion.” 42 U.S.C. § 2000bb-1(a), (b). Plaintiffs cannot make that showing because Weingartz Supply Company is not “person[.]” engaged in the “exercise of religion” within the meaning of RFRA or other federal statutes that provide accommodations for an organization’s religious beliefs.

It is common ground that the term “person” can include a corporation as well as an individual. *See* 1 U.S.C. § 1 (the Dictionary Act). It is also common ground that secular corporations enjoy certain First Amendment rights, such as the freedoms of speech and association. *See, e.g., Citizens United v. FEC*, 130 S. Ct. 876 (2010) (freedom of speech).

But, whereas the First Amendment freedoms of speech and association are “right[s] enjoyed by religious and secular groups alike,” the First Amendment’s Free Exercise Clause “gives special solicitude to the rights of religious organizations.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012). That special solicitude for religious organizations is rooted in “the text of the First Amendment.” *Ibid.*

Congress likewise has shown a special solicitude for religious organizations in statutes that regulate the relationship between employers and their employees. At the same time, however, Congress has not permitted for-profit, secular corporations to invoke religion as a basis to defeat the requirements of federal law.

Under Title VII of the Civil Rights Act of 1964, an employer cannot discriminate on the basis of religion in the terms or conditions of employment, unless the employer is “a religious corporation, association, educational institution, or society.” 42 U.S.C. § 2000e-1(a) (collectively, “religious organization”). Similarly, the Americans with Disabilities Act (“ADA”), which prohibits employment discrimination on the basis of disability, includes specific exemptions for religious organizations. *See* 42 U.S.C. § 12113(d)(1), (2); *Hosanna-Tabor*, 132 S. Ct. at 701 n.1 (discussing the ADA exemptions). And the National Labor Relations Act (“NLRA”), which gives employees collective bargaining and other rights, has been interpreted to exempt church-operated educational institutions

from the jurisdiction of the National Labor Relations Board. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

The organizations found to qualify for these religious exemptions all have been non-profit, religious organizations, as in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987). There, the Court held that a gymnasium run by the Mormon Church was free to discharge a building engineer who failed to observe the Church's standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco. *See id.* at 330 & n.4. In so holding, the Court stressed that the Church did not operate the gym on a for-profit basis. *See id.* at 339.⁸

Similarly, in the Supreme Court's RFRA and free exercise cases that involved corporate plaintiffs, the plaintiffs were non-profit, religious organizations. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993) ("Church of the Lukumi Babalu Aye, Inc. (Church), is a not-for-profit corporation organized under Florida law"); *Gonzales v. O Centro Espirita*

⁸ *See also, e.g., LeBoon v. Lancaster Jewish Community Center Ass'n*, 503 F.3d 217, 221 (3d Cir. 2007) (non-profit Jewish community center); *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 190 (4th Cir. 2011) (non-profit nursing-care facility run by an order of the Roman Catholic Church); *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724-725 (9th Cir. 2011) (per curiam) (non-profit Christian humanitarian organization); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1300 (11th Cir. 2006) (non-profit Hispanic Baptist congregation affiliated with the Southern Baptist Convention).

Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (RFRA plaintiff was a religious sect); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (free exercise claim raised by a church-operated school).

The Supreme Court and courts of appeals have emphasized that for-profit status is an objective criterion that allows courts to distinguish a secular company from a potentially religious organization, without making intrusive inquiries into an entity's religious beliefs. "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.*

Thus, the D.C. Circuit held that an organization qualifies for the religious exemption in the NLRA if, among other things, the organization is "organized as a 'nonprofit'" and holds itself out as religious. *Id.* at 1343 (quoting *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 400, 403 (1st Cir. 1985) (en banc) (opinion of then-Judge Breyer)). The D.C. Circuit explained that this bright-line distinction prevents courts from "'trolling through a person's or institution's religious beliefs.'" *Id.* at 1341-42 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)). The D.C. Circuit stressed that the "prohibition on such

intrusive inquiries into religious beliefs underlay” the Supreme Court’s interpretation of the Title VII religious exemption in *Amos*. *Id.* at 1342.

Similarly, in *Spencer v. World Vision, Inc.*, 633 F.3d 723, 734 (9th Cir. 2011), Judge O’Scannlain explained that the Title VII religious exemption must “center[] on neutral factors (i.e., whether an entity is a nonprofit and whether it holds itself out as religious),” “[r]ather than forcing courts to ‘troll[] through the beliefs of [an organization], making determinations about its religious mission.”” *Id.* at 734 (O’Scannlain, J., concurring) (quoting *Great Falls*, 278 F.3d at 1342).

In enacting RFRA, Congress carried forward the background principles reflected in pre-existing federal employment statutes, by requiring a plaintiff to show a substantial burden on a person’s exercise of religion. Likewise, under the parallel provisions of RLUIPA, a state or local zoning regulation is not subject to strict scrutiny unless it “imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution[.]” 42 U.S.C. § 2000c(a)(1). Under RFRA and RLUIPA, as under pre-existing federal statutes, an entity’s for-profit status is an objective criterion that allows courts to distinguish a secular corporation from a potentially religious organization. “[F]or-profit corporate entities, unlike religious non-profit organizations, do not—and cannot—legally claim a right to exercise or establish a ‘corporate’ religion under the First Amendment or the RFRA.” *Conestoga Wood Specialties Corp. v. Sebelius*, No.

13-1144, slip op. at 6 (3d Cir. Feb. 7, 2013) (Garth, J., concurring) (emphases omitted); *see also Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1288 (W.D. Okla. 2012) (“Plaintiffs have not cited, and the court has not found, any case concluding that secular, for-profit corporations . . . have a constitutional right to the free exercise of religion.”), *appeal pending*, No. 12-6294 (10th Cir.); *Briscoe v. Sebelius*, No. 13-285, slip op. 8 (D. Colo. Feb. 27, 2013) (“Secular, for-profit corporations neither exercise nor practice religion.”).

Plaintiffs concede that Weingartz Supply Company and its subsidiaries are “for-profit, secular companies.” R.1, Page ID #13, ¶ 75 (complaint). Plaintiffs do not claim that Weingartz Supply Company qualifies for the religious exemptions in Title VII, the ADA, the NLRA, or any other federal statute that regulates the employment relationship. Likewise, RFRA provides no basis to exempt the corporation from the regulations that govern the health coverage offered under the Weingartz Supply Company group health plan, which is a significant aspect of employee compensation. A for-profit, secular corporation cannot deny its secular workforce the employee benefits required by federal law.

B. The Obligation To Cover Contraceptives Lies With The Weingartz Supply Company Group Health Plan, Not With Mr. Weingartz Personally.

1. Plaintiffs cannot circumvent the distinction between non-profit, religious organizations and for-profit, secular corporations by attempting to shift the focus

of the RFRA inquiry from Weingartz Supply Company to Mr. Weingartz, who is the corporation's president. Federal law does not require Mr. Weingartz personally to provide health coverage to Weingartz Supply Company employees, or to satisfy the myriad other requirements that federal law places on Weingartz Supply Company. These obligations lie with the corporation itself.

The contraceptive-coverage requirement does not compel Mr. Weingartz as an individual to do anything. *See Autocam Corp. v. Sebelius*, 2012 WL 6845677, *7 (W.D. Mich. Dec. 24, 2012), *appeal pending*, No. 12-2673 (6th Cir.). "It is only the legally separate" corporation that has "any obligation under the mandate." *Ibid*. It is the corporation that acts as the employing party; it is the corporation that sponsors the group health plan for the company'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*, ___ F.3d ___, 2013 WL 362725, *6 (7th Cir. Jan. 30, 2013) (Rovner, J., dissenting).

Weingartz Supply Company is a "creature of statute" that is its "own 'person' under Michigan law, [] distinct and separate from its owners." *Handley v. Wyandotte Chems. Corp.*, 325 N.W.2d 447, 449 (Mich. Ct. App. 1982). Although plaintiffs seek to elide this distinction, the Supreme Court has stressed 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); *see also Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003) (“A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities.”).

Mr. Weingartz “quite properly enjoy[s] the protections and benefits of the corporate form.” *Autocam Corp.*, 2012 WL 6845677, *7. But the “corporate form brings obligations as well as benefits.” *Ibid.* “The owners of an LLC or corporation, even a closely-held one, have an obligation to respect the corporate form, on pain of losing the benefits of that form should they fail to do so.” *Grote*, 2013 WL 362725, *6 (Rovner, J., dissenting). Mr. Weingartz is “not at liberty to treat the company’s bank accounts as [his] own; co-mingling personal and corporate funds is a classic sign that a company owner is disregarding the corporate form and treating the business as his alter ego.” *Ibid.*

“So long as the business’s liabilities are not [Mr. Weingartz’s] 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 [Mr. Weingartz’s] own expenditures.” *Ibid.* The money used to pay for health

coverage under the Weingartz Supply Company group health plan “belongs to the company, not to” Mr. Weingartz. *Ibid.*

Mr. Weingartz has “chosen to conduct [] business through corporations, with their accompanying rights and benefits and limited liability.” *Gilardi v. Sebelius*, No. 13-104, slip op. 10 (D.D.C. March 3, 2013), *appeal pending*, No. 13-5069 (D.C. Cir.). He “cannot simply disregard that same corporate status when it is advantageous to do so.” *Id.* at 11. “The law protects that separation between the corporation and its owners for many worthwhile purposes.” *Autocam Corp.*, 2012 WL 6845677, *7. “Neither the law nor equity can ignore the separation when assessing claimed burdens on the individual owners’ free exercise of religion caused by requirements imposed on the corporate entities they own.” *Ibid.*; *see also Conestoga Wood Specialties Corp. v. Sebelius*, ___ F. Supp. 2d ___, 2013 WL 140110, *8 (E.D. Pa. Jan. 11, 2013) (“It would be entirely inconsistent to allow the [individual plaintiffs] to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations.”), *appeal pending*, No. 13-1144 (3d Cir.).

2. None of the pre-*Smith* Supreme Court cases that formed the background to RFRA held or even suggested that a requirement that a corporation provide certain employee benefits could be a substantial burden on its controlling shareholders’ exercise of religion. The only pre-*Smith* free exercise case that

involved employee benefits, *United States v. Lee*, 455 U.S. 252 (1982), considered a free exercise claim raised by an individual employer, not by a corporation or its shareholders. Moreover, *Lee* rejected the “free exercise claim brought by [an] individual Amish employer who argued that paying Social Security taxes for his employees interfered with his exercise of religion.” *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643 (2012) (Sotomayor, J., in chambers). Even with respect to that individual employer, the Supreme Court stressed that, “[w]hen followers of a particular sect enter into commercial activities as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.” *Lee*, 455 U.S. at 261. The Court explained that “[g]ranted an exemption from social security taxes to an employer operates to impose the employer’s religious faith on the employees,” *ibid.*, who would be denied their social security benefits if the employer did not pay the social security taxes.

The two cases cited in RFRA itself—*Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)—did not involve either corporate regulation or employee benefits. In *Sherbert*, the Supreme 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. And, in *Yoder*, the Court held that a state government could not compel Amish parents to send their children to high school.

The district court relied on *Thomas v. Review Board*, 450 U.S. 707 (1981), *see* R.39, Page ID #552, but, there, the Supreme Court simply applied *Sherbert*'s reasoning to hold that a state government could not deny unemployment compensation to an individual who lost his job because of his religious beliefs. *See also Gilardi v. Sebelius*, No. 13-104, slip op. 23 (D.D.C. March 3, 2013) (“Plaintiffs misread *Thomas*. . . . In that case, . . . the burden of the denial of benefits rested with the person exercising his religion, not a separate person or corporate entity, as is the case here.”), *appeal pending*, No. 13-5089 (D.C. Cir.).

The district court was equally mistaken to suggest that two Ninth Circuit decisions held that the regulation of a corporation was a substantial burden on the free exercise rights of its controlling shareholders. *See* R.39, Page ID #547. Those cases held only that corporations had “*standing* to assert the free exercise right of [their] owners.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009) (citing *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988)) (emphasis added). Injury-in-fact for standing need not be large; an “identifiable trifle” will suffice. *Stone v. William Beaumont Hospital*, 782 F.2d 609, 617 n.2 (6th Cir. 1986) (citation omitted). The issue of standing to assert a First Amendment claim is thus distinct from the question of whether a plaintiff has

stated a violation of RFRA, which requires a plaintiff to show that a federal regulation “*substantially* burden[s]” a person’s exercise of religion. 42 U.S.C. § 2000bb-1(a) (emphasis added). *Stormans*, which involved a post-*Smith* free exercise claim, did not address the issue of substantial burden. *Townley* stated only that the challenged statute “to some extent would adversely affect [the corporate owners’] religious practices,” *Townley*, 859 F.2d at 620, and then rejected the free exercise claim. Even assuming that the Ninth Circuit’s standing rulings were correct (an issue not presented here because Mr. Weingartz is a plaintiff and therefore can assert his own rights), the decisions provide no support for plaintiffs’ RFRA claim.

C. Decisions That Employees Make About How To Use Their Compensation Cannot Properly Be Attributed To The Corporation Or Its Shareholders.

For the reasons discussed above, plaintiffs’ attempt to conflate Weingartz Supply Company with Mr. Weingartz cannot salvage their RFRA claim. Even apart from this central flaw in plaintiffs’ argument, their claim fails because an employee’s decision to use her health coverage for a particular service cannot properly be attributed to her employer, much less to the corporation’s controlling shareholder.

Employees of Weingartz Supply Company are free to use the wages they receive from the corporation to pay for contraceptives. Plaintiffs do not suggest

that these individual decisions by the company's employees can be attributed to the company or to Mr. Weingartz. "Implementing the challenged mandate will keep the locus of decision-making in exactly the same place: namely, with each employee, and not" with the company or its president. *Autocam Corp.*, 2012 WL 6845677, *6. "It will also involve the same economic exchange at the corporate level: employees will earn a wage or benefit with their labor, and money originating from [Weingartz Supply Company] will pay for it." *Ibid.*

A group health plan "covers many medical services, not just contraception." *Grote*, 2013 WL 362725, *13 (Rovner, J., dissenting). "To the extent [Mr. Weingartz is] funding anything at all—and . . . one must disregard the corporate form to say that" he is—he is "paying for a plan that insures a comprehensive range of medical care that will be used in countless ways" by the employees and their family members who participate in the Weingartz Supply Company group health plan. *Ibid.* The decision as to what specific "services will be used is left to the employee and her doctor." *Ibid.* "No 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 [Mr. Weingartz's] decision or action." *Ibid.*

Plaintiffs' contrary position is at odds with the analysis used by the Supreme Court in other First Amendment contexts. In analyzing Establishment Clause

challenges, the Supreme Court has recognized that a state does not, by providing a source of funding, necessarily become responsible for an individual's decisions in using those funds. In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), for example, the Court rejected an Establishment Clause challenge to a state school voucher program. Of the more than 3,700 students who participated in the program during one school year, 96% of them used the vouchers to enroll at religiously affiliated schools. *See id.* at 647. Nonetheless, the Supreme Court held that the flow of voucher funds to religiously affiliated schools was not properly attributable to the State. The Court reasoned that “[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.” *Id.* at 652. And it explained that “no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the imprimatur of government endorsement.” *Id.* at 655.

The Supreme Court employed similar reasoning in *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000), to reject a First Amendment challenge to a student activity fee that required the complaining students “to pay fees which are subsidies for speech they find objectionable, even offensive.” *Id.* at

230. The Court noted that the funds were distributed to student groups on a view-point neutral basis, and explained that this system prevented “any mistaken impression that the student [groups] speak for the University” or the objecting students. *Id.* at 233 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995)).

It would be equally inappropriate to attribute an employee’s decision to use her comprehensive health coverage for a particular item or service to the employer that pays for or contributes to the plan. 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.” *Grote*, 2013 WL 362725, *13 (Rovner, J., dissenting). Indeed, “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 *6.

The connection between an employee’s medical decisions and the corporation’s controlling shareholder is even more attenuated than the connection

between an employee's medical decisions and the corporation. To hold that "a company shareholder's religious beliefs and practices are implicated by the autonomous health care decisions of company employees, such that the obligation to insure those decisions, when objected to by a shareholder, represents a substantial burden on that shareholder's religious liberties" would be "an unusually expansive understanding of what acts in the commercial sphere meaningfully interfere with an individual's religious beliefs and practices." *Id.* at *14. "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*, ___ F. Supp. 2d ___, 2012 WL 4481208, *6 (E.D. Mo. Sept. 28, 2012), *appeal pending*, No. 12-3357 (8th Cir.). *See also Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012); *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144 (3d Cir. Feb. 7, 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 2012 WL 6930302 (10th Cir. Dec. 20, 2012); *Conestoga Wood Specialties Corp. v. Sebelius*, ___ F. Supp. 2d ___, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013), *appeal pending*, No. 13-1144 (3d Cir.); *Autocam Corp. v. Sebelius*, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012), *appeal pending*, No. 12-2673 (6th Cir.); *Korte v. HHS*, ___ F. Supp. 2d ___, 2012 WL 6553996 (S.D. Ill. Dec. 14, 2012), *appeal pending*, No. 12-3841 (7th Cir.); *Grote Industries, LLC v. Sebelius*,

__ F. Supp. 2d __, 2012 WL 6725905 (S.D. Ind. Dec. 27, 2012), *appeal pending*, No. 13-1077 (7th Cir.); *Annex Medical, Inc. v. Sebelius*, __ F. Supp. __, 2013 WL 101927, *5 (D. Minn. Jan. 8, 2013), *appeal pending*, No. 13-1118 (8th Cir.); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012), *appeal pending*, No. 12-6294 (10th Cir.); *Briscoe v. Sebelius*, No. 13-285 (D. Colo. Feb. 27, 2013); *Gilardi v. Sebelius*, No. 13-104 (D.D.C. March 3, 2013), *appeal pending*, No. 13-5069 (D.C. Cir.).⁹

D. The Contraceptive-Coverage Requirement Is Narrowly Tailored To Advance Compelling Governmental Interests.

Because the contraceptive-coverage requirement does not impose a substantial burden on any exercise of religion by Weingartz Supply Company or Mr. Weingartz, there is no reason to consider whether such a burden is justified as the least restrictive means of furthering a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1(b). In any event, plaintiffs' claim fails on this secondary inquiry as well, because the contraceptive-coverage requirement is narrowly

⁹ Indeed, even church-operated enterprises are required to pay employees the minimum wage. *See Donovan v. Tony & Susan Alamo Foundation*, 722 F.2d 397, 403 (8th Cir. 1984) (rejecting free exercise challenge to the Fair Labor Standards Act because "enforcement of wage and hour provisions cannot possibly have any direct impact on appellants' freedom to worship and evangelize as they please"), *aff'd*, 471 U.S. 290 (1985); *DeArment v. Harvey*, 932 F.2d 721, 722 (8th Cir. 1991) (holding that the FLSA applies to church-run schools and that "any minimal free exercise burden was justified by the compelling governmental interest in enforcing the minimum wage and equal pay provisions of the FLSA").

tailored to advance compelling governmental interests in public health and gender equality. Indeed, the particular health services at issue here relate to an interest—a woman’s control over her procreation—that is so compelling as to be constitutionally protected from state interference. *See Hobby Lobby Stores*, 870 F. Supp. 2d at 1296; *see also Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (state law that banned use of contraceptives unconstitutionally intrudes upon the right of marital privacy).

1. “[T]he Government clearly has a compelling interest in safeguarding the public health by regulating the health care and insurance markets.” *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011), *aff’d*, *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011). The Affordable Care Act increases access to recommended preventive health services by requiring that these services be covered without cost sharing, that is, without requiring plan participants and beneficiaries to make co-payments or pay deductibles. *See* 42 U.S.C. § 300gg-13.

Even small increments in cost sharing have been shown to reduce the use of recommended preventive health services. *See* IOM Report 108-109. “Cost barriers to use of the most effective contraceptive methods are important because

long-acting, reversible contraceptive methods and sterilization have high up-front costs.” *Id.* at 108. “A recent study conducted by Kaiser Permanente found that when out-of-pocket costs for contraceptives were eliminated or reduced, women were more likely to rely on more effective long-acting contraceptive methods.” *Id.* at 109.

In addition to protecting a woman’s compelling interest in autonomy over her procreation, *see Eisenstadt*, 405 U.S. at 453, access to contraceptives is a crucial public health protection because an unintended pregnancy can have major negative health consequences for both the woman and the developing fetus. The Institute of Medicine described the harms to the woman and fetus that can occur when pregnancies are unintended. *See* IOM Report 103. For example, short intervals between pregnancies are associated with low birth weight and prematurity. *See ibid.* When a pregnancy is unintended, a woman may delay prenatal care or prolong behaviors that present risks for the developing fetus. *See ibid.* And, for women with certain medical conditions (such as diabetes), pregnancy can pose serious health risks. *See id.* at 103-104.

The requirement to cover women’s recommended preventive health services without cost sharing also protects the distinct compelling interest in gender equality. The Supreme Court has recognized the “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.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984). “Assuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests.” *Ibid.* In enacting the Affordable Care Act’s preventive health services coverage requirement, Congress found that “women have different health needs than men, and these needs often generate additional costs.” 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009) (Sen. Feinstein). “Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men.” *Ibid.* And this disproportionate burden on women creates “financial barriers . . . that prevent women from achieving health and well-being for themselves and their families.” IOM Report 20. The women’s preventive health services coverage requirement is designed to equalize preventive health services coverage for women and men, through, among other things, increased access to family planning services for women. *See, e.g.*, 155 Cong. Rec. at S12114 (Sen. Feinstein); *see also* 77 Fed. Reg. at 8728.

2. There is no doubt that the exemption that plaintiffs demand here would undermine Congress’s objectives. Whereas Congress sought to increase access to women’s recommended preventive health services by requiring that these services be covered without cost sharing, plaintiffs seek to exclude contraceptive coverage entirely from the Weingartz Supply Company plan. Thus, plaintiffs would require

that Weingartz Supply Company employees pay for contraceptives with their wages rather than with the health coverage that they earn as an employee benefit.

Plaintiffs do not explain what legal principle requires that Weingartz Supply Company employees pay for their contraceptives by using their cash compensation rather than their non-cash health coverage benefits. Plaintiffs' demand to exclude contraceptive coverage from the Weingartz Supply Company plan would protect no one's religious practices and would impose a wholly unwarranted burden on individual employees and their family members.

Plaintiffs argued below that the exemption they demand would not undermine the government's compelling interests because "grandfathered" plans that collectively cover millions of employees are not subject to the statutory requirement to cover recommended preventive health services without cost sharing. *See* R.39, Page ID #557 (opinion) (describing plaintiffs' argument). Plaintiffs are mistaken to assume that all or most grandfathered plans exclude contraceptive coverage. The Institute of Medicine found that "[c]ontraceptive coverage has become standard practice for most private insurance." IOM Report 108. In any event, the Affordable Care Act's grandfathering provision, 42 U.S.C. § 18011, does not have the effect of providing the type of permanent exemption from a coverage requirement that plaintiffs demand here. Although grandfathered plans are not subject to certain requirements, including the requirement to cover

recommended preventive health services without cost sharing, the grandfathering provision is transitional in effect, and 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).¹⁰

Changes to a group health plan such as the elimination of certain benefits, an increase in cost-sharing requirements, or a decrease in employer contributions can cause a plan to lose its grandfathered status. *See* 45 C.F.R. § 147.140(g). The district court correctly recognized that the grandfathering provision is “a reasonable plan for instituting an incredibly complex health care law while balancing competing interests.” R.39, Page ID #558 (opinion). “To find the Government’s interests other than compelling only because of the grandfathering rule would perversely encourage Congress in the future to require immediate and draconian enforcement of all provisions of similar laws, without regard to pragmatic considerations, simply in order to preserve ‘compelling interest’ status.” *Ibid.*; *see also Korte v. HHS*, ___ F. Supp. 2d ___, 2012 WL 6553996, *7 (S.D. Ill.

¹⁰ The number of grandfathered plans is steadily declining. *See, e.g.*, 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).

Dec. 14, 2012) (this “gradual transition” does not “undercut[] the neutral purpose or general applicability of the mandate”), *appeal pending*, No. 12-3841 (7th Cir.).

3. Plaintiffs also argued below that regulating the terms of group health plans is not the least restrictive means to accomplish the government’s objectives. They urged that, instead, the government “should directly provide women with preventive care through an administrative agency,” or allow women to “obtain contraceptive needs at community health centers.” R.39, Page ID #563 (opinion) (describing plaintiffs’ argument).

These proposals—which would require federal taxpayers to pay the cost of contraceptive services for the employees of for-profit, secular companies—reflect a fundamental misunderstanding of RFRA and the “least restrictive means” test that it incorporates. That test has never been interpreted to require the government 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).

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 the 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 9,238 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 March 20, 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
Alisa B. Klein

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

<u>Record Entry</u>	<u>Page ID# Range</u>	<u>Description</u>
R.1	1-42	Complaint
R.13	164-263	Preliminary Injunction Motion, Brief, and Exhibits
R.14	264-317	Opposition To Preliminary Injunction Motion
R.39	540-568	Opinion
R.42	577-579	Preliminary Injunction Order
R.47	678-680	Defendants' Notice of Appeal
R.48	681	Plaintiffs' Notice of Appeal