[ORAL ARGUMENT REQUESTED]

No. 12-1380

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM NEWLAND; PAUL NEWLAND; JAMES NEWLAND;
CHRISTINE KETTERHAGEN; ANDREW NEWLAND; and
HERCULES INDUSTRIES, INC., a Colorado Corporation,

Plaintiffs-Appellees,

v.

KATHELEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLORADO (1:12-cv-01123) (Kane, J.)

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ARGUMENT

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

Hercules Industries, Inc., is a for-profit corporation that manufactures heating, ventilation, and air conditioning equipment. Plaintiffs contend that, under RFRA, the Hercules Industries group health plan must be exempted from the federal regulatory requirement to cover FDA-approved contraceptives, as prescribed by a health care provider. 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 vehicle safety systems, wood cabinets, fuel systems, arts and crafts supplies, and mineral and chemical products.[1] The plaintiffs' theory in these cases is that, by enacting RFRA, Congress gave for-profit, secular corporations the "right to ignore anti-discrimination laws, refuse to pay payroll taxes, violate OSHA requirements, etc. in the name of religious freedom," unless these requirements survive strict scrutiny, which is "'the most

[1] *See, e.g.*, *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); *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.) (wood cabinets); *Autocam Corp. v. Sebelius*, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012), *appeal pending*, No. 12-2673 (6th Cir.) (fuel systems); *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); *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).

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)). Plaintiffs here assert that RFRA "*trumps other statutes*" that regulate the relationship between employers and employees, such as Title VII of the Civil Rights Act of 1964. Pl. Br. 17 (plaintiffs' emphasis).

Congress was careful to avoid that result. First, by requiring a plaintiff to show that a regulation substantially burdens "a person's exercise of religion," 42 U.S.C. § 2000bb-1(a), RFRA 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); *see also 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."). No pre-*Smith* case held—or even suggested—that for-profit corporations have the right to ignore federal employment regulations in the name of religious freedom.[2]

A. Hercules Industries, Inc., 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 federal regulation is a substantial burden on "a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). Plaintiffs cannot make that showing because Hercules Industries, Inc., which is a for-profit corporation that manufactures HVAC equipment, is not a "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.

Our opening brief explained that Congress has accommodated religious organizations through religious exemptions in statutes regulating the employer-employee relationship. At the same time, however, Congress has not permitted

[2] Although the district court applied the wrong preliminary injunction standard, *see* Opening Br. 12-13, we agree with plaintiffs that there is no need for a remand, *see* Pl. Br. 10, because the question whether plaintiffs are likely to succeed on the merits is a question of law that this Court decides de novo.

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, including employee compensation, 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, also includes specific exemptions for religious organizations. *See* 42 U.S.C. § 12113(d)(1), (2); *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 701 n.1 (2012) (discussing the ADA exemptions). Likewise, 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), which upheld a religious exemption claim by a non-profit entity run by the Mormon Church. *See also* Opening Br. 17 n.5 (citing other cases). Similarly, in the RFRA and free exercise cases on which plaintiffs rely, the claimants were non-

profit, religious organizations. *See* Pl. Br. 23 (citing *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 Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (religious sect); *Hosanna-Tabor Evangelical Lutheran Church & School*, 132 S. Ct. at 699 (church-operated school)).

Plaintiffs declare that "[t]he fact that these corporations were churches or were not-for-profit is beside the point." Pl. Br. 23. But 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. "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 noted 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).

Plaintiffs urge the Court to disregard this body of federal law. They assert that RFRA "*trumps other statutes*" such as Title VII of the Civil Rights Act of 1964. Pl. Br. 17 (plaintiffs' emphasis). Plaintiffs acknowledge, however, that "[t]his is a case of statutory interpretation." Pl. Br. 24. Congress, in enacting RFRA, carried forward the background principles reflected in the pre-existing federal employment statutes, by requiring a plaintiff to demonstrate a substantial burden on "a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). Under RFRA, as under these pre-existing federal statutes, an entity's for-profit status is an objective criterion that allows a court to distinguish a secular company 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.").

This distinction between non-profit, religious organizations and for-profit, secular corporations is rooted in "the text of the First Amendment," *Hosanna-Tabor Evangelical Lutheran Church & School*, 132 S. Ct. at 706, and embodied in federal law. Contrary to plaintiffs' assertion, the distinction does not require a court to "venture into deep theological waters." Pl. Br. 27. The distinction prevents precisely that entanglement by enabling the courts to rely on an objective standard rather than "'trolling through a person's or institution's religious beliefs.'" *Great Falls*, 278 F.3d at 1341-42 (quoting *Mitchell,* 530 U.S. at 828).

Hercules Industries is a for-profit corporation that manufactures HVAC equipment. Plaintiffs do not claim that the corporation 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 under the Hercules Industries group health plan, which is a significant aspect of employee compensation.

Plaintiffs underscore their misunderstanding of the issue before the Court when they emphasize that "Hercules has donated significant amounts of money to Catholic organizations and causes." Pl. Br. 3. Federal law does not prohibit for-profit corporations from donating money to religious charities, nor does it require "the pursuit of profit over any ethical value." Pl. Br. 27. But Hercules Industries does not claim that it could compel *its employees* to donate to religious charities or to tithe their salaries. Only a religious organization, like that at issue in *Amos*, can require its employees to tithe. *See Amos*, 483 U.S. at 330 & n.4. Hercules Industries is not a religious organization, and it therefore must afford its secular workforce the employee benefits that are required by federal law.[3]

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[3] Plaintiffs also misunderstand the other statutory provisions on which they rely. *See* Pl. Br. 15 & n.8. Unlike RFRA, these provisions do not require a showing that an entity is a person engaged in the exercise of religion. For example, 42 U.S.C. § 18023 permits a state government to prohibit abortion coverage in qualified health plans sold on a health insurance exchange, and a state government cannot assert "religious beliefs." Pl. Br. 15.

B. The Requirement That The Hercules Industries Group Health Plan Include Contraceptive Coverage Does Not Place A Substantial Burden On Any Personal Exercise Of Religion By The Newlands.

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 Hercules Industries to its shareholders. Federal law does not require the shareholders of Hercules Industries to provide health coverage to Hercules Industries employees, or to satisfy the myriad other requirements that federal law places on Hercules Industries. These obligations lie with the corporation itself.

The challenged regulations do not "compel the [Newlands] as individuals to do anything." *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 entit[y] they currently own that ha[s] 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).

"[I]ncorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). "As corporate owners, the [Newlands] quite properly enjoy 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) (citing *Wachovia Sec., LLC v. Banco Panamericano, Inc.*, 674 F.3d 743 (7th Cir. 2012); *Laborers' Pension Fund v. Lay–Com, Inc.*, 580 F.3d 602 (7th Cir. 2009)). The Newlands "are not at liberty to treat the company's bank accounts as their 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.* (citing *Van Dorn Co. v. Future Chem. & Oil. Corp.*, 753 F.2d 565, 570 (7th Cir. 1985)).

"So long as the business's liabilities are not the [Newlands'] liabilities—which is the primary and 'invaluable privilege' conferred by the corporate form, *Torco Oil Co. v. Innovative Thermal Corp.*, 763 F. Supp. 1445, 1451 (N.D. Ill. 1991) (Posner, J., sitting by designation)—neither are the business's expenditures

the [Newlands'] own expenditures." *Ibid.* The money used to pay for health coverage under the Hercules Industries group health plan "belongs to the company, not to the [Newlands]." *Ibid.*

The Newlands do not claim that they are personally responsible for the corporation's liabilities. They cannot selectively ask this Court to pierce the corporate veil and conclude that monies used to pay for health coverage under the Hercules Industries plan "ought to be treated as monies from the [Newlands'] own pockets." *Ibid.* "The [Newlands] have chosen to conduct their 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). "They 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.*

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. Plaintiffs rely on *United States v. Lee*, 455 U.S.

252 (1982), *see* Pl. Br. 24, but *Lee* considered a free exercise claim raised by an individual Amish employer—not by a corporation or its shareholders. Moreover, even with respect to the individual employer, *Lee* rejected the free exercise claim, emphasizing 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.

Plaintiffs also rely on *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Board*, 450 U.S. 707 (1981), *see* Pl. Br. 25, but those cases did not involve any corporate regulation. *Sherbert* 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 *Thomas* 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."). Plaintiffs rely heavily on *Abdullhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010), *see* Pl. Br. 7, 15, 28, 30, but that case considered a prisoner's request for halal foods and is clearly inapposite here.

Plaintiffs rely on the Ninth Circuit's decisions in *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), and *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988), but those cases merely held that the corporations had standing to assert the free exercise rights of their shareholders. *See* Opening Br. 22. Even assuming that those standing rulings were correct (an issue not presented here because the Newlands are plaintiffs and thus can assert their own rights), the decisions do not support plaintiffs' claim under 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). *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194 (2d Cir. 2012), cited at Pl. Br. 25, rejected a free exercise challenge to a state law that regulated kosher food labels and provides no support for plaintiffs' RFRA claim.

Plaintiffs also cite *McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985), *see* Pl. Br. 6, 24, but, there, a state hearing examiner "pierced the 'corporate veil'" to make the individual owners of the stock and assets of a corporation "liable for the illegal actions of" the corporation. *McClure*, 370 N.W.2d at 850-51 & n.12. Moreover, the *McClure* court rejected the free exercise claim because the corporate plaintiff was "not a religious corporation—it is a Minnesota business corporation engaged in business for profit." *Id*. at 853.

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 the corporation and its shareholders 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 item or service cannot properly be attributed to her employer, much less to the corporation's shareholders.

Hercules Industries employees are free to use the wages they receive from the corporation to pay for contraceptives. Plaintiffs do not suggest that these individual decisions by Hercules Industries employees can be attributed to the corporation or to its shareholders. "Implementing the challenged mandate will keep the locus of decision-making in exactly the same place: namely, with each employee, and not" the corporation or its shareholders. *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 [Hercules Industries] 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 the [Newlands] themselves are funding anything at all—and . . . one must disregard

the corporate form to say that they are—they are 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 Hercules Industries 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 the [Newlands'] 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 (citations omitted).

The connection between an employee's medical decisions and the corporation's shareholders 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.).[4]

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

The contraceptive-coverage requirement is also narrowly tailored to advance compelling governmental interests in public health and gender equality. Plaintiffs assert that these interests are "generic and abstract," Pl. Br. 36, but the interests at issue here—a woman's control over her procreation—are 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,

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[4] *See also Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144 (3d Cir. Feb. 7, 2013); *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012); *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 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.).

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), *cert. denied*, 133 S. Ct. 63 (2012). 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* Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 108-109 (2011) ("IOM Report"). "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. 8725, 8728 (Feb. 15, 2012).

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 Hercules Industries plan. Thus, plaintiffs would require that Hercules Industries 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 Hercules Industries 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 Hercules Industries plan would protect no one's religious practices and would impose a wholly unwarranted burden on individual employees and their family members.

Plaintiffs assert that the exemption they demand would not undermine the government's compelling interests because grandfathered plans are not subject to the statutory requirement to cover recommended preventive health services without cost sharing. *See* Pl. Br. 36-51. But plaintiffs incorrectly assume that 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 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).[5] The grandfathering provision is "a reasonable plan for instituting an

[5] *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).

incredibly complex health care law while balancing competing interests." *Legatus v. Sebelius*, __ F. Supp. 2d __, 2012 WL 5359630, *9 (Oct. 31, 2012), *appeal pending*, No. 13-1092 (6th Cir.). "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*.

3. Plaintiffs alternatively contend that, instead of regulating the terms of group health plans, the federal government itself could provide "free coverage of birth control." Pl. Br. 48. But, as our opening brief explained, RFRA does not 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). Employees of for-profit, secular corporations are entitled to use non-wage benefits for purchases of their choosing, just as these employees are entitled to use their wages for such purchases, and such corporations have no right to demand that the government pay instead.

II. Plaintiffs Fail To State A Claim Under The First Amendment.

A. The Contraceptive-Coverage Requirement Does Not Violate The Free Exercise Clause.

The First Amendment's Free Exercise Clause is not implicated when the government burdens a person's religious exercise through laws that are neutral and generally applicable. *See Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 879 (1990). Even assuming *arguendo* that plaintiffs' free exercise rights are burdened by the contraceptive-coverage requirement, there is no Free Exercise Clause violation because the requirement is neutral and generally applicable. *See O'Brien*, 2012 WL 4481208, *6-9; *Korte*, __ F. Supp. 2d at __, 2012 WL 6553996, *7-8 (S.D. Ill. Dec. 14, 2012).

"Neutrality and general applicability are interrelated," and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). A law is not neutral "if the object of the law is to infringe upon or restrict practices because of their religious motivation." *Id*. at 533. A law is not generally applicable if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief." *Id*. at 543.

A law need not be universal to be generally applicable. Exemptions undermining "general applicability" are those that disfavor religion. For example, the ordinance regulating animal slaughter in *Lukumi* was not generally applicable

because it applied only to the religious practice of animal sacrifice, and not to hunting or other secular practices to which the asserted concerns of animal cruelty and public health applied with equal force. *See id*. at 542-46.

The requirement to cover women's recommended preventive health services was established, not with the object of interfering with religious practices, but to improve women's access to recommended health care and lessen the disparity between men's and women's health care costs. *See O'Brien*, 2012 WL 4481208, *7. "This is evident from both the inclusion of the religious employer exemption, as well as the legislative history of the ACA's Women's Health Amendment." *Ibid*. (citing 2009 WL 4405642; 155 Cong. Rec. S12265, S12271 (daily ed. Dec. 3, 2009) (statement of Sen. Franken) ("The problem [with the current bill] is, several crucial women's health services are omitted. [The Women's Health Amendment] closes this gap."); 2009 WL 4280093; 155 Cong. Rec. S12021-02, S12027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand) ("... in general women of childbearing age spend 68 percent more in out-of-pocket health care costs than men.... This fundamental inequity in the current system is dangerous and discriminatory and we must act.")).

The Affordable Care Act's grandfathering provision is "a reasonable plan for instituting an incredibly complex health care law while balancing competing interests." *Legatus*, 2012 WL 5359630, *9. This "gradual transition" does not

"undercut[] the neutral purpose or general applicability of the mandate" to cover recommended preventive health services. *Korte*, 2012 WL 6553996, *7. That requirement applies to group health plans in general, and the provisions that address grandfathered plans apply to religious and secular employers alike.

Nor does the religious employer exemption from the contraceptive-coverage requirement "compromise the neutrality of the regulations by favoring certain religious employers over others." *O'Brien*, 2012 WL 4481208, *8. Rather, "the religious employer exemption presents a strong argument in favor of neutrality, demonstrating that the 'object of the law' was not 'to infringe upon or restrict practices because of their religious motivation.'" *Ibid*. (quoting *Lukumi*, 508 U.S. at 533); *see also Lee*, 455 U.S. at 260 (noting that "Congress granted an exemption" from social security taxes, "on religious grounds, to self-employed Amish and others").

Clearly, the Free Exercise Clause permits the government to provide an exemption for non-profit, religious institutions such as churches and their integrated auxiliaries, *see* 45 C.F.R. § 147.130(a)(1)(iv)(B), and to address religious objections raised by additional non-profit, religious organizations, *see* 78 Fed. Reg. 8456 (Feb. 6, 2013), without also extending such measures to for-profit, secular corporations. That is not "discriminat[ion] against some or all religious

beliefs" or the imposition of "special disabilities on the basis of religious status." *Lukumi*, 508 U.S. at 532, 533.

B. The Contraceptive-Coverage Requirement Does Not Violate The Establishment Clause.

"The 'clearest command of the Establishment Clause' is that the government must not treat any religious denomination with preference over others." *O'Brien*, 2012 WL 4481208, *9 (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). "The Establishment Clause also guards against 'excessive government entanglement with religion.'" *Ibid*. (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971)).

The religious employer exemption "does not differentiate between religions, but applies equally to all denominations." *Ibid*. Nor does the exemption create an excessive government entanglement with religion. "The religious employer exemption, by necessity, distinguishes between religious and secular employers, and HHS has selected a logical bright line between the two." *Id*. at *10.

Plaintiffs "see no difference between" a for-profit, secular corporation and a non-profit, religious organization. *Korte*, 2012 WL 6553996, *8. As discussed above, however, "[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." 78 Fed. Reg. at 8461-62. Consistent with this

longstanding federal law, the Departments proposed to make certain accommodations for "nonprofit religious organizations, but not to include for-profit secular organizations." *Id.* at 8462. "Using well established criteria to determine eligibility for an exemption based on religious belief, such as the nonsecular nature of the organization and its nonprofit status, the [Affordable Care Act], through its implementing rules and regulations, both recognizes and protects the exercise of religion." *Hobby Lobby Stores*, 870 F. Supp. 2d at 1289. "The fact that the exceptions do not extend as far as plaintiffs would like does not make the mandate nonneutral." *Ibid.*; *see also Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 666 (1970) (upholding property tax exemptions for real property owned by non-profit, religious organizations and used exclusively for religious worship).[6]

The Supreme Court has made clear that the government "may encourage the free exercise of religion by granting religious accommodations, even if not required by the Free Exercise Clause, without running afoul of the Establishment Clause." *O'Brien*, 2012 WL 4481208, *10 (citing cases). "'Such legislative accommodations would be impossible as a practical matter'" if, as plaintiffs

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[6] These criteria bear no resemblance to the state law invalidated in *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1250 (10th Cir. 2008), cited at Pl. Br. 54, which authorized scholarships "to eligible students who attend any accredited college in the state—public or private, secular or religious—other than those the state deems 'pervasively sectarian.'"

contend, the government could not distinguish between non-profit, religious organizations and for-profit, secular corporations. *Ibid*. (quoting *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 79 (Cal. 2004)).

C. The Contraceptive-Coverage Requirement Does Not Violate Plaintiffs' Freedom Of Speech.

The preventive health service regulations regulate the terms of group health plans. That is the regulation of conduct, not speech. *See O'Brien*, 2012 WL 4481208, *12. And "neither the doctor's conduct in prescribing nor the patient's conduct in receiving contraceptives is inherently expressive." *Ibid*.

"It is true that the receipt of health care benefits often includes a conversation between a doctor and a patient, and the preventive services coverage regulations encompass 'patient education and counseling for all women with reproductive capacity.'" *Ibid*. (citation omitted). "However, this speech is merely incidental to the conduct of receiving health care." *Ibid*. (citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006)). Unlike in the cases on which plaintiffs rely, "the regulations here do not require funding of one defined viewpoint." *Ibid*. The speech that is incident to receiving health care "is an unscripted conversation between a doctor and a patient, not political propaganda in favor of one candidate, an amicus brief espousing one side of an issue, or advertisements in favor of a particular product." *Ibid*. "Here, the government has

not compelled plaintiffs to speak, to subsidize speech, or to subsidize expressive conduct." *Ibid*. Plaintiffs thus fail to state a claim under the First Amendment.

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 6,902 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
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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2013, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system and caused seven hard copies of the brief to be sent to this Court by Federal Express, overnight delivery. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein
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