IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 12-cv-01123-JLK

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

Plaintiffs,

vs.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services;
HILDA SOLIS, in her official capacity as Secretary of the United States Department of Labor;
TIMOTHY GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR;
UNITED STATED DEPARTMENT OF THE TREASURY,

Defendants.

REPORTER'S TRANSCRIPT
Hearing on Motion for Preliminary Injunction

Proceedings before the HONORABLE JOHN L. KANE, JR., Judge, United States District Court for the District of Colorado, commencing at 1:35 p.m., on the 25th day of July, 2012, in Courtroom A802, United States Courthouse, Denver, Colorado.

Proceeding Recorded by Mechanical Stenography, Transcription Produced via Computer by Janet M. Coppock, 901 19th Street, Room A-257, Denver, Colorado, 80294, (303) 893-2835

APPEARANCES

Matthew Scott Bowman of Alliance Defending Freedom, 801 G. Street N.W., Suite 509, Washington, DC 20001;

Michael Jeffrey Norton of Alliance Defending Freedom, 7951 East Maplewood Avenue, Suite 100, Greenwood Village, CO 80111, appearing for Plaintiffs.

Michelle Renee Bennett, U.S. Department of Justice, 20 Massachusetts Avenue N.W., Washington, DC 20008, appearing for Defendants.

* * * * *

PROCEEDINGS

THE COURT: I normally don't have an entourage like this, but these are summer interns that are here and they want to learn as much as possible, and I can't think of a better place for them to be than here for that purpose.

This is Case No. 12-CV-1123, William Newland, et al., versus Kathleen Sebelius, et al. The matter comes on for hearing for preliminary injunction filed by the plaintiffs asking that the government be enjoined from enforcing regulations against the defendant, Hercules Industries, requiring the health insurance policy provided for its employees to have provisions in it with benefits for contraception and family planning and abortifacients.

So I am ready to proceed, but I am concerned to begin

with that I don't have any facts. There aren't any affidavits that have been filed and we necessarily have to proceed on a factual basis, so if you have testimony and that's what your intent is, then that's fine. I have read all the briefs and most of the cases, if not all of them, but certainly I have read the cases that are cited and a couple of law review articles as well, so I don't think that at this juncture an opening statement is necessary in order to get the testimony in, but -- yes, sir.

MR. BOWMAN: Matthew Bowman for the plaintiffs, Your Honor. If I may, our amended complaint is a verified complaint. The plaintiffs signed it and so it is an affidavit, factual affidavit, and I don't believe the government challenged that it is a factual basis, at least as in the nature of the document.

THE COURT: If we can proceed on that basis, it's all right, but I need to hear from the defendants on that.

What is your position?

MS. BENNETT: Your Honor, Michelle Bennett from the Department of Justice. Your Honor, we don't dispute the sincerity of the Newlands' religious beliefs.

THE COURT: I am sorry, I should have told you this in advance, but I am wired for sound and I need you to go to the lectern.

MS. BENNETT: Your Honor, we do not dispute the

sincerity of the Newlands' religious beliefs and we are prepared to proceed on the papers that have been submitted with the citations in the government's brief to the IOM report and the various studies.

THE COURT: So you agree that no evidentiary testimony is necessary?

MS. BENNETT: That's right, Your Honor.

THE COURT: Okay. That's fine.

In order to issue a preliminary injunction, I need and I want counsel to address the issues of what kind of injunction the plaintiffs are seeking. There are favored under 10th Circuit law and disfavored injunctions and I want you to be able to make those distinctions. This seems to be a prohibitory rather than a mandatory injunction, but there is another issue involving the enjoining of a federal regulation in the 10th Circuit law and I think there is some ambiguity to that issue.

In addition, I have to weigh the equities with respect to irreparable harm, the imminence of the harm and the question of whether the constitutional rights of the plaintiffs are harmed, a balance of harms regarding the harm to the government, as well as to the plaintiffs, and then the public interest. Those matters do not require in my view a great deal of discussion, but the likelihood of success on the merits is the one I want counsel to focus on, particularly with respect

to the RFRA claim.

The rule of prudence advises courts to avoid deciding constitutional issues when they can, and I think this case to my knowledge, and if you disagree, I want to hear from you about it, but I think it can be decided on the RFRA claim and not on the constitutional issues.

The question of likelihood of success on the merits again has some ambiguities in 10th Circuit law, but it's a question of whether there is a relaxed standard of success on the merits or a normal standard. The Supreme Court of the United States has indicated that a probability of success on the merits has to be established, but the 10th Circuit has decided cases since then that suggest that it's -- it's adhering to its previous doctrine of a relaxed standard in some instances.

The question that will have to be decided by me is are the issues so serious, substantial, difficult and doubtful as to make the issue ripe for litigation and deserving for more deliberative investigation and I need to know about the substantial burden on exercise of religion that is contained in the law regarding RFRA.

I want counsel to talk about the distinction between closely held corporations and public held corporations. I want to hear argument about whether the corporate form can or should be disregarded in an equitable proceeding. And I want to hear

questions regarding if there is any challenge to the sincerity of belief. There has been no objection so far, but I do want to have some comment on that from counsel.

And then if we -- I do want to hear argument, and I am not ruling that the prima facie case has been established thus requiring the government to come forward with its burden, but I do want to hear argument on that burden with regard to the generalized interest in public health and the specific interest that is germane to this particular case.

So with those thoughts in mind, I want you to proceed with the argument, but you can rest assured that I have read your briefs, studied them as much as I can.

MR. BOWMAN: Thank you, Your Honor, and may it please the Court. My name is Matthew Bowman and I represent the plaintiffs in this case, the Newland family and their family business, Hercules Industries. At counsel table with me is co-counsel, Michael Norton.

THE COURT: Mr. Norton, good afternoon.

MR. BOWMAN: As well as three of the plaintiffs, William Newland, Andrew Newland and Paul Newland.

THE COURT: Good afternoon, gentlemen.

MR. BOWMAN: For over 50 years and three generations the Newland family has put their work and their values into their business. They have served the community. They have made charitable donations and they frankly provide generous

compensation and healthcare services to their employees, including numerous benefits for pregnancy for women, for their wellness and to prevent their risk.

They have tried and this is all -- treating their employees with dignity is part of their commitment to their Catholic faith and part of that is also not providing items to which they have religious convictions against participating in. The government's mandate in this case forces them to either violate those beliefs or suffer severe fines in lawsuits.

So we are here asking for a preliminary injunction and I am prepared to address the questions that Your Honor has asked that we do address and I will do that. A preliminary injunction would seek to ask the government to comply with what Congress has stated it must comply with, which is the Religious Freedom Restoration Act, the strict scrutiny that applies whenever they are going to impose a substantial burden on sincerely held beliefs.

This is the same kind of relief we are asking for. It's the same kind of relief that the government itself contends it's already given to thousands of other corporations that are non-profit in a guidance issued earlier this year called a safe harbor, which they are letting them have an extra year where the government contends this mandate is not going to apply to them at all even though those entities are not exempt.

And in addition, the government on Page 17 of our

brief, the government itself claims that most large employers, most large employers do not have to comply with this mandate. That's what the government says on its website, healthcare.gov. When it describes the situation of who has to comply, most large employers are grandfathered plans. They don't have to comply with the mandate. We contend that the government can't show a compelling interest to force us to comply with it in this case.

Now, we have brought four claims, but as Your Honor noted, and we agree, we believe this case can be resolved under the Religious Freedom Restoration Act. And in specific note under the Supreme Court case in the *O Centro Espirita* decision, *Gonzales v. O Centro Espirita*, in that case people wanted to be able to use a Schedule I controlled substance. This was a substance that the court acknowledged that Congress had found had a high potential for abuse, was not safe under any circumstances, and yet because the court indicated that the government had an exemption not for that substance, not for dimethyltryptamine, which they wanted to use in that case, but for another Schedule I substance, because they had an exemption that allowed hundreds of thousands of Native Americans to use peyote, the Court said they had to allow an exemption for the hundreds in this particular RFRA case where they were seeking a preliminary injunction.

Now, in this situation what the government has done is

in relation to its interests of women's health and equality, which they claim that the mandate serves, they are not applying the mandate to tens of millions of women indefinitely who are in plans that the government has voluntarily said under this law you don't have to comply with this mandate and they are in these plans the government has identified as grandfathered.

Notably, the government does require grandfathered plans for these tens of millions of women to do a variety of things. They can't exclude people because of preexisting conditions. They have to include dependents up to age 26. They can't impose lifetime spending limits. These are all interests that Congress decided were important enough to impose on grandfathered plans.

Congress decided the mandate in this case was not important enough to impose on grandfathered plans covering tens of millions of women. As a result, they can't claim that they have an interest of the highest order that the Supreme Court requires of the gravest and most paramount nature to enforce it against us in this case when we have stated sincerely held religious beliefs which they concede and we contend we have a substantial burden of those beliefs, which I will address.

Now, I could talk about the merits of the Religious Freedom Restoration Act. I am going to talk about all the things Your Honor asked. I could do it in that order, if you would like.

THE COURT: No, no. I don't want to -- I am sure that you have prepared. I just wanted to make sure that those points are covered. And then there is one other that at some point I need a little further clarification on and that's that you want this injunction to start before August and that's why we have expedited this hearing. And you have stated in your moving papers that it's necessary to do this in order to have the health plan in effect by November. I am a little bit unclear on two things. There is mention in your moving papers about the open season provision.

MR. BOWMAN: Enrollment.

THE COURT: Enrollment, yeah. We have something similar to that in the Federal Government and that may be why I am confused because what that means to those of us who are paid by the government is there is a season, usually I think it's in December and part of November, where you can change plans. And I don't know how that works with regard to your company.

The other is that if it takes this much time, again I am at a loss unless it's explained in greater detail, is this employer owned health plan funded by the employer, but is there some kind of reserve insurance or something that has to be done in order to make it effective. My familiarity with these plans is limited.

I do know in other areas there is a kind of insurance that provides for catastrophic relief to make sure that a

smaller fund isn't wiped out. You find that all the time with defamation insurance by newspapers and radio stations. A very, very large deductible is what it amounts to. I don't know exactly how that works with you and I need to know that.

MR. BOWMAN: Okay. I will address that.

I would like to turn first to the question of the nature, the corporate nature of the plaintiffs in this case, whether they are closely held and the corporate form which Your Honor asked about. Knowing that the Supreme Court imposes the most demanding test known to constitutional law in this case under RFRA, the government has essentially argued that they don't want to get to that level of strict scrutiny, I would contend because they can't succeed under it, so they are trying to prevent that and to subvert it by saying, well, you are not exercising religious beliefs in the first place because you are a business corporation.

Now, the irony of this argument, Your Honor, if I may, is that in our society our business culture is often cited for having too much greed. The essence of the government's opinion in this case is that the only thing the Newlands can care about is money and because they are for-profit, they can't be for anything else. In fact, that's not free exercise of law, that's not Colorado law and it is bad public policy. There is no business exception to the First Amendment free exercise or for the Religious Freedom Restoration Act. Congress said "any"

free exercise of religion is covered.

Now, I would like to distinguish the government's argument, as I understand in this case, in two parts. First it seems like they are making an argument that because of the corporate form of Hercules through which the Newland family operates, they can't be exercising religion. This I believe is contradicted by the government's own position because the government has recognized the free exercise of religion that needs to be accommodated in this very mandate for thousands of corporations that are not for profit either because they are churches and they are going to be exempt entirely or because they are not churches and they are not exempt, but they are going to be "accommodated," and that process is being worked out in the federal rules.

But the corporate form itself is not something that the government in total seems to believe cannot be the source of free exercise of religion. Quite to the contrary, the Affordable Care Act itself under which this regulation was enacted explicitly states that facilities and institutions can have moral and religious objections, for example, to abortion. And we cite this on Page 14 of our reply brief.

The Supreme Court in the *Citizens United* case has said that corporations have First Amendment rights. The *O Centro Espirita* case, *O Centro Espirita* is not a person. It's a church. The *Church of the Lukumi Babalu Aye, Inc.* case,

another corporation. So it's not the corporate form that the government can say you can't exercise religion under. It seems to me, then, that the government is arguing that because of your profit motive, you can't be exercising religion.

The government cites zero cases in which a court held that because people through a corporation have a profit motive, they can't also be exercising religion. We cited at least nine cases in which courts have found the opposite. Most notably, the Minnesota Supreme Court in the *McClure* case called it conclusory and unsupported to argue that because this business corporation was asserting free exercise claims, that it had no constitutional right to free exercise of religion, conclusory and unsupported.

And then we cite these other cases in our brief, the *Stormans* and the *Townley* cases from the Ninth Circuit, where again this exact argument was made, that Stormans, Inc. or the Townley Engineering & Manufacturing Company could not categorically exert free exercise of religion. The Ninth Circuit said that's not even a relevant argument because these are closely held family corporations and at a minimum the corporation can assert the family's free exercise and the family exercises its beliefs in the business. And that's what's happening and the Ninth Circuit went ahead and those clients didn't win the case. The point, though, is that they were able to exercise -- to say we are exercising religion.

The government is burdening us.

Now let's move on to the scrutiny standard. In those cases they used scrutiny under *Employment Division v. Smith* which was reduced in 1990 for the First Amendment. Here Congress has specified the scrutiny. It's the most demanding test of constitutional law. It is strict scrutiny. The government can't avoid getting around that just because of our profit motive.

THE COURT: You mentioned the California cases and I did read those. I am interested in hearing your views about what effect the fact that Hercules is a Subchapter S corporation has on your argument.

MR. BOWMAN: I think that actually to the extent it's necessary, that actually strengthens our argument because Subchapter S is a designation for tax purposes. The profits are taxed as they are received by the owners rather than taxed in the corporation and then taxed again when the shareholders get it. So it sort of further illustrates, as if we needed additional things, that this is really the family. This is a family operating under the corporate form. And as we said in our brief, the corporate form here doesn't immunize the Newlands from this mandate. The corporate form is the mechanism under which the mandate applies to them.

Moreover, the four Newland family members who own Hercules Industries are having their property mandated, so the

mandate as applied to them, to the Newland family through the corporation is for -- there is nobody else who is going to set up the plan and engage in these practices that they believe is immoral. It's them. They are Hercules Industries. They are management. They are the board. They decide from the board whether or not to comply with the mandate. They are the shareholders. They are entirely responsible.

So there is no moral separation in a closely held family corporation between a mandate on the business and a mandate on the family owners. The Ninth Circuit essentially decided that in *Stormans* and the other cases we cite. There is no legal distinction. Sure, there are legal distinctions for other purposes, for limited liability and the corporate form. That doesn't mean that you don't exercise religion. No court has ever held that because the corporate form inserts limited liability, they can't exercise religion. The government cites no cases holding that. We cite many that hold the opposite.

The government's own position is it's not true for not-for-profit corporations and there is no distinction in the nature of the corporate form to be made on that level.

And again, multiple Supreme Court cases dealing with the free exercise of religion are in the context of making money. The plaintiffs in the *Sherbert v. Verner* and *Thomas v. Review Board*, they were making -- they petitioned the Court not only that they be able to exercise their religion in their

employment, but that the government would give them money for unemployment benefits. And that wasn't any obstacle for the plaintiffs to be able to say we are exercising religion, but no one turned around and said you are making money, so you can't be exercising religion. It's simply an unsupportable position as the Minnesota Supreme Court concluded.

That's my recitation on the closely held issue, and I will be glad to answer further questions you have on that.

As far as in an equitable proceeding, again whether the corporate form can be addressed and how it should be addressed in an injunction, I think again that equity is in the plaintiffs' favor because equity recognizes that here we have a family business that they have built and operated for 50 years. Equity says it's not going to make a legal distinction that, well, this mandate doesn't really apply to them. It does really apply to them, but equity recognizes that, so there is not even a legal distinction.

I don't think you need to postulate, although since we are on equity, we can give the Newland family relief, but maybe we wouldn't be able to otherwise. So if that was the nature of Your Honor's question, the Ninth Circuit certainly concluded they didn't need to go there.

THE COURT: Well, sometimes I go where the Ninth Circuit doesn't.

MR. BOWMAN: Fair enough, as do I.

In relation to the compelling interest standard, I think it's important again that the government bears the burden. The Congress specified in the Religious Freedom Restoration Act, which I think is the focus of this Court's decision, that the government bears the burden to show a compelling interest and at least that they are pursuing it through the least restrictive means.

The Court also specifies in many strict scrutiny cases including in free exercise that the defendants cannot propose an interest in the abstract. I think Your Honor asked about this point as far as the general health interest versus the abstract health interest and this is how I perceived the question. But in the *California Democratic Party* case the Supreme Court was very clear you can't propose such an interest, a compelling interest in the abstract. You must show it in the circumstances of this case.

Again, in *O Centro* the Court said it has to be compelling. It has to be through the application of the challenged law to the person, the particular claimant. So the government can't just say, well, we have an interest in advancing our citizens' health. That is an important interest for the government to pursue. That's not the question under strict scrutiny standard under the Religious Freedom Restoration Act.

The question is do you have an interest in coercing us

to provide this particular item when you are exempting these tens of millions of women from this same alleged interest, when you are admitting that a majority of employers of the same size are not having to comply with this mandate under the grandfather exemption, when you have a host of other exemptions you have carved out, one for churches and we have the accommodations for the nonprofits who are not churches, and we are going to allow individuals not to receive this in their plan because they might be Amish or because they have a shared responsibility. You have a whole host of exceptions, but most notably the grandfather exemption. So they have to be able to justify the coercion of us here, not just, well, we have an interest in health.

And as a flip side of that is that the Court doesn't have to decide that the government doesn't have an interest in health. The Court doesn't even have to decide that the government doesn't have -- that contraception is not helpful for women. That's not a question before the Court. The question is does the government have a compelling interest to coerce us to provide it in this instance when, for example, the Secretary of Health & Human Services has admitted that contraception is already widely available when again they are taking tens of millions of women voluntarily through the Affordable Care Act and saying we are not going to apply the mandate to you, but for these 250 employees we have an interest

of the highest order. So that's why the interest does need to be formulated in the specific in order to satisfy the Religious Freedom Restoration Act.

I would like to talk about the government's argument that this massive grandfathering exemption is going to go away. They essentially say, well, ignore those tens of millions of women we are not giving health and equality to. That's temporary. Even if that were true, why not wait until they have all gone away before coercing the Newlands? But putting that aside, it's simply not consistent with the Affordable Care Act itself, with the defendants' own regulations or with their stated descriptions to say, well, this is just a phase-in.

The Affordable Care Act calls a plan's grandfathering status a right, so grandfathering is when if you don't change your plan beyond certain limits, you don't have to comply with most of the Affordable Care Act. The Affordable Care Act called it a right at 42 U.S.C. 18011, and the regulations of the defendants repeat this many, many times in 75 Fed. Reg. 34,538. We cite this in our reply brief. They call it a right to be able to maintain the status.

There is no sunset provision in the Affordable Care Act when all these plans are not going to be grandfathered anymore. It's not there. The government on its website says, well, most large employers will remain outside of among other things this mandate because they are grandfathered. And the

government isn't letting grandfathered plans off the hook completely. They have identified things that they think are important enough to force even grandfathered plans to cover.

You can't exclude people because of preexisting conditions. You have to cover dependents up to age 26. They have a list of things -- the government went through all the things they are going to make healthcare plans do through the Affordable Care Act. They picked the really important ones and said even grandfathered plans have to comply with these. The mandate in this case was not important enough for Congress and the government to decide, well, we have to apply it to you. It was an interest of a lower order.

I think it's also important for the specificity of the interest that the government is insisting it has and I say that they need to satisfy. The fact that in the last Supreme Court term in the *Brown v. Entertainment Merchants Association*, the Supreme Court set forth some pretty strict rules about how to meet strict scrutiny, evidentiary questions. The government has this burden to satisfy if they are going to pass strict scrutiny.

The Court in *Brown* said you can't have evidence that's just correlation of harm. You have to show an actual problem in need of solving. You have to show that this mandate is necessary to solve the problem and you have to have evidence to show that the thing you are trying to prevent through your

mandate is being -- has a causal scientific connection.

In the *Brown* case, the State of California decided, and very sadly this is somewhat topical, Your Honor, the Supreme Court -- or the State of California decided that violent video games cause young people to react more violently. And they used scientific studies arguing that this is true, that exposure to violent media has an effect on acting out violence.

What the Supreme Court said in *Brown v. Entertainment Merchants Association* was the State of California cannot impose that ban which restricts speech, another First Amendment right, cannot impose that ban because the scientific evidence was only a correlation between the media and the result. It wasn't causal.

Now, in the government's evidence as far as the scientific evidence for the specificity of their harm here, the government has evidence through this Institution of Medicine report, they cite about 11 pages of this report, and the evidence there essentially says, well, what harms will fall upon women if they don't use contraception. It lists alcohol and drug problems and it lists some other things. And we recite this in our reply brief.

The scientific studies themselves, the Institute of Medicine, if you go back and read the 1995 report they are referring to, it admits they have these methodological flaws.

We are not really sure if the unintendedness of the pregnancy causes the alcoholism or if this is just somebody already predisposed to it. They admit the methodological flaws. Well, that's fine as a matter of general public policy.

The government is within its right to encourage contraception. The government funds contraception. But for the government to say we are going to force citizens, the Newland family, to provide it, they have to show a compelling interest to do that and they haven't shown that these harms would fall on women. What the court said in *Brown* was the risk of uncertainty falls on the government under the strict scrutiny standard.

I will just repeat again *O Centro Espirita* said this is the same standard applicable in free speech cases. There is only one strict scrutiny standard that's the most direct test of constitutional law. They simply haven't satisfied the evidentiary standard here. Not only have they not shown why these harms befall women, but in part that's because the Secretary admits women already have access to contraception. All the women who work for Hercules Industries, they have jobs and health plans.

The evidence from the government indicates that actually most of the need for -- most of these alleged harms for contraception are involved in high-risk populations. But the government hasn't shown that it can't -- it hasn't shown

any evidence that it can't achieve these alleged interests through another means.

And I think that gets to the second part of the Religious Freedom Restoration Act claim which I think is central to the Court's question, the least restrictive means test. Under that test the government has to show that there is not another way that it could be accomplishing this goal that it has identified that would be less restrictive of the religious rights of the claimants here.

Now, the government already funds contraception for women massively, Title X of the United States Code, Title XIX, Title XX. There are massive government direct provision of contraception to women. This is not -- it's not an odd thing for this, the Federal Government, to give women contraception. And so they could provide contraception to women who are exempt under RFRA, and the point here is they have no evidence to indicate that if they did that, there would be any health harm at all because contraception, whatever its effectiveness, has the same effectiveness no matter who it comes from. If it comes from the government, if it comes from the Newland family, it's the same product.

And the government's evidence here never makes the logical leap between we have an interest in promoting women's health to the leap that we have to coerce the Newlands to do it. In fact, Your Honor, the government has admitted in its

regulatory process in this case that it is quite willing to have other people deliver contraception to nonexempt entities. The government is engaging in the advanced notice of proposed rule making process for nonprofit entities, corporations that are not churches, so they are not exempt. They have to comply with the mandate, but they don't want to.

The government is engaging in a process that they started in March, the ANPRM, under which they will say, well, the women who work at these entities and the beneficiaries of those plans will still get their contraception from the insurance company or from some other source. They are not sure what source. They said it will be from some other source. And the point is that the government admits, well, this entirely satisfies our interests. As long as the women at nonexempt entities get their contraception from some other source, our interests are served.

And the entire regulatory process is going on for nonprofit entities about which other source will be used and how it will be arranged. And that's all uncertain, but the premise of the question is the government has conceded that their interests are fully served if somebody else provides the contraceptive coverage. Well, that is the least restrictive means component of the Religious Freedom Restoration Act.

And the government tried to argue that the *Wilgus* case suggests that they don't have to consider alternative

mechanisms. They just have to consider -- they can take the option that they have enacted through the regulation and they just have to consider whether it would work better or worse than the exempted people. That's not what *Wilgus* actually says. *Wilgus* requires, quote, that the government, to pass scrutiny, they have "to support its choice of regulation, and it must refute the alternative schemes offered by the challenger." That's *Wilgus* at 1289.

So the least restrictive means test under RFRA is just what it sounds like it is. Is there another way to do this that wouldn't force the Newland family to violate their religious beliefs. The government concedes there is plenty of ways to do this for nonprofit corporations, and as we discussed earlier, there is no legal distinction that can be made to say that the Newland family can't exercise religion under RFRA either.

The Court asked about substantial burden, which will be what I will move to next. The government argues that there is not a substantial burden in this case, and I believe it's because they are misinterpreting what a substantial burden is. The Supreme Court says in the *Thomas v. Review Board* case that a substantial burden is prototypically when, quote, you have got the compelling a violation of conscience. So the government comes in and says you have to do this, but that violates my conscience. You have to do it anyway. That's sort

of your quintessential substantial burden.

Then the Court in *Thomas* and *Sherbert* said we don't have that here because no one was forcing the plaintiff in *Sherbert* to work on Saturdays on the Sabbath and no one was forcing Mr. Thomas to manufacture tank turrets. Instead, because they didn't want to do that, they didn't get unemployment benefits. And the Supreme Court said in those cases that counts as a substantial burden. They admitted it. It counts anyway.

What we have in this instance is the prototypical kind of substantial burden because substantiality of a burden measures how heavy is the thing the government is putting on you. What kind of thing is the government doing to you. And in here it's doing the prototypical kind of burden. You must provide this service that the provision of which violates your religious freedom. The substantiality measures the weight of the burden.

So when the government says, well, it's not substantial, what I think they are really doing is trying to veer into the weighing of the theological centrality or importance of it or the fact that, well, this is the Newland family, but their corporation isn't them exactly. And none of that works at all. Under the 10th Circuit's standard, which simply follows the Supreme Court in the *Abdulhaseeb* case, says you have got a substantial burden if you either require

participation in something that violates beliefs or you exert substantial pressure.

Here we have requiring them to do what violates their beliefs and you have -- even if you kind of distinguish between Hercules and the Newland family, you have the substantial pressure. The family are the only people who implement Hercules' obedience of the law and Hercules' business practices. That's substantial pressure far beyond what the Supreme Court has found.

In the *Yoder* case the person was only fined $5 for not sending his child to public school. That was a substantial burden. So the substantial burden, understanding substantiality for what it is, it seems to me is not a difficult question in this case.

The government also cites the *Braunfeld* case. This was a Sunday closure law case. And there is an explanation in *Braunfeld*, well, it's not -- if the government doesn't make unlawful what you want to do, then it's not substantial. Well, here the government is making it unlawful for what the Newlands want to do, so it seems to me that the Newlands have a prototypical substantial burden. In addition, they have these other pressures as well because they own the business, because they run the business, because they decide things for the business. This is a family business.

I would like to address some of the preliminary

injunction questions that Your Honor has asked. The most recent one you asked, I think you were talking about the timing and the fact that this mandate will apply to the Newland family starting on November 1st. It seems to me the government's brief concedes it will apply to them starting November 1st and they are saying somehow that's too far away for a preliminary injunction.

I found that argument somewhat puzzling. If you look in Wright and Miller Federal Practice and Procedure, it states just matter of factly that anytime you need relief prior to trial, a preliminary injunction is the appropriate method. The Third Circuit adopted that standard in the *BP Chemicals* case. 11A, Wright and Miller Federal Practice and Procedure 2948.1, irreparable injury before trial is an adequate question as far as the imminence of the injury, so the *BP Chemicals* case in the Third Circuit, 229 F.3d 254.

November is not very far away, as much as all of us would wish this summer would go on longer.

THE COURT: Not in this heat.

MR. BOWMAN: Fair enough. Nor in Washington DC's heat, but this plan doesn't happen on October 31st. You can't set up a health plan for hundreds of employees on October 31st and start November 1st. The open enrollment period that the employees enter, it's not a choice between plans. It's a choice of whether to be in the plan or not or whether to have

dependents in the plan or not, that sort of thing, so there is a choice going on and they can't really decide do I want to be in the plan if I don't know what the plan is going to cover. Is it going to cover this for me or not? That's a decision that they can't make if they don't know what it covers. That starts on October 1st.

But you can't offer them a plan if you don't have the administrative details set up, and that's what we recited in our amended complaint in which Your Honor referred to. This is a self-insured plan, so the Newland family is not just the employer. They are the insurer. And self-insured plans typically will have stop-loss insurance. It's not insurance for the employee. It's insurance for themselves. If an employee gets a catastrophic injury that exceeds $100,000 or some, you know, some level, then the stop-loss insurance will kick in to protect the Newlands from that sort of injury.

And this is standard industry practice, the stop-loss insurance for a self-insured plan, and you have to submit bids to the stop-loss companies. And then you have to get their bids and you have to review them, and you have to contract with them and set the contract up. And you have to agree to it. All that begins happening in August. And the stop-loss companies won't take the bid unless they know what the plan covers because they don't know what their liability is going to be.

So you have to have your plans set and that's why we ask for relief by August. And we do greatly appreciate Your Honor having the briefing and oral argument come in in July. So that's the nature of the timing and the stop-loss character of the insurance here.

Your Honor asked about likelihood of success, whether it's a relaxed standard or a normal standard. I think it's a normal standard. I am interested in your specificity of your question. We think this is a pretty straightforward preliminary injunction standard case, that it doesn't -- the 10th Circuit has sort of exceptions where you will go off into little -- a different kind of standards based upon what's happening. We think none of that really applies here. The government didn't argue in their brief that it applied, so there is not really briefing on this question.

We set forth -- I think we both set forth the same standard, likelihood of success, balance of hardships, et cetera, et cetera, irreparable harm. I think both sides at least have briefed this case as a straightforward question. I know that the 10th Circuit says, well, if you are going to force the government to do something instead of stopping them from doing something, then that might be a distinction.

I think here this is a stopping measure because right now today, July 25th, they are not forcing the Newland family to do anything. In fact, they are not forcing anybody to do

anything under this mandate until next week, August 1st. So, in fact, for 200 years the United States has existed without this mandate being in place, so we are trying to maintain the status quo.

This is not a case, an exception to the preliminary injunction standard where we are asking for the status quo to be changed. The status quo as of today, as of all of American history until next week and as for the Newlands until November 1st is we don't have to cover this stuff in our plan. It violates our religious beliefs. That's all we are asking be maintained and that's exactly what the government contends it's granting voluntarily without a court order to nonprofit corporations by the thousands through its -- the guidance that they issued.

They issued a guidance where there was an uproar about nonprofit corporations having to cover this. They issued a guidance and they said we are going to create a temporary safe harbor. Even though this normally should apply to you starting your first plan after August 2012, we are not going to apply it to you until your first plan after August 2013. They have essentially granted hundreds of preliminary injunctions without the court being involved. How they can in this case refuse to do so I just don't understand, Your Honor. That's what they are doing.

And then they have said through their grandfather

exception that most larger employers are going to not have to comply with this mandate indefinitely. So I think we are kind of at a straightforward preliminary injunction standard here. That's the position we have taken in this case.

As far as the irreparable harm, I think that the government in its brief acknowledged that the 10th Circuit standard was a common standard, the *Kikumura* case, that if you have shown a violation of fundamental rights like free exercise, free speech, et cetera, you have essentially shown irreparable harm. We contend that it's just the nature of the violation of their beliefs. They have got harm and they are going to have this moral harm if they have to participate in this plan, so we don't think there is much of an irreparable harm question here.

The balance of public interests relates to a lot of the themes that show the government doesn't satisfy the strict scrutiny standard here. The government is omitting tens of millions of women from this mandate voluntarily from the get-go. For them to say, oh, we have a public interest in -- the public would be horribly harmed if these couple hundred employees at Hercules Industries don't get this mandate -- and they are looking the other way. They are not giving this equality in health to women at the level of tens of millions.

To say that's a public harm and then the government says, oh, we are going to grant this one-year safe harbor, what

I am calling quintessential illustration, why doesn't that violate the public harm? They have essentially conceded that the public interest is not -- does not weigh in their favor here based on the way they are treating massive numbers of other people in similar circumstances.

I am prepared to talk about the constitutional things, but as Your Honor noted, I think this case can be resolved on RFRA. Obviously, if the Court found that we didn't show likelihood of success on the merits of the RFRA claim, then we would need to address the other three claims that we have asserted.

Just a moment, Your Honor.

In terms of the -- you did mention something about the sincerity of the beliefs, Your Honor. I think the government conceded that our beliefs are sincere. They are. This is a Catholic family. They are basing their beliefs on Catholic tradition. This is not the stereotypical prisoner that says he needs to eat steak for dinner every night as his religion. This is a well-founded belief system, that they are participating in a religious tradition so I don't think there is really a question of sincerity.

THE COURT: I think that's covered in the brief, actually, and it's very thin ice to skate upon to make that kind of examination. I think we accept it as sincere. It arises on a few occasions with a sham, but that is not present

here.

MR. BOWMAN: I agree, Your Honor. I think the courts have said it's really not the court's business to probe into that too far, so that's our position on that question.

I am happy to -- unless you have any questions right now, I am happy to rest.

THE COURT: The only issue really with respect to the way in which you have concluded your remarks about not having to go into the constitutional issues because it can be decided on RFRA, but you said if I ruled in your favor on that, so I am a little bit concerned about that because I will reach a decision in this case and I will do it, but not at the close of argument. I am going to issue a decision here either late tomorrow afternoon or on Friday morning, so naturally I have done quite a bit of work ahead of time.

And as I see it, the essential distinction between a constitutional argument and a RFRA argument is that RFRA overruled Justice -- by legislation Justice Scalia's decision, but we run into that constitutional conundrum about whether the legislative branch can overrule the Supreme Court and so the older standard would apply. I don't think there is that much more to go into on it, do you?

MR. BOWMAN: Not much, Your Honor. Partially it would depend on how the RFRA claim is resolved. So I think strict scrutiny is strict scrutiny is strict scrutiny. So you get

free speech. I don't think the government can pass strict scrutiny here, so if the question is they don't pass strict scrutiny, I think the free speech and free exercise claims end up in the same place. I think the establishment clause claim has a little bit of a different flavor in it in terms of the government saying there are a lot of people who object to providing contraception. We think some are religious enough and others aren't. I think that the 10th Circuit frowned upon choosing among religions and I think -- again, I am not asking Your Honor to rule before you rule.

I am just saying that the claim under RFRA, there they did bring three other claims. I think as you said and mentioned in the briefs, the Supreme Court decided in *City of Boerne v. Flores* that while Congress can't impose RFRA on the states, it can on the Federal Government. And, of course, the entire premise of the *O Centro Espirita* case is that's exactly what they did, so I don't think there is any question here that the RFRA standard applies to what the Federal Government is doing.

THE COURT: At the risk of being more irreverent than I usually am, I think that about the only Supreme Court Justice that wants to choose among religions is Chief Justice Burger in *Wisconsin v. Yoder*.

MR. BOWMAN: Where the Amish have special exceptions.

THE COURT: Yeah, but not for anybody else, but that's

the only case I can think of where we choose like that.

MR. BOWMAN: Well, no comment on his opinion, Your Honor.

THE COURT: Well, he is dead, so he can't do anything about it anyway.

MR. BOWMAN: Unless Your Honor has any more questions, I am happy to have the government address this --

THE COURT: Sure. Thank you very much.

MR. BOWMAN: -- and come up in rebuttal. Thank you.

MS. BENNETT: Good afternoon, Your Honor.

THE COURT: Good afternoon, Ms. Bennett.

MS. BENNETT: May it please the Court.

When individuals establish a for-profit secular corporation, that entity becomes subject to a host of laws and regulations governing businesses from Title VII to OSHA regulations to tax laws to laws like the one at issue here that govern the healthcare coverage a corporation provides to its employees. The government is not aware of any case in which a secular for-profit corporation like Hercules Industries obtained an exemption from these types of general corporate laws under RFRA or the First Amendment and for good reason.

Allowing such exceptions would limit the protections employees of such corporations receive to only those that are consistent with the owners' personal religious beliefs. Because plaintiffs have not shown they are likely to succeed on

the RFRA First Amendment claims and they cannot satisfy the remaining preliminary injunction criteria, this Court should deny plaintiffs' request for a preliminary injunction.

Your Honor, as you requested, I will start with the likelihood of success on the merits prong, and we agree with the plaintiffs that it's just the traditional likelihood of success standard. First, with respect to substantial burden, Hercules Industries is not a religious organization and thus it cannot exercise religion. Hercules Industries is a for-profit corporation. Its products and pursuits are not religious. It manufactures HVAC equipment to make money. Its articles of incorporation even after their most recent amendment in light of this case still mention only commercial purposes. Hercules is not affiliated with any formerly religious entity and Hercules does not employ persons of a particular faith.

Your Honor, the idea that the government is expounding that a secular corporation cannot exercise religion is not new. It comes up in the context of Title VII which, as Your Honor knows, prohibits discrimination in employment. Title VII creates an exemption for religious organizations. Here essentially what we are arguing is that Hercules is not a religious organization. It's a secular organization and therefore it cannot exercise a religion.

In a case that plaintiffs cite, *Townley*, the Ninth Circuit considered under Title VII whether a corporation

similar to Hercules was secular or religious. In that case the corporation was for profit and it produced mining products. It also conducted mandatory weekly devotional services for employees and enclosed Gospel tracts in outgoing mail, printed Bible versus on commercial documents and financially supported churches and various charities. In that case the Ninth Circuit had "no difficulty" concluding that the company was secular.

Your Honor, the reason this makes sense is a religious organization can, as I said, under Title VII discriminate in its hiring decisions, whereas a secular corporation cannot. So in this context because Hercules Industries is a secular corporation, its employees don't necessarily ascribe to the beliefs of the corporation's owners. So allowing Hercules to claim that it exercises religion would limit its employees to only those protections that the owners' beliefs adhere to.

And Your Honor, plaintiffs cite several cases, none of which expressly addressed this issue. In fact, most of them expressly declined to address it. *McClure*, *Stormans*, *Townley* all expressly declined to discuss whether a for-profit secular corporation could exercise religion.

THE COURT: Do you see any distinction between a close held corporation and a publicly held corporation?

MS. BENNETT: Your Honor, I think the distinction is between a secular corporation and a religious corporation.

THE COURT: That's not my question. My question is do

you see a distinction between a publicly held corporation and a close held corporation specifically as it regards the government's obligation to use a least restrictive means to enforce something?

MS. BENNETT: We don't, Your Honor. We think that when individuals enter into the corporate form and form a secular corporation, they separate themselves from the entity that they create.

THE COURT: Why does the government have Subchapter S if it's not a policy in order to facilitate the formation of a corporation by entrepreneurs?

MS. BENNETT: Your Honor, I don't think my position is that the government doesn't want entrepreneurs to form corporations. Our position is that when they do so, they by creating a separate legal entity, they separate themselves from the corporation.

THE COURT: But it's a pass-through, isn't it, for tax purposes?

MS. BENNETT: It is for tax purposes, Your Honor, that's true, but I don't think for -- it's certainly not for -- under Title VII for purposes of discriminating in the context of who they can hire.

Your Honor, so with respect to Hercules, since it's not a religious organization, it cannot exercise religion. With respect to the Newlands, the regulations don't apply to

the Newlands. The regulations impose obligations on two legally separate entities, the Hercules Industries group health plan, which is a separate legal entity from Hercules Industries, which is a separate legal entity from the Newlands. As I indicated, the Newlands can't ignore that separation to avoid a general commercial law designed to improve the health and well-being of its employees.

The plaintiffs cite *McClure v. Sports and Health Club*. I think there is actually some language in there that's very relevant to this case. The Court there said that "Sports and Health, however, is not a religious corporation-it is a Minnesota business corporation engaged in business for profit. By engaging in this secular endeavor, appellants," who in that case were the owners of the corporation, "have passed over the line that affords them absolute freedom to exercise religious beliefs."

"When appellants entered into the economic arena and began trafficking in the market place, they have subjected themselves to the standards the legislature has prescribed not only for the benefit of prospective and existing employees, but also for the benefit of the citizens of the state as a whole in an effort to eliminate pernicious discrimination."

Your Honor, in that case the Court recognized this distinction that we are trying to draw here between entering a -- creating a secular corporation versus a religious

organization.

Your Honor, contrary to plaintiff's position, *Stormans* and *Townley* did not address this issue. *Stormans* addressed whether a corporation had standing to assert the rights of its employees, but it didn't address whether those employees have their religious freedom rights violated when the government imposes a burden on their organization. And, in fact, in that case the court did not even address substantial burden.

Townley is the same. The court found that requiring the owners of this corporation to accommodate their employees' religious beliefs, in that case by allowing the employee not to attend this mandatory devotional session, was not a substantial burden.

Your Honor, so for these reasons we think that the plaintiffs are not likely to succeed on the merits because they have not shown that the regulations imposed a substantial burden on either Hercules Industries or the Newlands.

Your Honor, moving to the compelling interest and least restrictive means analysis, the government has set forth in its brief two compelling interests. Both of those are clearly and firmly established in the case law. The first is improving the health of women and children. The second is equalizing the provision of preventative services for men and women.

With respect to the first, plaintiffs argue that

correlation is not sufficient, that there must be causation. And I think they overstate *Brown*, but certainly, Your Honor, I am sure you have looked at it already, but if you go back and look at the IOM report and the studies the government cites, they show that cost sharing requirements result in women not obtaining preventative services, including contraceptive services. And unplanned pregnancies that result from lack of access to contraception results in poor health outcomes for women and for their children.

One point I just wanted to point out with respect to something in plaintiffs' reply, at Footnote 19 they cite a study that says, the claim says that lack of access to contraception is not a reason women don't use contraception. If Your Honor takes a look at that study, you will actually find that the survey that they took gave women with six choices for why they didn't use contraception and allowed them to choose one of the six, and none of them was the cost or financial burden, so that study doesn't actually support the position that plaintiffs take. We think that the IOM report which was put together by a group of medical experts and supported by scientific research serves just the opposite.

Your Honor, with respect to the specificity of the government's need to show a compelling interest in this case, the government doesn't have to show a compelling interest with respect to just Hercules Industries. The government has to

show a compelling interest with respect to similarly situated organizations, in other words, secular corporations whose owners might have a religious objection to this particular coverage.

And so the fact that the Newlands provide a generous health benefits plan to their employees or pay them a generous salary is not relevant to the government's compelling interest. It's also not relevant for the reason we mentioned in our brief, but that's not really the problem that the preventative services coverage regulations were meant to address. It's the lack of access to contraception which leads to unintended pregnancies that results in women entering into prenatal care later.

Your Honor, the plaintiffs make much of the grandfathering. They call it an exemption. It's not really an exemption. It's a phase-in, and I would like to discuss that a bit. As we have indicated in our briefs, the grandfathering exception was Congress' attempt to build on the existing employer-based system.

In this country most people receive their healthcare through their employer. Congress didn't want to set aside that system and start a new one, so they created a grandfathering provision to allow employers that were already providing coverage to phase into these requirements over time. Congress under the compelling interest standard can pursue competing

compelling interests, which is what it was doing in this case.

There is no case law that says that if Congress phases in one requirement and imposes another one immediately, that that is any sort of indication that the phased-in requirement is not a compelling interest. As I said, the government can pursue these competing compelling interests.

And just to be clear, Your Honor, plaintiffs here are not asking for a phase-in. In fact, they are actually eligible for grandfathering to the extent that everyone else is. What they are asking for is a permanent exemption for them to not have to provide preventative services to their employees. So it wouldn't be just that their employees would be without access to health coverage for contraception for a year or less. It would be permanent.

With respect to the only other exemption that plaintiffs mention, the religious employer exemption, while that applies mostly to churches, and the government certainly has a compelling interest in accommodating religion, and the religious employer exemption was an attempt to accommodate that interest. As I mentioned before in the Title VII context, churches can discriminate in their hiring decisions based on religion, and so it makes more sense when the government is attempting to balance those competing interests that allows those employers, churches, to exclude this type of coverage.

The same principles apply with respect to the safe

harbor which applies to nonprofit entities that have not provided contraception in the past. The government has a compelling interest in accommodating the religious beliefs of those organizations. And the distinction here, as I mentioned before, is that Hercules is not a religious organization and thus it cannot exercise religion, so the government doesn't have the same interest in accommodating those religious beliefs.

With respect to the least restrictive means analysis, Your Honor, I just want to make clear the government is not arguing that the Court only needs to consider the government's proposed means. The Court certainly can consider alternatives. However, the alternatives that plaintiffs have suggested are problematic for several reasons.

First of all, the agencies don't have authority to implement the alternatives that they have suggested. Congress passed a statute, the Affordable Care Act, which plaintiffs do not challenge, that requires group health plans to provide preventative services without cost sharing, so the agencies can't go outside that scheme and provide free contraception separately in a way that's inconsistent with the plan that Congress set up.

Secondly, as I indicated, Congress chose that system because it was based on the existing employer-based system. And the least restrictive means that are outside that system

would be enormously costly and administratively burdensome. And the government doesn't have to, as I think the 10th Circuit made clear in *U.S. v. Wilgus*, consider every imaginative alternative. That case is actually instructive. It involved a law that was attempting to protect eagle feathers. The law limited access to eagle feathers to members of a Native American tribe that filed for a permit or allowed members of the Native American tribe to pass eagle feathers down from generation to generation.

There the alternatives that the Court considered were all within that scheme that Congress had set up. The one alternative was allowing non-members of Native American religions, but that were not members of federally recognized tribes, to obtain permits. And the second alternative was allowing Native American tribe members to pass down their feathers to non-Native American tribe members. One can certainly imagine a system where the government created a sanctuary to raise eagles from birth, therefore making the eagle population expand and could give out feathers to more people, but the Court didn't look to that because it was outside the system that Congress had set up. Those are the same -- those same deficiencies apply to the alternatives plaintiffs have offered here.

Your Honor, with respect to the preliminary injunction standard, you asked about equity. I think it's important for

the Court to consider here the equities involved for the employees of Hercules Industries. As I indicated, those employees were hired without regard to their religion. And so to prohibit them from obtaining the benefits of a law, the health benefits that medical experts have said are necessary for women's medical health and well-being because of the religious beliefs of the owner of that corporation I think does a disservice to those women and to the public interest. And for those reasons we think that the last two preliminary injunction factors weigh in the government's favor.

I also wanted to clear up one thing. At the beginning Your Honor said that the preventative services covered regulation requires employers to provide coverage for abortifacients. That's not true. It requires coverage for contraceptive methods, sterilization, and education counseling.

THE COURT: It does require the provision of -- what do they call it -- morning after pills and those are considered to be abortifacients.

MS. BENNETT: They are not, Your Honor. The FDA agency's long-standing policy and procedure is that Plan B and Ella are contraceptive methods, that they do not abort a pregnancy. And I think --

THE COURT: That's one view.

MS. BENNETT: That's the government's view, yes, Your Honor.

THE COURT: Right. It's not the only view.

MS. BENNETT: Right, Your Honor.

THE COURT: That's part of the controversy. I don't think we need to get into it, but I said abortifacients because it's in the briefs.

MS. BENNETT: All right, Your Honor. I just want to just make clear, though, that the requirement is to cover contraceptive services.

THE COURT: I understand that's what you are saying. That's what the government says, but the plaintiffs have a different view and it's in their briefs.

MS. BENNETT: Yes, Your Honor.

THE COURT: That morning after pill to them is an abortifacient. And they are not standing alone when they say that. I mean, because the FDA says it, I agree that's what the FDA says, but that's not the only statement that's made on it.

MS. BENNETT: Right, Your Honor. I understand that.

THE COURT: Okay.

MS. BENNETT: Your Honor, with respect to the First Amendment claims, we agree with what plaintiffs said. If you reject -- if you determine plaintiffs are not likely to succeed on the RFRA claim, which we think you should, then you do need to reach the First Amendment claims. Your Honor seems to have those in hand. I am happy to provide any information you would like. I think it's helpful to look at the New York and

California state court cases in which both of the Supreme Courts of those two states upheld similar requirements in state law under challenges that were identical to the ones made here.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Bowman, you get the last bite at the apple.

MR. BOWMAN: Thank you, Your Honor. I will make it small, if I can.

The government is making a distinction between secular and religious corporations. And frankly, Congress didn't make that distinction in RFRA. It didn't say free exercise of religion as long as you are not secular. It said any free exercise of religion. Your Honor, if First Amendment rights, free exercise, which is the nature of the First Amendment right, were not applicable to secular corporations, the New York Times would have held that -- not print the Pentagon papers or they would have lost the libel case and not had the malice standard.

This is a for-profit company asserting free speech rights, and the Court said if you have First Amendment rights to free exercise of religion has moralized, you don't have free exercise if you are secular. Now, we are also not saying that just because you can assert -- you can exercise religion, that you can't -- that you necessarily win. So, oh, we are not saying you are going to wipe out Title X and all these

regulations on businesses. What Congress said is you look at each one and you say, all right. Is there a compelling interest and a least restrictive means to force this employer who has religious beliefs to comply with law A? Is there a compelling interest and least restrictive means for them to comply with law B?

So in all the cases that the government cites, *Lee*, *Stormans*, et cetera, where the Court is saying, well, if you are in commerce, then that's relevant, none of those courts said you weren't exercising religion in the first place. *Lee* recognized that the Amish employer was exercising religion and was burdened, but then the question was is the burden justified. You go to the scrutiny standard.

All we are trying to say on this point is they are trying to prevent you from getting to the standard, the scrutiny standard. And the reason again is that Congress set it up and it's this strict scrutiny standard. It's not the standard that *Stormans* used. It's not the standard that *Lee* used. *Lee* was a precursor to *Smith*. RFRA doesn't cite *Lee*. RFRA cites *Sherbert* and *Yoder* as the standard. *Lee* never said it's applying a compelling interest.

The government -- Ms. Bennett did make a statement that in equity the Court shouldn't prohibit employees of the Newland family from getting the benefits of contraception. This is not a case about prohibiting anyone from using

contraception or buying contraception. This is a question of whether the Newlands have to provide it.

The government relies ostensibly on the fact that under the Affordable Care Act, Congress has decided to use the employer-based insurance system. That's true, but that's not the compelling interest they have used to justify the mandate. The compelling interest they used to justify the mandate was deliver contraception to women so that they have health and equality. It's not to deliver it via the employer system. They have chosen to do it that way, but they haven't shown a compelling interest for that mechanism.

They just showed a compelling interest. They haven't even alleged a compelling interest and we don't think they have shown it, but the one that they alleged wasn't to deliver it through the employer-based system because that in and of itself is arguably a much weaker interest than the two that they are trying to use. So it illustrates the point from the *Brown* case that the government doesn't have a compelling interest in each marginal percentage point of which it advances these interests.

So the government is exempting tens of millions of women from the interests identified and then on the margins of religious objectors it's saying we have a compelling interest here. Now, the government argued we can't use these alternative mechanisms to deliver contraception to women because the agency doesn't have the authority to do that.

Your Honor, that's the point. These are just agencies. They don't have the authority to trump what Congress said in RFRA. Congress undoubtedly has the authority to deliver contraception to women for religious objecting entities if it wanted to, if it had the votes or the public will, and it has passed that for low income women in Title X, Title XIX and Title XX. The question isn't whether the agency has the authority to do it. The agency doesn't have a presumption that they can do whatever the government has a compelling interest to do even if Congress hasn't authorized it. That's not the way our republic works under the Constitution. Congress is the one who has.

The Supreme Court in the *Riley* case indicated that you do need to consider the least restrictive means. The fact the government wanted to pursue in that case the interests of forcing people to disclose something to people on telemarketing, the Court said you can't force people to violate this First Amendment right. Even though it would help to have them disclose it in this telemarketing call, you have got to do that through other means. You have got to just enforce laws where telemarketers are actually committing fraud. You have got to post the information on your own website. In other words, in the *Riley* case the Supreme Court said, government, if you can do it yourself, you can't make other people violate their rights.

That's all I have, Your Honor.

THE COURT: Thank you very much.

I would like to commend counsel on the quality of their arguments and the quality of the briefs. It has not made my job easier to decide, but it's made it easier, so I will thank you for that. I will issue an opinion. I have to go consider another important question about whether on an Indian reservation it's assault with a deadly weapon to beat somebody over the head with a cowboy boot, but after that I will write this opinion and I will get it out by Friday.

(Recess at 2:52 p.m.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 29th day of July, 2012.

S/Janet M. Coppock