[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.)

BRIEF FOR THE APPELLANTS

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STATEMENT OF RELATED CASES

This case presents the question whether, under the Religious Freedom Restoration Act, a for-profit corporation may deny its employees federally required health insurance benefits, if the corporation's controlling shareholders assert a religious objection to providing such employee benefits. The same issue is pending before this Court in *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir.), and before other courts of appeals in the following cases:

Conestoga Wood Specialties Corp. v. Sebelius, No. 13-1144 (3d Cir.);

Autocam Corp. v. Sebelius, No. 12-2673 (6th Cir.);

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Korte v. HHS, No. 12-3841 (7th Cir.);

Grote Industries, LLC v. Sebelius, No. 13-1077 (7th Cir.);

O'Brien v. HHS, No. 12-3357 (8th Cir.);

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Tyndale House Publishers, Inc. v. Sebelius, No. 13-5018 (D.C. Cir.).

GLOSSARY

FDA	Food and Drug Administration
HHS	U.S. Department of Health and Human Services
HRSA	Health Resources and Services Administration
HVAC	Heating, ventilation and air conditioning
RFRA	Religious Freedom Restoration Act

STATEMENT OF JURISDICTION

The district court has jurisdiction under 28 U.S.C. § 1331. The district court entered a preliminary injunction on July 27, 2012. *See* Appellants' Appendix ("App.") 54. The government filed a notice of appeal on September 25, 2012. *See* App. 72. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether, under the Religious Freedom Restoration Act ("RFRA"), a for-profit corporation may deny its employees federally required health insurance benefits, if the corporation's controlling shareholders assert a religious objection to providing such employee benefits. (Issue addressed at R.30, pp.10-17).

STATEMENT OF THE CASE

1. Plaintiffs are Hercules Industries, Inc., a for-profit Colorado corporation that manufactures heating, ventilation, and air conditioning ("HVAC") equipment, and five controlling shareholders and/or officers of the company (collectively, "the Newlands"). People employed by Hercules Industries obtain health insurance coverage for themselves and their family members through the Hercules Industries group health plan, as an employee benefit that is part of their compensation packages. The company does not hire the employees on the basis of their religion, and the employees do not necessarily share the religious beliefs of the Newlands, who allege that they regard all forms of contraception as immoral.

Hercules Industries and the Newlands contend that, under RFRA, the Hercules Industries group health plan is entitled to an exemption from the federal regulatory requirement that the plan cover Food and Drug Administration ("FDA")-approved contraceptive methods and contraceptive services, as prescribed by a health care provider ("the contraceptive-coverage requirement"). The district court granted a preliminary injunction, *see* App. 54, and subsequently stayed further proceedings pending the resolution of this appeal. *See* App. 75.

2. In a related appeal now pending before this Court, the for-profit Oklahoma corporation Hobby Lobby Stores, Inc., and its controlling shareholders and/or officers seek a RFRA-based exemption from the contraceptive-coverage requirement. The district court denied the plaintiffs' motion for a preliminary injunction, *see Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012), and this Court denied the plaintiffs' motion for an injunction pending appeal. *See* No. 12-6294, 12/20/12 Order (Lucero and Ebel, JJ.). The plaintiffs then sought an injunction pending appeal from the Supreme Court, which was denied by Justice Sotomayor. *See Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641 (2012) (Sotomayor, J., in chambers).[1]

[1] The same issue is also pending before other courts of appeals. *See 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*, __ F. Supp. 2d __, 2012 WL 6845677 (W.D. Mich. Dec. 24,

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STATEMENT OF FACTS

A. Statutory Background

Congress has long regulated certain terms of group health plans, and the Patient Protection and Affordable Care Act establishes additional minimum standards for such plans. As a component of the Act's emphasis on cost-effective preventive medicine, Congress provided that a non-grandfathered plan must cover certain preventive health services without requiring plan participants and beneficiaries to make co-payments or pay deductibles. These preventive health services include immunizations recommended by the Advisory Committee on Immunization Practices, *see* 42 U.S.C. § 300gg-13(a)(2); items or services that have an "A" or "B" rating from the U.S. Preventive Services Task Force, *see id*. § 300gg-13(a)(1); preventive care and screenings for infants, children and adolescents as provided in guidelines of the Health Resources and Services Administration ("HRSA"), a component of the Department of Health and Human

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2012), *appeal pending*, No. 12-2673 (6th Cir.); *Legatus v. Sebelius*, __ F. Supp. 2d __, 2012 WL 5359630 (Oct. 31, 2012), *appeal pending*, No. 13-____ (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.); *O'Brien v. HHS*, __F. Supp. 2d __, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012), *appeal pending*, No. 12-3357 (8th Cir.); *Annex Medical, Inc. v. Sebelius*, __ F. Supp. __, 2013 WL 101927 (D. Minn. Jan. 8, 2013), *appeal pending*, No. 13-1118 (8th Cir.); *Tyndale House Publishers, Inc. v. Sebelius*, __ F. Supp. 2d __, 2012 WL 5817323 (D.D.C. Nov. 16, 2012), *appeal pending*, No. 13-5018 (D.C. Cir.).

Services ("HHS"), *see id*. § 300gg-13(a)(3); and certain additional preventive services for women as provided in HRSA guidelines, *see id*. § 300gg-13(a)(4).

Collectively, these preventive health services provisions require coverage of an array of recommended services including immunizations, blood pressure screening, mammograms, cervical cancer screening, and cholesterol screening.[2] HRSA commissioned a study by the Institute of Medicine to help it develop the statutorily required preventive services guidelines for women. Consistent with the Institute's recommendations, the regulations require coverage for "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity, as prescribed by a provider." 77 Fed. Reg. 8725 (Feb. 15, 2012) (internal quotation marks omitted). FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, injections and implants, emergency contraceptive drugs, and intrauterine devices ("IUDs").[3] Group health plans

[2] *See*, *e.g.*, U.S. Preventive Services Task Force "A" and "B" Recommendations, *available at* http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm.

[3] *See* Birth Control Guide, FDA Office of Women's Health, *available at* http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM282014.pdf (last updated Aug. 2012). Although plaintiffs describe the drugs Plan B and Ella as abortifacients, these drugs are not abortifacients within the meaning of federal law because they have no effect if a woman is pregnant. *See* 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997) ("Emergency contraceptive pills are

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typically start new plan years annually, and the coverage requirement takes effect for all plan years that begin on or after August 1, 2012. *Id*. at 8726.

The regulations that implement the contraceptive-coverage requirement authorize an exemption from that requirement for the group health plan of any organization that qualifies as a religious employer. The regulations define a religious employer as an organization that has as its purpose the inculcation of religious values, that primarily hires and serves persons who share the religious tenets of the organization, and that is a non-profit organization as described in Internal Revenue Code provisions applicable to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. *See* 45 C.F.R. § 147.130(a)(1)(iv)(B). In addition, the agencies charged with enforcing the contraceptive-coverage requirement established a temporary enforcement safe harbor for plans sponsored by certain non-profit organizations that have religious objections to providing

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not effective if the woman is pregnant; they act by delaying or inhibiting ovulation, and/or altering tubal transport of sperm and/or ova (thereby inhibiting fertilization), and/or altering the endometrium (thereby inhibiting implantation)."); 45 C.F.R. § 46.202(f) ("[P]regnancy encompasses the time period from implantation to delivery.").

contraceptive coverage. *See* 77 Fed. Reg. at 8727; HHS, Guidance on the Temporary Enforcement Safe Harbor (Aug. 15, 2012).[4]

B. Factual Background and District Court Proceedings

Plaintiff Hercules Industries, Inc., is a for-profit Colorado corporation that manufactures heating, ventilation, and air conditioning equipment. *See* First Amended Complaint ¶ 11 (App. 23). Hercules Industries has 265 full-time employees at various locations. *See id*. ¶ 38 (App. 27). The corporation does not hire employees on the basis of their religion, and the employees do not necessarily share the religious beliefs of the Newland plaintiffs, who are the officers and controlling shareholders of the corporation and who allege that they regard all forms of contraception as "intrinsic evils." *Id*. ¶¶ 30, 31 (App. 26).

People employed by Hercules Industries obtain health insurance coverage for themselves and their family members through the Hercules Industries group health plan. *See id*. ¶ 39 (App. 27). Plaintiffs contend that the Hercules Industries plan should be exempted from the contraceptive-coverage requirement. Hercules Industries and the Newlands allege that this requirement violates their rights under RFRA. *See id*. ¶¶ 113-122 (App. 40-41). They also allege constitutional claims, but the district court declined to address those claims. *See* App. 63.

[4] *Available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf.

The district court granted a preliminary injunction without deciding whether Hercules Industries and the Newlands established a likelihood of success on the merits of their RFRA claim. The court declared that it could issue a preliminary injunction under a "relaxed" likelihood-of-success standard if it determined that the RFRA claim raises questions that warrant more deliberate investigation. App. 60 & n.7, 63. Applying that relaxed standard, the court concluded that the question whether the contraceptive-coverage requirement imposes a "substantial burden" on any exercise of religion by plaintiffs "merit[s] more deliberate investigation." App. 65.

After the government appealed the preliminary injunction, the district court declined to rule on the government's motion to dismiss the amended complaint, which was fully briefed. *See* App. 75-76. The court stayed proceedings, concluding that "the most prudent course is to await the Tenth Circuit's ruling on the preliminary injunction appeal rather than cloud the issues pending there with rulings on Defendants' Motion to Dismiss." App. 76.

SUMMARY OF ARGUMENT

Plaintiff Hercules Industries, Inc., is a for-profit corporation that manufactures heating, ventilation, and air conditioning products. People employed by Hercules Industries obtain health insurance coverage for themselves and their family members through the Hercules Industries group health plan, as an employee

benefit that is part of their compensation packages. Hercules Industries and the Newlands contend that the plan should be exempted, under the Religious Freedom Restoration Act, from the federal requirement that the plan cover FDA-approved contraceptive methods and contraceptive services, as prescribed by a health care provider for the employees of Hercules Industries and their family members. The district court issued a preliminary injunction that blocks enforcement of the contraceptive-coverage requirement.

The injunction should be vacated because plaintiffs cannot establish a reasonable likelihood of success on the merits of their RFRA claim. RFRA is not implicated because the contraceptive-coverage requirement does not impose a substantial burden on any exercise of religion by Hercules Industries or the Newlands. It is common ground that a religious organization can engage in the exercise of religion, and other federal statutes grant religious organizations the prerogative to discriminate on the basis of religion in the terms and conditions of employment. But Hercules Industries is not a religious organization. It is a for-profit employer that manufactures HVAC equipment. Thus, the Hercules Industries plan must afford the company's employees and their family members the employee benefits required by federal law.

The personal religious beliefs of the corporation's officers and controlling shareholders, the Newlands, cannot provide a basis for the Hercules Industries plan

to deny federally required employee benefits to Hercules Industries employees and their families. The obligation to cover contraceptive services lies with the Hercules Industries plan which, like Hercules Industries itself, is a legal entity separate and distinct from the Newlands. "As corporate owners, the [Newlands] quite properly enjoy the protections and benefits of the corporate form." *Autocam Corp. v. Sebelius*, __ F. Supp. 2d __, 2012 WL 6845677, *7 (W.D. Mich. Dec. 24, 2012), *appeal pending*, No. 12-2673 (6th Cir.). "[T]his separation between a corporation and its owners 'at a minimum [ ] means the corporation is not the *alter ego* of its owners for purposes of religious belief and exercise.'" *Conestoga Wood Specialties Corp. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 140110, *8 (E.D. Pa. Jan. 11, 2013) (citation omitted), *appeal pending*, No. 13-1144 (3d Cir.). "It would be entirely inconsistent to allow the [Newlands] to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations." *Ibid*.

"[O]ther cases enforcing RFRA have done so to protect a plaintiff's own participation in (or abstention from) a specific practice required (or condemned) by his religion." *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir.), 12/20/12 Order, p.7. Here, by contrast, plaintiffs seek to "extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship." *Ibid*. The Hercules Industries

group health plan provides a form of compensation for the benefit of the employees and their family members, who need not share the personal religious beliefs of the Newlands and who have the right to decide for themselves whether to use the health coverage that the plan must make available. "RFRA is a shield, not a sword." *O'Brien v. HHS*, __F. Supp. 2d __, 2012 WL 4481208, *6 (E.D. Mo. Sept. 28, 2012), *appeal pending*, No. 12-3357 (8th Cir.). It is "not a means to force one's religious practices upon others." *Ibid*. "RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *Ibid*.

The burden of which plaintiffs complain is also far outweighed by the compelling interests that employees and their family members have in obtaining access to FDA-approved contraceptive methods and contraceptive services, as prescribed by a health care provider. By requiring that a plan provide such contraceptive-coverage, the regulations ensure that decisions about whether to use contraception and which method to use are made by a patient and her doctor—not by her employer. The district court's suggestion that these interests cannot be compelling because plans that collectively cover millions of people are not subject to the requirement to cover recommended preventive health services reflects a misunderstanding of the Affordable Care Act provisions on which the court relied.

The court's suggestion that, instead of regulating the terms of group health plans, the federal government should provide "free birth control," App. 68, reflects a misunderstanding of the least restrictive means test, which does not require federal taxpayers to subsidize private religious practices.

STANDARD OF REVIEW

This Court reviews the grant of a preliminary injunction for an abuse of discretion. *See Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 698 F.3d 1295, 1301 (10th Cir. 2012). A preliminary injunction is an abuse of discretion if it rests on an error of law. *See ibid*.

ARGUMENT

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

A preliminary injunction is an "extraordinary remedy." *Attorney Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009). "To obtain a preliminary injunction, the moving party must demonstrate: '(1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest.'" *Ibid*. (quoting *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008))).

In district court, plaintiffs did not dispute that they must demonstrate a likelihood of success on the merits as a prerequisite to obtaining a preliminary injunction. To the contrary, plaintiffs correctly recited the *Tyson Food* standard set out above and proceeded to argue that they could establish a likelihood of success on the merits of their RFRA claim. *See* App. 18. Nonetheless, the district court declared that it would issue a preliminary injunction without deciding whether plaintiffs are likely to succeed on the merits of their RFRA claim. The court employed a "relaxed" likelihood-of-success standard and issued a preliminary injunction because it concluded that the RFRA claim warrants "more deliberate investigation." App. 60 & n.7, 63, 65.

That ruling was legal error. This Court explained, in denying an injunction pending appeal in the parallel *Hobby Lobby* litigation, that the "relaxed standard" does not apply where, as here, "a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme." No. 12-6294, 12/20/20 Order at 5 (Lucero & Ebel, JJ.) (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1286 (W.D. Okla. 2012) (quoting *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003))). The district court in this case recognized that, "[s]hould an injunction enter, Defendants will be prevented from 'enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce.'"

App. 62 (quoting *Cornish v. Dudas*, 540 F. Supp. 2d 61, 61 (D.D.C. 2008)). Accordingly, the court could not properly issue injunctive relief without deciding whether plaintiffs are likely to succeed on their RFRA claim.

Moreover, although the district court assumed that an injunction would not harm third parties, the court overlooked the harm that the injunction would cause to the people employed by Hercules Industries and their family members, who have been denied federally required employee benefits. The harm to the participants in the Hercules Industries plan forecloses the suggestion that "the equities tip strongly" in plaintiffs' favor. App. 60.

II. Hercules Industries and the Newlands Are Not Likely To Succeed On Their RFRA Claim.

Hercules Industries and the Newlands cannot establish a likelihood of success on the merits of their RFRA claim. Congress enacted RFRA in response to the Supreme Court's decision in *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), which held that the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws. *See Gonzales v. O Centro Espirita Beneficente Unio do Vegetal*, 546 U.S. 418, 424 (2006). The *Smith* Court rejected the interpretation of the Free Exercise Clause announced in *Sherbert v. Verner*, 374 U.S. 398 (1963), and held that the Constitution does not require judges to engage in a case-by-case assessment of the religious burdens imposed by neutral laws of

general applicability. *See O Centro*, 546 U.S. at 424 (citing *Smith*, 494 U.S. at 883-890).

Congress responded by enacting RFRA, which adopts a statutory rule comparable to the constitutional rule rejected in *Smith*. *See ibid*. Under RFRA, the federal government generally may not, as a statutory matter, "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). A substantial burden on a person's exercise of religion is permissible only if the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id*. § 2000bb-1(b).

A. The Contraceptive-Coverage Requirement Does Not Impose A Substantial Burden On Any Exercise Of Religion By Hercules Industries or the Newlands.

1. RFRA is not implicated here because the contraceptive-coverage requirement does not impose a substantial burden on any exercise of religion by Hercules Industries or the Newlands. It is common ground that the term "person" may include a corporation, and that corporations enjoy certain First Amendment rights. *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (freedom of speech); *Pacific Gas & Elec. v. Public Utilities Comm'n*, 475 U.S. 1 (1986) (same). But, whereas the First Amendment freedoms of speech and association are

"right[s] enjoyed by religious and secular groups alike," the Free Exercise Clause "gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

That special solicitude is reflected in Acts of Congress that give religious organizations alone the latitude to deny their employees certain benefits and protections of federal law. Although Title VII of the Civil Rights Act of 1964 generally prohibits an employer from discriminating on the basis of religion in the terms or conditions of employment, it exempts a "religious corporation, association, educational institution, or society" from this prohibition. 42 U.S.C. § 2000e-1(a). Moreover, because the line between a religious organization's religious and secular activities may be difficult to discern, the Title VII exemption applies regardless of whether the activities are religious in nature. *See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335-36 & n.14 (1987). Thus, in *Amos*, the Supreme Court held that a non-profit gymnasium run by the Mormon Church was free to fire a janitor who failed to observe the Church's standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco. *See id*. at 330 & n.4.

Similarly, a church-operated educational institution is exempt from the jurisdiction of the National Labor Relations Board, and even lay faculty members

of such an institution cannot invoke the collective bargaining and other federal rights that the National Labor Relations Act grants to employees. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

Hercules Industries, Inc., is not a religious organization, however. By plaintiffs' own description, Hercules Industries is a for-profit corporation that manufactures HVAC equipment. Because Hercules Industries is not a religious organization, it cannot invoke the special statutory provisions that allow religious employers to deny employee benefits for religious reasons. Indeed, plaintiffs do not claim that Hercules Industries qualifies for the Title VII exemption. Federal law does not allow Hercules Industries to take religion into account in establishing the terms or conditions of employment.

No court has ever found a for-profit corporation to be a religious organization for purposes of federal law. The Supreme Court stressed that the activities under review in *Amos* were not conducted on a for-profit basis, *see Amos*, 483 U.S. at 339, and the D.C. Circuit explained that for-profit status provides an objective way to distinguish a secular company from a potentially religious organization. *See University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). "As the *Amos* Court noted, it is hard to draw a line between the secular and religious activities of a religious organization." *Id*. at 1344. By contrast, "it is relatively straight-forward to distinguish between a non-profit and a for-profit

entity." *Ibid*.; *see also Spencer v. World Vision, Inc.*, 633 F.3d 723, 734 (9th Cir. 2011) (O'Scannlain, J., concurring) (urging that analysis of the Title VII exemption should "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'") (quoting *Great Falls*, 278 F.3d at 1342).

"The central function" of the Title VII exemption is "to exempt churches, synagogues, and the like, and organizations closely affiliated with those entities" from the prohibition against discriminating on the basis of religion in employment. *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988). Accordingly, the organizations found to qualify for the exemption have been non-profit, religious organizations.[5]

RFRA cannot be interpreted in a way that disregards the established dichotomy between religious and secular employers. As discussed above, this

[5] *See*, *e.g.*, *Amos*, 483 U.S. at 330 & n.3 (non-profit gymnasium run by the Mormon Church); *LeBoon v. Lancaster Jewish Community Center Ass'n*, 503 F.3d 217, 221 (3d Cir. 2007) (non-profit Jewish community center whose stated mission was to "enhance and promote Jewish life, identity, and continuity") (internal quotation marks omitted); *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 190 (4th Cir. 2011) (non-profit nursing-care facility run by an order of the Roman Catholic Church); *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) (per curiam) (non-profit Christian humanitarian organization); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295 (11th Cir. 2006) (non-profit Hispanic Baptist congregation affiliated with the Southern Baptist Convention).

dichotomy is rooted in the Free Exercise Clause, *see Hosanna-Tabor*, 132 S. Ct. at 706, and embodied in other federal statutes. When Congress enacted RFRA in 1993, it did so against the backdrop of the federal statutes that grant religious employers alone the prerogative to rely on religion in setting the terms and conditions of employment. Hercules Industries is a for-profit, secular employer, and it therefore must provide the employee benefits that federal law requires.

2. Plaintiffs cannot circumvent the distinction between religious and secular employers by declaring that the contraceptive-coverage requirement imposes a substantial burden on the personal free exercise rights of the Newlands, who are the corporation's controlling shareholders and officers. The obligation to cover recommended preventive health services is imposed on group health plans and issuers of health insurance coverage, *see* 42 U.S.C. § 300gg-13(a), and the Newlands are neither.

A group health plan is a legally separate entity from the company that sponsors it. *See* 29 U.S.C. § 1132(d). And Hercules Industries, Inc., is a "separate legal entity, unique from its officers, directors, and shareholders." *In re Phillips*, 139 P.3d 639, 643 (Colo. 2006); *see also* Colo. Rev. Stat. §§ 7-106-203, 7-108-401. Although plaintiffs seek to collapse these distinctions, the Supreme Court has explained that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the

natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). As a Colorado corporation with a "perpetual" existence, Hercules Industries, Inc., has broad powers to conduct business, hold and transact property, and enter into contracts. *See* Colo. Rev. Stat. § 7-103-102.

Significantly, by engaging in commerce through a corporation, the Newlands protect themselves from personal liability for the corporation's debts, which is "an inherent purpose of incorporation." *Leonard v. McMorris*, 63 P.3d 323, 330 (Colo. 2003); *In re Phillips*, 139 P.3d at 644; Colo. Rev. Stat. § 7-108-401. The district court questioned whether it is "possible to 'pierce the veil' and disregard the corporate form in this context?" App. 65. But the Newlands do not contend that a court could pierce the veil to hold them personally liable for the debts and obligations of the corporation. The Newlands benefit from the legal separation inherent in the corporate form, and they cannot selectively contend—when it suits their interests—that they and the corporation are one and the same.

"As corporate owners, the [Newland] Plaintiffs quite properly enjoy the protections and benefits of the corporate form." *Autocam Corp. v. Sebelius*, __ F. Supp. 2d __, 2012 WL 6845677, *7 (W.D. Mich. Dec. 24, 2012), *appeal pending*, No. 12-2673 (6th Cir.). But the "corporate form brings obligations as well as benefits." *Ibid*. "[T]his separation between a corporation and its owners 'at a

minimum [ ] means the corporation is not the *alter ego* of its owners for purposes of religious belief and exercise.'" *Conestoga Wood Specialties Corp. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 140110, *8 (E.D. Pa. Jan. 11, 2013) (quoting *Autocam Corp.*, __ F. Supp. 2d __, 2012 WL 6845677, *7). "It would be entirely inconsistent to allow the [Newlands] to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations." *Ibid*.

The challenged regulations do not "compel the [Newlands] as individuals to do anything." *Autocam Corp.*, __ F. Supp. 2d __, 2012 WL 6845677, *7. "They do not have to use or buy contraceptives for themselves or anyone else." *Ibid*. "It is only the legally separate entities they currently own that have any obligation under the mandate." *Ibid*. "The law protects that separation between the corporation and its owners for many worthwhile purposes." *Ibid*. "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*.

3. None of the Supreme Court cases on which plaintiffs relied supports their position here. When Justice Sotomayor denied the *Hobby Lobby* plaintiffs' motion to enjoin the contraceptive-coverage requirement, she explained that the Supreme Court has never "addressed similar RFRA or free exercise claims brought by

closely held for-profit corporations and their controlling shareholders alleging that the mandatory provision of certain employee benefits substantially burdens their exercise of religion." *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643 (2012) (Sotomayor, J., in chambers). In the one case that involved employee benefits, the Court rejected the "free exercise claim brought by individual Amish employer who argued that paying Social Security taxes for his employees interfered with his exercise of religion." *Ibid*. (citing *United States v. Lee*, 455 U.S. 252 (1982)). Even with respect to that individual employer, the Court stressed that, "[w]hen followers of a particular sect enter into commercial activities as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261. The Court explained that "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees." *Id.* at 260.

The two cases cited in RFRA itself—*Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)—did not involve the regulation of a corporation. In *Sherbert*, the Supreme Court upheld the free exercise claim of an individual who was denied state unemployment benefits because her religious beliefs prohibited her from working on a Saturday. And, in *Yoder*, the Court held that a state compulsory school-attendance law substantially

burdened the religious exercise of Amish parents who refused to send their children to high school. Similarly, in *Thomas v. Review Board*, 450 U.S. 707 (1981), the Court upheld the free exercise claim of an individual who was denied state unemployment benefits because his religious beliefs prohibited him from participating in the production of armaments.[6]

Plaintiffs also relied 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 neither case held that the regulation of a corporation imposes a substantial burden on the free exercise rights of the corporation's owner or officer. The Ninth Circuit held only that the corporations had "*standing* to assert the free exercise right of [their] owners." *Stormans*, 586 F.3d at 1120 (citing *Townley*, 859 F.2d at 620 n.15) (emphasis added). The injury in fact that is necessary to establish standing need not be large; an "identifiable trifle" is enough. *Chicano Police Officer's Ass'n v. Stover*, 526 F.2d 431, 436 (10th Cir. 1975) (quoting *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973)), *vacated on other grounds*, 426 U.S. 944 (1976). By contrast, RFRA is not implicated unless a federal regulation "*substantially* burden[s]" a person's exercise of religion. 42 U.S.C. § 2000bb-1(a) (emphasis added). *Stormans*, which involved

[6] *See also Braunfeld v. Brown*, 366 U.S. 599 (1961) (rejecting the free exercise claim of individuals who faced criminal penalties if they operated their stores on a Sunday).

a post-*Smith* free exercise claim, did not address the issue of substantial burden. *Townley* stated only that the challenged statute "to some extent would adversely affect [the corporate owners'] religious practices," *Townley*, 859 F.2d at 620, and then rejected the free exercise claim.

4. "RFRA's provisions do not apply to *any* burden on religious exercise, but rather to a 'substantial' burden on that exercise." *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1293 (W.D. Okla. 2012) (emphasis in original), *appeal pending*, No. 12-6294 (10th Cir.). "Whatever burden the [Newlands] may feel from being involved with a for-profit corporation that provides health insurance that could possibly be used to pay for contraceptives, that burden is simply too indirect to be considered substantial under the RFRA." *Conestoga Wood Specialties Corp. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 140110, *14 (E.D. Pa. Jan. 11, 2013).

"The particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [the corporate] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiff[s'] religion.'" *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir.), 12/20/12 Order, p.7 (quoting *Hobby Lobby Stores*, 870 F. Supp. 2d at 1294).

"Such an indirect and attenuated relationship," *ibid*., does not establish a substantial burden on any free exercise of religion by plaintiffs.

"[O]ther cases enforcing RFRA have done so to protect a plaintiffs' own participation in (or abstention from) a specific practice required (or condemned) by his religion." *Ibid*. Here, by contrast, plaintiffs seek to "extend the reach of RFRA to encompass the independent conduct of third parties with whom plaintiffs have only a commercial relationship." *Ibid*. "RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *O'Brien v. HHS*, __F. Supp. 2d __, 2012 WL 4481208, *6 (E.D. Mo. Sept. 28, 2012), *appeal pending*, No. 12-3357 (8th Cir.). *Accord 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 (D. Minn. Jan. 8, 2013), *appeal pending*, No. 13-1118 (8th Cir.).

"RFRA is a shield, not a sword." *O'Brien*, __ F. Supp. 2d __, 2012 WL 4481208, *6. It is "not a means to force one's religious practices upon others." *Ibid*. A group health plan provides a form of employee compensation that, like salary, is for the benefit of employees and their family members. The participants

in a group health plan are not required to share the religious beliefs of the company's officers or controlling shareholders, and they have the right to decide for themselves how to use their health coverage, just as they are entitled to decide for themselves how to use their salaries.[7]

An owner or officer of a for-profit, secular company may, for example, have a personal religious objection to receiving immunizations, and he may on that basis be entitled to a state-law exemption from the requirement that his children be vaccinated as a condition of attending school. *See, e.g.*, N.Y. Pub. Health Law § 2164(9) (McKinney 2002) (authorization such an exemption). It does not follow, however, that the same individual could demand that the group health plan of the company he controls be exempted from the federal law requirement to cover specified immunizations. *See* 42 U.S.C. § 300gg-13(a)(2). Neither RFRA nor any other federal statute gives such a company the right to require employees and their family members to pay out of pocket for preventive health services that do not accord with the personal religious beliefs of the company's owners or officers.

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

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

Because the contraceptive-coverage requirement does not impose a substantial burden on any exercise of religion by Hercules Industries or the Newlands, there is no need to consider whether such a burden is justified as the least restrictive means of furthering a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1(b). In any event, plaintiffs' argument fails on that secondary inquiry as well, because the contraceptive-coverage requirement is narrowly tailored to advance compelling governmental interests.

1. The district court did not dispute the importance of ensuring that employees and their family members have access to recommended preventive health services, including contraceptive coverage. That "the employees' rights being affected are of constitutional dimension" because they relate to matters of procreation and marriage, *Hobby Lobby*, 870 F. Supp. 2d at 1296, only confirms that the interests served by the contraceptive-coverage requirement are compelling.

The district court nonetheless opined that the governmental interests cannot be compelling because certain plans that collectively cover millions of employees are not subject to the requirement to cover recommended preventive health services (including FDA-approved contraceptive methods and services prescribed by a provider). *See* App. 67-68. This reasoning reflects a misunderstanding of the Affordable Care Act provisions on which the district court relied, as well as an

unfounded assumption that the plans subject to those provisions do not cover such contraceptive services.

Contrary to the district court's suggestion (App. 67), plans offered by small employers are not exempt from the requirement to cover recommended preventive health services. Small businesses that elect to offer non-grandfathered health coverage to their employees are required to provide coverage for recommended preventive services, including contraceptive methods and services, without cost-sharing. *See* 42 U.S.C. § 300gg-13. Moreover, small employers have business incentives to provide health insurance coverage, and an otherwise eligible small employer would lose eligibility for certain tax benefits if it did not provide any insurance at all. *See* 26 U.S.C. § 45R.

Nor does the Act's grandfathering provision, 42 U.S.C. § 18011, have the effect of providing the type of permanent exemption from coverage requirements that plaintiffs demand here. Although grandfathered plans are not subject to certain Affordable Care Act requirements, including the requirement to cover recommended preventive health services, the grandfathering provision is transitional in effect, and it is expected that a majority of employer plans will lose their grandfathered status by 2013. *See* 75 Fed. Reg. 34,538, 34,552 (June 17, 2010). Certain changes to a group health plan such as the elimination of certain benefits, an increase in cost-sharing requirements, or a decrease in employer

contributions can cause a plan to lose its grandfathered status. *See* 45 C.F.R. § 147.140(g). The grandfathering provision is "a reasonable plan for instituting an 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-___ (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*.

The district court also assumed that grandfathered plans exclude contraceptive coverage. But, by the *O'Brien* plaintiffs' account, "a whopping 90% of employer-based insurance plans already covered a full range of prescription contraceptives" before the contraceptive-coverage requirement was established. *O'Brien v. HHS*, No. 12-3357 (8th Cir.), Pl. Br. 32-33 (filed 11/13/12).

The district court noted that non-profit religious institutions such as churches and their auxiliaries are exempt from the contraceptive-coverage requirement. App. 67; *see also* 45 C.F.R. § 147.130(a)(1)(iv)(B). But, clearly, the government that provide an exemption to non-profit, religious institutions, without also extending that measure to for-profit, secular employers like Hercules Industries. Indeed, the federal government has long afforded favorable tax treatment to non-

profit organizations that are organized and operated exclusively for religious purposes. *See* 26 U.S.C. § 501(c)(3).

2. The district court alternatively suggested that, instead of regulating the terms of group health plans, the federal government should provide "free birth control," which, the court opined, could be done through "a variety of methods: creation of a contraception insurance plan with free enrollment, direct compensation of contraception and sterilization providers, creation of a tax credit or deduction for contraceptive purchases, or imposition of a mandate on the contraception manufacturing industry to give its items away for free." App. 68. These proposals reflect a fundamental misunderstanding of the "least restrictive means" test, which 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 plans cover prescription contraceptives).

CONCLUSION

The preliminary injunction should be reversed.

Respectfully submitted,

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JANUARY 2013

REQUEST FOR ORAL ARGUMENT

This case presents the question whether, under the Religious Freedom Restoration Act, a for-profit corporation may deny its employees federally required health insurance benefits, if the corporation's controlling shareholders assert a religious objection to providing such employee benefits. The same issue is pending before this Court in *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir.), and before other circuits. *See* Statement of Related Cases, *supra*. Given the importance of the issue, the government respectfully requests oral argument.

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

I hereby certify that the certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6, 688 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Alisa B. Klein
ALISA B. KLEIN

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 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
ALISA B. KLEIN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge John L. Kane

Civil Action **No. 1:12-cv-1123-JLK**

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

Plaintiffs,

v.

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.

ORDER

Kane, J.

This matter is currently before me on Plaintiffs' Motion for Preliminary Injunction (doc. 5). Based on the forthcoming discussion, Plaintiffs' motion is GRANTED.

BACKGROUND

The Patient Protection and Affordable Care Act

Signed into law on March 23, 2010, the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), instituted a variety of healthcare reforms.

Among its many provisions, it requires most U.S. citizens and legal residents to have health insurance, creates state-based health insurance exchanges, and requires employers with fifty or more full-time employees to offer health insurance.[1] *Id.* The ACA also implemented a series of provisions aimed at insuring minimum levels of health care coverage.[2] Most relevant to the instant suit, the ACA requires group health plans to provide no-cost coverage for preventive care and screening for women. 42 U.S.C. § 300gg-13(a)(4).[3]

Unlike some other provisions of the ACA, however, the preventive care coverage mandate does not apply to certain healthcare plans existing on March 23, 2010.[4] *See* Interim

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[1] In a recent decision, the Supreme Court upheld the constitutionality of the so-called individual mandate, but invalidated the portion of the Affordable Care Act threatening loss of existing Medicaid funding if a state declines to expand its Medicaid programs. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, __ U.S. __; 183 L. Ed. 2d 450 (June 28, 2012).

[2] Termed the "Patient's Bill of Rights" these provisions require health plans to: provide coverage to persons with pre-existing conditions, protect a patient's choice of doctors, allow adults under the age of twenty-six to maintain coverage under their parent's health plan, prohibit annual and lifetime limits on most healthcare benefits, and end pre-existing condition exclusions for children under the age of nineteen. *See* Patient's Bill of Rights *available at* http://www.healthcare.gov/law/features/rights/bill-of-rights/index.html (last viewed on July 27, 2012). As discussed *infra* at n.4, not all health plans are required to meet these conditions.

[3] The ACA did not, however, specifically delimit the contours of preventive care. Instead, it delegated that responsibility to the Health Resources and Services Administration ("HRSA"). On August 1, 2011, HRSA adopted Required Health Plan Coverage Guidelines that defined the scope of women's preventive services for purposes of the ACA coverage mandate. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines *available at* http://www.hrsa.gov/womensguidelines/ (last visited July 27, 2012). The HRSA guidelines include, among other things, "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id.*

[4] Numerous provisions of the ACA apply to grandfathered health plans: the prohibition on pre-existing condition exclusions (group health plans only), the prohibition on excessive waiting periods (both group and individual health plans), the prohibition on lifetime (both) and annual (group only) benefit limits, the prohibition on rescissions (both), and the extension of dependent care coverage (both) to name a few. 75 Fed. Reg. at 34542. For a comprehensive

Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34538,34540 (June 17, 2010). This gap in the preventive care coverage mandate is significant. According to government estimates, 191 million Americans belong to plans which may be grandfathered under the ACA. *Id.* at 34550. Although there are many requirements for maintaining grandfathered status, *see* 26 C.F.R. § 54.9815-1251T(g), if those requirements are met a plan may be grandfathered for an indefinite period of time.

In addition to grandfathering under the ACA, the preventive care guidelines exempt certain religious employers from any requirement to cover contraceptive services.[5] *See* Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621 (Aug. 3, 2011). The guidelines also contain a temporary enforcement "safe-harbor" for plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage

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summary of the applicability of ACA provisions to grandfathered health plans, see Application of the New Health Reform Provisions of Part A of Title XXVII of the PHS Act to Grandfathered Plans, *available at* http://www.dol.gov/ebsa/pdf/grandfatherregtable.pdf. (last visited July 26, 2012).

[5] In order to qualify as a "religious employer" eligible for this exemption, an employer must meet the following criteria:

> (1) The inculcation of religious values is the purpose of the organization.
>
> (2) The organization primarily employs persons who share the religious tenets of the organization.
>
> (3) The organization serves primarily persons who share the religious tenets of the organization.
>
> (4) The organization is a non-profit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

76 Fed. Reg. 46621, 46626 (Aug. 3, 2011); *See* 77 Fed. Reg. 8725 (Feb. 15, 2012).

that do not qualify for the religious employer exemption. *See* Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act 77 Fed. Reg. 8725, 8726-8727 (Feb. 15, 2012). The preventive care guidelines take effect on August 1, 2012.

Hercules Industries, Inc.

Plaintiff Hercules Industries, Inc. is a Colorado s-corp engaged in the manufacture and distribution of heating, ventilation, and air conditioning ("HVAC") products and equipment. Hercules is owned by siblings William, Paul and James Newland and Christine Ketterhagen, who also comprise the company's Board of Directors. Additionally, William Newland serves as President of the company and his son, Andrew Newland serves as Vice President.[6]

Although Hercules is a for-profit, secular employer, the Newlands adhere to the Catholic denomination of the Christian faith. According to the Newlands, "they seek to run Hercules in a manner that reflects their sincerely held religious beliefs" Amended Complaint (doc. 19) at ¶ 2. Thus, for the past year and a half the Newlands have implemented within Hercules a program designed to build their corporate culture based on Catholic principles. *Id*. at ¶ 36. Hercules recently made two amendments to its articles of incorporation, which reflect the role of religion in its corporate governance: (1) it added a provision specifying that its primary purposes are to be achieved by "following appropriate religious, ethical or moral standards," and (2) it added a provision allowing members of its board of directors to prioritize those "religious, ethical or moral standards" at the expense of profitability. *Id*. at ¶ 112. Furthermore, Hercules has donated

[6] Throughout this opinion, I will refer to William Newland, Paul Newland, James Newland, Christine Ketterhagen, and Andrew Newland as the "Newlands."

significant amounts of money to Catholic organizations and causes. *Id*. at ¶ 35.

According to Plaintiffs, Hercules maintains a self-insured group plan for its employees "[a]s part of fulfilling their organizational mission and Catholic beliefs and commitments." *Id.* at ¶¶ 37. Significantly, because the Catholic church condemns the use of contraception, Hercules self-insured plan does not cover abortifacent drugs, contraception, or sterilization. *Id*. at ¶ 41.

Hercules' health insurance plan is not "grandfathered" under the ACA. Furthermore, notwithstanding the Newlands' religious beliefs, as a secular, for-profit corporation, Hercules does not qualify as a "religious employer" within the meaning of the preventive care regulations. Nor may it seek refuge in the enforcement "safe harbor." Accordingly, Hercules will be required to either include no-cost coverage for contraception in its group health plan or face monetary penalties. Faced with a choice between complying with the ACA or complying with their religious beliefs, Plaintiffs filed the instant suit challenging the women's preventive care coverage mandate as violative of RFRA, the First Amendment, the Fifth Amendment, and the Administrative Procedure Act.

Believing the alleged injury to their constitutional and statutory rights to be imminent, Plaintiffs filed the instant Motion for Preliminary Injunction.

DISCUSSION

A preliminary injunction is an extraordinary remedy; accordingly, the right to relief must be clear and unequivocal. *See, e.g.*, *Flood v. ClearOne Commc'ns, Inc.*, 618 F.3d 1110, 1117 (10th Cir. 2010). To meet this burden, a party seeking a preliminary injunction must show: (1) a likelihood of success on the merits, (2) a threat of irreparable harm, which (3) outweighs any harm to the non-moving party, and that (4) the injunction would not adversely affect the public

interest. *See, e.g.*, *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012). Although this inquiry is, on its face, relatively straightforward, there are a variety of exceptions. If the injunction will (1) alter the status quo, (2) mandate action by the defendant, or (3) afford the movant all the relief that it could recover at the conclusion of a full trial on the merits, the movant must meet a heightened burden. *See O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), aff'd and remanded, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

In determining whether an injunction falls into one of these "disfavored" categories, courts often focus on whether the requested injunctive relief will alter the status quo. The "status quo" is "the last uncontested status between the parties which preceded the controversy until the outcome of the final hearing." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001). In making this determination, however, I must look beyond the parties' legal rights, focusing instead on the reality of the existing status and relationship between the parties. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1260 (10th Cir. 2005). If the requested relief would either preserve or restore the relationship and status existing ante bellum, the injunction does not alter the status quo.

This determination is not, however, necessarily dispositive. An injunction restoring the status quo ante bellum may require action on behalf of the nonmovant. Such an injunction, one which "affirmatively require[s] the nonmovant to act in a particular way," is mandatory and disfavored. *Id.* at 1261.

Although I follow the Tenth Circuit's guidance in determining whether Plaintiffs seek to disturb the status quo or require affirmative action by Defendants, I am careful to avoid

uncritical adherence to the "status quo-formula" and the "mandatory/prohibitory formulation." In making this determination, I must be mindful of "the fundamental purpose of preliminary injunctive relief under our Rules of Civil Procedure, which is 'to preserve the relative positions of the parties until a trial on the merits can be held.'" *Bray v. QFA Royalties, LLC*, 486 F. Supp. 2d 1237, 1243-44 (D. Colo. 2007) (citing *O Centro*, 389 F.3d at 999-1001 (Seymour, C.J., concurring)).

Before the instigation of this lawsuit, Plaintiffs maintained an employee insurance plan that excluded contraceptive coverage. Although Defendants have passed a regulation requiring Plaintiffs to include such coverage in their coverage for the plan-year beginning on November 1, 2012, that regulation, as it applies to Plaintiffs, has not yet taken effect. Should the requested injunction enter, Defendants will be enjoined from enforcing the preventive care coverage mandate against Plaintiffs pending the outcome of this suit. The status quo will be preserved, and Defendants will not be required to take any affirmative action.

Because Plaintiffs do not seek a "disfavored" injunction, I must consider whether Plaintiffs are entitled to rely on an altered burden of proof. *Cf. O Centro*, 389 F.3d at 976. If the equities tip strongly in their favor, Plaintiffs "may meet the requirement for showing success on the merits by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation."[7]

[7] Although some courts in this district have questioned the continued validity of this relaxed likelihood-of-success-on-the-merits standard in light of the Supreme Court's decision in *Winter v. Natural Resource Defense Council, Inc.*, 555 U.S. 7, 20 (2008) (holding that a plaintiff seeking a preliminary injunction "must establish that he is likely to succeed on the merits"), because the Tenth Circuit has continued to refer to this relaxed standard I assume it still governs the issuance of preliminary injunctions in this circuit. *See RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1209 n.3 (10th Cir. 2009).

Okla. ex rel. Okla. Tax Comm'n v. Int'l Registration Plan, Inc., 455 F.3d 1107, 1113 (10th Cir. 2006).

Accordingly, I begin by considering the equities before turning to Plaintiffs' likelihood of success on the merits.

1. Irreparable Harm

Although it is well-established that the potential violation of Plaintiffs' constitutional and RFRA rights threatens irreparable harm, *see Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001), Plaintiffs must also establish that "the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (emphasis in original). Imminence does not, however, require immediacy. Plaintiffs need only demonstrate that absent a preliminary injunction, "[they] are likely to suffer irreparable harm before a decision on the merits can be rendered." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1, p. 139 (2d ed. 1995)).

Absent injunctive relief, Plaintiffs will be required to provide FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity as part of their employee insurance plan. Per the terms of the preventive care coverage mandate, that coverage must begin on the start date of the first plan year following the effective date of the regulations, November 1, 2012. Defendants argue this harm, three months in the future, is not sufficiently imminent to justify injunctive relief. In light of the extensive planning involved in preparing and providing its employee insurance plan, and

the uncertainty that this matter will be resolved before the coverage effective date, Plaintiffs have adequately established that they will suffer imminent irreparable harm absent injunctive relief. This factor strongly favors entry of injunctive relief.

2. Balancing of Harms

I must next weigh the irreparable harm faced by Plaintiffs against the harm to Defendants should an injunction enter. Should an injunction enter, Defendants will be prevented from "enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 61 (D.D.C. 2008).

This harm pales in comparison to the possible infringement upon Plaintiffs' constitutional and statutory rights. This factor strongly favors entry of injunctive relief.

3. Public Interest

Defendants argue that entry of the requested injunction is contrary to the public interest, because it would "undermine [their] ability to effectuate Congress's goals of improving the health of women and children and equalizing the coverage of preventive services for women and men so that women who choose to do so can be part of the workforce on an equal playing field with men." Defendants' Response (doc. 26) at73. This asserted interest is, however, undermined by the creation of exemptions for certain religious organizations and employers with grandfathered health insurance plans and a temporary enforcement safe harbor for non-profit organizations.

These interests are countered, and indeed outweighed, by the public interest in the free exercise of religion. As the Tenth Circuit has noted, "there is a strong public interest in the free

exercise of religion even where that interest may conflict with [another statutory scheme]." *O Centro*, 389 F.3d at 1010. Accordingly, the public interest favors entry of an injunction in this case.

On balance, the threatened harm to Plaintiffs, impingement of their right to freely exercise their religious beliefs, and the concommittant public interest in that right srongly favor the entry of injunctive relief. Although the less rigorous standard for preliminary injunctions is not applied when "a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme," *Aid for Women v. Foulston*, 441 F.3d 1101, 1115 (10th Cir. 2006), the government's creation of numerous exceptions to the preventive care coverage mandate has undermined its alleged public interest.[8] Accordingly, I find the general rule disfavoring the relaxed standard inapplicable. Plaintiffs need only establish that their challenge presents "questions going to the merits . . . so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Okla. Tax Comm'n,* 455 F.3d at 1113.

4. Likelihood of Success on the Merits

Plaintiffs raise a variety of constitutional and statutory challenges. Because Plaintiffs' RFRA challenge provides adequate grounds for the requested injunctive relief, I decline to address their challenges under the Free Exercise, Establishment and Freedom of Speech Clauses of the First Amendment. *See, e.g.*, *United States v. Hardeman*, 297 F.3d 1116, 1135-36 (10th Cir. 2002) (en banc).

[8] *See* discussion *supra* at pp. 2-4 and *infra* at p. 14-15.

Passed in 1993, the Religious Freedom Restoration Act ("RFRA") sought to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b). Although unconstitutional as applied to the states, *see City of Boerne v. Flores*, 521 U.S. 507 (1997), it remains constitutional as applied to the federal government. *See United States v. Wilgus*, 638 F.3d 1274, 1279 (10th Cir. 2011).

Under RFRA, the government may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). This general prohibition is not, however, without exception. The government may justify a substantial burden on the free exercise of religion if the challenged law: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* at § 2000bb-1(b). The initial burden is borne by the party challenging the law. Once that party establishes that the challenged law substantially burdens her free exercise of religion, the burden shifts to the government to justify that burden. The nature of this preliminary injunction proceeding does not alter these burdens. *Gonzales*, 546 U.S. at 429. Thus, I must first consider whether Plaintiffs have demonstrated that the preventive care coverage mandate substantially burdens their free exercise of religion. If so, I must then consider whether the government has demonstrated that the preventive care coverage mandate is the least restrictive means to achieve a compelling interest.

Substantial Burden of Free Exercise

Plaintiffs argue that providing contraception coverage violates their sincerely held

religious beliefs. Although the government does not challenge the sincerity of the Newlands' religious beliefs, it argues that Plaintiffs have failed to demonstrate a substantial burden on their free exercise of religion. This argument relies upon two key premises. First, the government asserts that the burden of providing insurance coverage is borne by Hercules. Second, the government argues that as a for-profit, secular employer, Hercules cannot engage in an exercise of religion. Accordingly, the argument concludes, the preventive care coverage mandate cannot burden Hercules' free exercise of religion.[9] Plaintiffs counter, arguing that there exists no law forbidding a corporation from operating according to religious principles.

These arguments pose difficult questions of first impression. Can a corporation exercise religion? Should a closely-held subchapter-s corporation owned and operated by a small group of individuals professing adherence to uniform religious beliefs be treated differently than a publicly held corporation owned and operated by a group of stakeholders with diverse religious beliefs? Is it possible to "pierce the veil" and disregard the corporate form in this context? What is the significance of the pass-through taxation applicable to subchapter-s corporations as it pertains to this analysis? These questions merit more deliberate investigation.

Even if, upon further examination, Plaintiffs are able to demonstrate a substantial burden on their free exercise of religion, however, the government may justify its application of the preventive care coverage mandate by demonstrating that application of that mandate to Plaintiffs

[9] In the alternative, the government argues that because Plaintiffs routinely contribute to other schemes that violate the religious beliefs alleged here, the preventive care coverage mandate does not substantially burden Plaintiffs' free exercise of religion. This argument requires impermissible line drawing, and I reject it out of hand. *See Thomas v. Review Bd. of Ind. Emp't Sec.*, 450 U.S. 707, 715 (1981).

is the least restrictive means of furthering a compelling interest.

Compelling Interest

In order to justify a substantial burden on Plaintiffs' free exercise of religion, the government must show that its application of the preventive carecoverage mandate to Plaintiffs furthers "interests of the highest order." *Hardeman*, 297 F.3d at 1127. It is well-settled that the interest asserted in this case, the promotion of public health, is a compelling government interest. *See Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir. 1998). The government argues that the preventive care coverage mandate, as applied to Plaintiffs and all similarly situated parties, furthers this compelling interest.

Assuming, *arguendo*, that application of the preventive care coverage mandate to Plaintiffs and all similarly situated parties furthers a compelling government interest,[10] that argument does not justify a substantial burden on Plaintiffs' free exercise of religion: "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the person – the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales*, 546 U.S. at 430-31.

I do not mean to suggest that the government may not establish a compelling interest in the uniform application of a particular program. To make such a showing, however, the government must "offer[] evidence that granting the requested religious accommodations would seriously compromise its ability to administer this program." *Id*. at 435. Any such argument is

[10] Plaintiffs strenuously challenge whether the preventive care coverage mandate actually furthers the promotion of public health. I need not address that argument to resolve the instant motion, and I decline to do so.

undermined by the existence of numerous exemptions to the preventive care coverage mandate. In promulgating the preventive care coverage mandate, Congress created significant exemptions for small employers and grandfathered health plans.[11] [12] 26 U.S.C. § 4980H(c)(2) (exempting from health care provision requirement employers of less than fifty full-time employees); 42 U.S.C. § 18011 (grandfathering of existing health care plans). Even Defendants created a regulatory exemption to the contraception mandate. 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011) (exempting certain religious employers from the contraception requirement of the preventive care coverage mandate).

"[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993); *see also United States v. Friday*, 525 F.3d 938, 958 (10th Cir. 2008). The government has exempted over 190 million health plan

[11] The government's attempt to characterize grandfathering as "phased implementation" is unavailing. As noted above, health plans may retain their grandfathered status indefinitely. Most damaging to the government's alleged compelling interest, even though Congress required grandfathered health plans to comply with certain provisions of the ACA, it specifically exempted grandfathered health plans from complying with the preventive care coverage mandate. *See* 42 U.S.C. § 18011(a)(3-4) (specifying those provisions of the ACA that apply to grandfathered health plans).

[12] The government argues that because these provisions are generally applicable, and not specifically limited to the preventive services coverage regulations, they are not exemptions from the preventive care coverage mandate. This is a distinction without substance. By exempting employers from providing health care coverage, these provisions exempt those employers from providing preventative health care coverage to women. If the government has a compelling interest in ensuring no-cost provision of preventative health coverage to women, that interest is compromised by exceptions allowing employers to avoid providing that coverage – whether broadly or narrowly crafted.

participants and beneficiaries from the preventive care coverage mandate;[13] this massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs.[14]

Least Restrictive Means

Even if the government were able to establish a compelling interest in applying the preventive care coverage mandate to Plaintiffs, it must also demonstrate that there are no feasible less-restrictive alternatives. *Wilgus*, 638 F.3d at 1289. The government need not tilt at windmills; it need only refute alternatives proposed by Plaintiffs. *Id*.

Plaintiffs propose one alternative, government provision of free birth control, that could be achieved by a variety of methods: creation of a contraception insurance plan with free enrollment, direct compensation of contraception and sterilization providers, creation of a tax credit or deduction for contraceptive purchases, or imposition of a mandate on the contraception manufacturing industry to give its items away for free. Defendants argue Plaintiffs' "misunderstand the nature of the 'least restrictive means' inquiry." Brief in Opposition (doc. 26) at 43. According to Defendants, this inquiry should be limited to whether Plaintiffs and other similarly situated parties could be exempted without damaging Defendants' compelling interest.

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[13] Even if, as is estimated under the government's high-end estimate, 69% of health plans lose their grandfathered status by the end of 2013, millions health plan participants and beneficiaries will continue to be exempted from the preventive care coverage mandate. *See* 75 Fed. Reg. 34538, 34553.

[14] To the extent the government argues creating an exemption for Plaintiffs threatens to undermine the preventive care coverage mandate, that argument is inconsistent with RFRA and irrelevant in this context. *See Gonzales*, 546 U.S. at 436 (rejecting "slippery slope" argument as inconsistent with RFRA).

It is, however, not Plaintiffs but Defendants who misunderstand the least restrictive means inquiry. Defendants need not refute every conceivable alternative, but they "must refute the alternative schemes offered by the challenger."[15] *Wilgus*, 638 F.3d at 1289.

Despite their categorical argument, Defendants attempt to refute Plaintiffs' proposed alternative. First, Defendants argue that because Plaintiffs' alternative "would impose considerable new costs and other burdens on the Government and are otherwise impractical," they should be rejected as not "feasible" or "plausible." Brief in Opposition (doc. 26) at 44. Although a showing of impracticality is sufficient to refute the adequacy of a proposed alternative, Defendants have failed to make such a showing in this case. As Plaintiffs note, "the government already provides free contraception to women." Reply Brief in Support (doc. 27) at 38.

Defendants also argue Plaintiffs' alternative would not adequately advance the government's compelling interests. They acknowledge that Plaintiffs' alternative would achieve the purpose of providing contraceptive services to women with no cost sharing, but argue that Plaintiffs' alternative will not "ensur[e] that women will face minimal logistical and administrative obstacles to receiving coverage of their care." Brief in Opposition (doc. 26) at 45. Although Plaintiffs argue that this amounts to a redefinition of Defendants' compelling interest,

[15] Furthermore, both parties impermissibly expand the scope of this determination. As noted above, my inquiry is limited to the parties before me; I do not consider all other "similarly situated parties." To the extent Plaintiffs' alternative would apply to other parties, it is overinclusive. Because the parties frame this discussion, however, I analyze the alternative as presented by Plaintiffs and responded to by Defendants.

it is instead a logical corollary thereto.[16] Nonetheless, Defendants have failed to adduce facts establishing that government provision of contraception services will necessarily entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women. Once again, the current existence of analogous programs heavily weighs against such an argument.

Defendants bear the burden of demonstrating that refusing to exempt Plaintiffs from the preventive care coverage mandate is the least restrictive means of furthering their compelling interest. Given the existence of government programs similar to Plaintiffs' proposed alternative, the government has failed to meet this burden.

Conclusion

The balance of the equities tip strongly in favor of injunctive relief in this case. Because this case presents "questions going to the merits . . . so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation," I find it appropriate to enjoin the implementation of the preventive care coverage mandate as applied to Plaintiffs. Accordingly,

Defendants, their agents, officers, and employees, and their requirements that Plaintiffs provide FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, are ENJOINED from any application or enforcement thereof against Plaintiffs, including the substantive requirement imposed in 42

[16] To be clear, I do not believe Defendants have sufficiently demonstrated a compelling interest in enforcing the preventive care coveragemandate against Plaintiffs. For purposes of my analysis under "least restrictive means" prong of RFRA, however, I assume the existence of such an interest.

U.S.C. § 300gg-13(a)(4), the application of the penalties found in 26 U.S.C. §§ 4980D & 4980H and 29 U.S.C. § 1132, and any determination that the requirements are applicable to Plaintiffs.

Pursuant to Fed. R. Civ. P. Rule 65(c), Plaintiffs shall post a $100.00 bond as security for any costs and damages that may be sustained by Defendants in the event they have been wrongfully enjoined or restrained.

Such injunction shall expire three months from entry of an order on the merits of Plaintiffs' challenge. In order to expedite the resolution of this case, the parties shall file a Joint Case Management Plan on or before August 27, 2012.

And, finally, I take this opportunity to emphasize the *ad hoc* nature of this injunction. The government's arguments are largely premised upon a fear that granting an exemption to Plaintiffs will necessarily require granting similar injunction to all other for-profit, secular corporations voicing religious objections to the preventive care coverage mandate. This injunction is, however, premised upon the alleged substantial burden on Plaintiffs' free exercise of religion – not to any alleged burden on any other party's free exercise of religion. It does not enjoin enforcement of the preventive care coverage mandate against any other party.

Dated: July 27, 2012

BY THE COURT:

/s/ John L. Kane
Senior U.S. District Court Judge