No. 12-6294

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HOBBY LOBBY STORES, INC., et al.,
Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Oklahoma, No. Civ-12-1000-HE, Hon. Joe Heaton, Presiding

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AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE SUPPORTING PLAINTIFFS-APPELLANTS AND URGING REVERSAL

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae, the American Center for Law & Justice, is not a publicly held corporation, issues no stock, and has no parent corporation. Because the American Center for Law & Justice issues no stock, no publicly held corporation owns 10% or more of its stock. Fed. R. App. P. 26.1.

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IDENTITY AND INTEREST OF THE AMICUS CURIAE

Amicus curiae, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to defending constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and state courts in numerous cases involving constitutional issues. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). The ACLJ has also participated as amicus curiae in numerous cases involving constitutional issues before the Supreme Court and lower federal courts. *E.g.*, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Van Orden v. Perry*, 545 U.S. 677 (2005).

The ACLJ has been active in litigation concerning the regulations at issue here, which require many employers, under pain of penalty, to include in their employee health benefit plans coverage for all contraceptive methods, including abortion-inducing drugs, sterilization procedures, and related patient education and counseling ("the Mandate").

In particular, the ACLJ represents the plaintiffs in *O'Brien v. United States Department of Health & Human Services*, No. 12-3357 (8th Cir.), *Korte v. United States Department of Health & Human Services*, No. 12-3841 (7th Cir.), *American Pulverizer Co. v. United States Department of Health & Human Services*, No. 12-cv-3459 (W.D. Mo.), and *Gilardi v. United States Department of Health & Human Services*, No. 1:13-CV-104 (D.D.C.), all of which are actions brought by for-profit businesses challenging the Mandate. Furthermore, the ACLJ has filed amicus curiae briefs in thirteen other cases involving challenges to the Mandate brought by nonprofit organizations. *E.g., Wheaton College v. Sebelius*, Nos. 12-5273, 12-5291 (D.C. Cir.). Also, more than 63,000 supporters of the ACLJ have signed a petition opposing the Mandate.

As such, the ACLJ has expertise in the issues raised in this case and has an interest that may be affected by the outcome of this action, primarily because this Court's decision will be persuasive authority in *O'Brien*, *Korte*, *American Pulverizer*, and *Gilardi* as well as in the cases in which the ACLJ has appeared as an amicus curiae.

RULE 29 STATEMENTS REGARDING CONSENT TO FILE, AUTHORSHIP, AND FINANCIAL CONTRIBUTIONS

The parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae and its counsel made such a monetary contribution. Fed. R. App. P. 29.

INTRODUCTION

Federal regulations enacted pursuant to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (Mar. 23, 2010) ("the Affordable Care Act") require many employers, under pain of penalty, to include in their employee health benefit plans coverage for contraceptive methods, including abortion-inducing drugs, sterilization procedures, and related patient education and counseling ("the Mandate").

There are more than forty ongoing federal lawsuits brought by both for-profit and non-profit employers seeking a religious exemption from the Mandate. *See* Becket Fund for Religious Liberty, *HHS Mandate Information Central*, http://www.becketfund.org/hhsinformationcentral/ (last visited

Feb. 11, 2013). At present, for-profit plaintiffs are protected by injunctions preventing application of the Mandate to them in eleven cases,[1]/ while injunctive relief has been denied in three cases, including this one.[2]/

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[1]/ *Annex Med., Inc. v. Sebelius*, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013) (granting injunction pending appeal); *Grote v. Sebelius*, 2013 U.S. App. LEXIS 2112 (7th Cir. Jan. 30, 2013) (same); *Korte v. U.S. Dep't of Health & Human Servs.*, 2012 U.S. App. LEXIS 26734 (7th Cir. Dec. 28, 2012) (same); *O'Brien v. U.S. Dep't of Health & Human Servs.*, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012) (same); *Triune Health Grp. v. U.S. Dep't of Health & Human Servs.*, No. 1:12-cv-06756, slip op. (N.D. Ill. Jan. 3, 2013) (granting preliminary injunction) (copy attached); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, 2012 U.S. Dist. LEXIS 182307 (W.D. Mo. Dec. 20, 2012) (same); *Tyndale House Publ'rs v. Sebelius*, 2012 U.S. Dist. LEXIS 163965 (D.D.C. Nov. 16, 2012) (same); *Legatus v. Sebelius*, 2012 U.S. Dist. LEXIS 156144 (E.D. Mich. Oct. 31, 2012) (same); *Newland v. Sebelius*, 2012 U.S. Dist. LEXIS 104835 (D. Colo. July 27, 2012) (same); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 2012 U.S. Dist. LEXIS 182942 (E.D. Mo. Dec. 31, 2012) (granting temporary restraining order); *Monaghan v. Sebelius*, 2012 U.S. Dist. LEXIS 182857 (E.D. Mich. Dec. 30, 2012) (same).

[2]/ *Hobby Lobby Stores v. Sebelius*, 2012 U.S. Dist. LEXIS 164843 (W.D. Okla. Nov. 19, 2012) (denying preliminary injunction), *appeal docketed*, 2012 U.S. App. LEXIS 26741 (10th Cir. Dec. 20, 2012) (denying injunction pending appeal), *and* 2012 U.S. LEXIS 9594 (Dec. 26, 2012) (Sotomayor, J., in chambers) (same); *Autocam Corp. v. Sebelius*, 2012 U.S. Dist. LEXIS 184093 (W.D. Mich. Dec. 24, 2012) (denying preliminary injunction), *appeal docketed*, 2012 U.S. App. LEXIS 26736 (6th Cir. Dec. 28, 2012) (denying injunction pending appeal); *Conestoga Wood Specialties Corp. v. Sebelius*, 2012 U.S. Dist. LEXIS 4449 (E.D. Pa. Jan. 11, 2013) (denying preliminary injunction after

(Text of footnote continues on following page.)

The Mandate runs counter to both the Constitution and longstanding American tradition. This Nation has a long and proud tradition of accommodating the religious beliefs and practices of all its citizens, not dividing them into "approved" and "disapproved" camps at the discretion of government functionaries. *See Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952) (noting that government follows "the best of our traditions" when it "respects the religious nature of our people and accommodates the public service to their spiritual needs").

The Founding Fathers made it clear that the freedoms of religion and conscience occupy the highest rung of civil liberty protections. For example, before the end of Thomas Jefferson's second term as President, he wrote to the Baltimore Baptist Association in 1808 stressing the importance of religious freedom under the Constitution. Regarding potential challenges posed to the religious freedom guaranteed to all Americans, Jefferson stated that "a recollection of our former vassalage in religion . . .

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granting TRO), *appeal docketed*, 2013 U.S. App. LEXIS 2706 (3d Cir. Feb. 7, 2013) (denying injunction pending appeal).

will unite the zeal of every heart, and the energy of every hand, to preserve that independence."[3]/ The following year, Jefferson wrote to the Society of the Methodist Episcopal Church at New London, Connecticut, and stated that "[n]o provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority."[4]/

Moreover, in a 1789 letter to the United Baptists in Virginia, President George Washington stated that he would fight against any efforts by the government to threaten religious liberties:

> If I could have entertained the slightest apprehension that the Constitution framed in the Convention, where I had the honor to preside, might possibly endanger the religious rights of any ecclesiastical Society, certainly I would never have placed my signature to it; and if I could now conceive that the general Government might ever be so administered as to render the liberty of conscience insecure, I beg you will be persuaded that no one would be more zealous than myself to establish effectual barriers against the

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[3]/ RJ&L Religious Liberty Archive, *Jefferson Letter to the Members of the Baltimore Baptist Association, 1808*, http://www.churchstatelaw.com/historicalmaterials/8_8_8.asp (last visited Feb. 11, 2013).

[4]/ Writings of Thomas Jefferson: Replies to Public Addresses: To the Society of the Methodist Episcopal Church at New London, Conn., on Feb. 4, 1809, vol. XVI, pp. 331-32 (Monticello ed. 1904).

> horrors of spiritual tyranny, and every species of religious persecution.[5]/

Before Jefferson and Washington made these statements—in fact, even before the Declaration of Independence was drafted in 1776—the Continental Congress passed a resolution in 1775 exempting individuals with pacifist religious convictions from military conscription:

> As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.[6]/

Thus, even when this country was in dire need of men to take up arms to fight for independence, our forefathers knew that the freedom of conscience is inviolable and must be honored. They understood that to conscript men into military service against their conscience would have

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[5]/ *The Founding Fathers & the Debate Over Religion in Revolutionary America: A History in Documents* 137–38 (Matthew L. Harris & Thomas S. Kidd eds., Oxford U. Press 2012).

[6]/ Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harvard L. Rev. 1409, 1469 (1990).

undermined the very cause of liberty to which they pledged their lives, property, and sacred honor.

The Mandate imposes a substantial burden on individuals and organizations, including the Plaintiffs here, who firmly believe that compliance with the Mandate would cause them to violate their sincerely-held religious beliefs. In particular, based on their Christian faith, Plaintiffs oppose the Mandate's requirement that they include coverage in their employee health plan for abortion-inducing drugs and devices and related education and counseling. *Hobby Lobby Stores v. Sebelius*, 2012 U.S. Dist. LEXIS 164843, at *2 (W.D. Okla. Nov. 19, 2012). Christianity's longstanding moral opposition to abortion does not stem from a tangential, minor point of doctrine; it is a core principle of the Christian faith that life, beginning at conception, must be valued and preserved.[7]/

Plaintiffs simply ask to be permitted to continue to run their companies without having to violate their sincerely-held religious beliefs. They seek the same protection of conscience provided to other religious groups and

[7]/ *See, e.g.*, *Psalm* 22; *Psalm* 139; *Luke* 1:41; *Genesis* 9:6.

individuals from the time of the Continental Congress. This same protection of conscience was codified in 1993 in the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.* ("RFRA"). Plaintiffs' claim under RFRA is the focus of this brief.

SUMMARY OF THE ARGUMENT

The district court abused its discretion in denying Plaintiffs' motion for a preliminary injunction. RFRA protects the religious exercise of all "persons," whether natural or corporate in form. The Mandate substantially burdens the religious exercise of Plaintiffs because it pressures them to either violate their religious beliefs or pay significant annual penalties to stay true to their beliefs. Because the Mandate imposes a substantial burden on Plaintiffs, Defendants must establish that the Mandate furthers a compelling governmental interest as applied to Plaintiffs, and that the Mandate is the least restrictive means of achieving that interest. Defendants, however, cannot satisfy that high standard of proof. This Court, accordingly, should reverse the decision of the district court.

ARGUMENT

I. Hobby Lobby And Mardel Are "Persons" Under RFRA.

RFRA provides that the federal government "shall 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) (emphasis added). The district court determined that the Greens were "persons" under RFRA, but that the two corporations, Hobby Lobby and Mardel, were not. *Hobby Lobby*, 2012 U.S. Dist. LEXIS 164843, at *26-30. The district court erred in its latter conclusion.

Although RFRA does not define the term "person," the United States Code states: "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . 'person'. . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Courts often interpret the term "person" to include corporations. *E.g., Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 687 (1978) ("[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes

of constitutional and statutory analysis."); *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1707 (2012) (noting that the term "person" often includes organizations).

Moreover, courts have determined that corporations have First Amendment rights, including free exercise rights. *E.g., Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010) (noting that corporations are legal persons that enjoy free speech rights); *Primera Iglesia Bautista Hispana v. Broward Cnty.*, 450 F.3d 1295, 1305 (11th Cir. 2006) ("[C]orporations possess Fourteenth Amendment rights of equal protection, due process, and, through the doctrine of incorporation, the *free exercise of religion*.") (citations omitted and emphasis added); *McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985) (stating that the "conclusory assertion that a corporation has no constitutional right to free exercise of religion is unsupported by any cited authority").

Indeed, just as a for-profit corporation need not be organized, operated, and maintained for the primary purpose of engaging in free speech activity to invoke First Amendment free speech protections, *see First National Bank*

v. Bellotti, 435 U.S. 765 (1978), a for-profit corporation need not be organized, operated, and maintained for the primary purpose of religious exercise to invoke the protections of the Free Exercise Clause and RFRA. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120, n.9 (9th Cir. 2009) ("[A]n organization that asserts the free exercise rights of its owners need not be primarily religious. . . .").

Similarly, religious freedom extends both to an organization that primarily engages in religious acts and to an organization that primarily engages in secular acts in a manner consistent with religious principles. Although the Free Exercise Clause "gives special solicitude to the rights of religious organizations," *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 706 (2012), that does not mean that the Free Exercise Clause (or RFRA) *only* protects religious organizations. Corporations, whether for-profit or non-profit, can, and often do, engage in a plethora of quintessentially religious acts such as tithing, donating money to charities, and committing oneself to act in accordance with the teachings of a religious faith. A corporate religious conscience can only be established

through policies created by the owners or directors according to their own moral, ethical, and religious beliefs.

The district court declined to follow the general rule that a corporation is a person by concluding that RFRA's "context indicates otherwise." *Hobby Lobby*, 2012 U.S. Dist. LEXIS 164843, at *27 (citing 1 U.S.C. § 1). The court stated,

> General business corporations do not, separate and apart from the action or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments, or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors. Religious exercise is, by its nature, one of those "purely personal" matters . . . which is not the province of a general business corporation.

Id.

The district court's reasoning misses the mark. Granted, corporations are "artificial beings, invisible, intangible, and existing only in contemplation of law." *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). But, any corporation, whether for-profit or non-profit, cannot take any action, or exercise *any* constitutional or statutory right, "separate and apart from the intention and direction of their

individual actors." *See Hobby Lobby*, 2012 U.S. Dist. LEXIS 164843, at *27. Under the district court's reasoning, even churches would not be protected by RFRA, which is a position rejected by the Supreme Court. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006) (upholding rights of church under RFRA).[8]/

In sum, Hobby Lobby and Mardel are persons under RFRA. They, and the Greens, are entitled to that law's protection. The district court reversibly erred in reaching a contrary conclusion.

II. The Mandate Substantially Burdens Plaintiffs' Religious Exercise.

In denying Plaintiffs' motion for a preliminary injunction, the district court determined that Plaintiffs were not likely to succeed on the merits of their RFRA claim. *Hobby Lobby*, 2012 U.S. Dist. LEXIS 164843 at *30, 41–42. This is a reversible error because the Mandate poses Plaintiffs with a stark

[8]/ The district court incorrectly stated that there is no indication that O Centro Espirita Beneficiente Uniao do Vegetal was incorporated. *Hobby Lobby*, 2012 U.S. Dist. LEXIS 164843, at 28 n.12. O Centro is a New Mexico corporation, as noted in the captions of the underlying cases. *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973 (10th Cir. 2004); *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236 (D.N.M. 2002).

and inescapable dilemma: either arrange and pay for abortion-inducing drugs and devices and related education and counseling, in violation of their religious beliefs, or face crippling penalties imposed by the federal government. As such, the Mandate presents a classic example of a substantial burden upon religious exercise, which triggers the application of strict scrutiny under RFRA.

RFRA's purposes are 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" and to "provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b).

The general rule under RFRA is that the federal government "shall 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), and the term "exercise of religion" "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §

2000cc-5(7)(A), *incorporated by* 42 U.S.C. § 2000bb-2(4). RFRA provides an exception to this general rule for instances in which the federal 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." 42 U.S.C. § 2000bb-1(b) (emphasis added). In other words, Defendants must satisfy strict scrutiny in explaining why they must apply the Mandate to Plaintiffs. *See O Centro*, 546 U.S. at 430 (noting that RFRA imposes the "strict scrutiny test").

Under RFRA, a law substantially burdens religious exercise when, among other things, a person is required to choose between (1) doing something his faith forbids or discourages (or not doing something his faith requires or encourages), and (2) incurring financial penalties, the loss of a government benefit, criminal prosecution, or other substantial harm. *See, e.g.*, *Sherbert*, 374 U.S. at 404.

For example, in *Sherbert*, the Supreme Court held that a state's denial of unemployment benefits to a Seventh-Day Adventist, whose religious

beliefs prohibited her from working on Saturdays, substantially burdened her exercise of religion. The regulation

> force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

374 U.S. at 404. Also, in *Yoder*, the Court held that a compulsory school-attendance law substantially burdened the religious exercise of Amish parents who refused to send their children to high school. The Court found the burden "not only severe, but inescapable," requiring the parents "to perform acts undeniably at odds with fundamental tenets of their religious belief." 406 U.S. at 218.

Here, Plaintiffs face an inescapable choice similar to the claimants in *Sherbert* and *Yoder*: they must either directly provide and pay for goods and services that they believe are immoral (and thereby commit an immoral act) or suffer severe penalties for non-compliance with the Mandate. The Mandate is akin to the hypothetical "fine imposed against appellant for her Saturday worship" referenced in *Sherbert*, 374 U.S. at 404, and, as in *Yoder*,

the Mandate requires Plaintiffs "to perform acts undeniably at odds with fundamental tenets of their religious belief." 406 U.S. at 218. Thus, contrary to the district court's decision, the Mandate places substantial pressure on Plaintiffs to take actions that violate their religious beliefs, which renders their religious exercise—refraining from immoral acts—effectively impracticable.

This lawsuit is *not* based upon an objection to something that *an employee* may do; rather, the Mandate *requires Plaintiffs to do something* that they believe is gravely immoral: directly arrange for, pay for, and provide coverage for objectionable goods and services. As the district court in *Tyndale House Publishers v. Sebelius* correctly noted in a similar context, "[*b*]*ecause it is the coverage*, not just the use, *of the contraceptives at issue to which the plaintiffs object*, it is irrelevant that the use of the contraceptives depends on the independent decisions of third parties." 2012 U.S. Dist. LEXIS 163965, at *44 (D.D.C. Nov. 16, 2012) (emphasis added).

Similarly, a motions panel of the Seventh Circuit properly explained, in granting an injunction pending appeal: "The religious-liberty violation at

issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services." *Korte v. U.S. Dep't of Health & Human Servs.*, 2012 U.S. App. LEXIS 26734, at *10 (7th Cir. Dec. 28, 2012).

Furthermore, the district court's holding that the burden imposed upon Plaintiffs' religious exercise is insubstantial also conflicts with the Supreme Court's decision in *Thomas v. Review Board*, 450 U.S. 707 (1981). There, a Jehovah's Witness was denied unemployment benefits because he quit his job after he was transferred to a department that produced tanks for the military. *Id.* at 710. His religious beliefs "specifically precluded him from producing or directly aiding in the manufacture of items used in warfare." *Id.* at 711. In holding that the claimant's religious exercise was substantially burdened by the denial of unemployment benefits, the Court explained:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith . . . thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. *While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial*.

Id. at 717-18 (emphasis added).

The claimant's religious objection in *Thomas* is analogous to Plaintiffs' religious objection here. As in *Thomas*, Plaintiffs' religious faith dictates that the direct facilitation and encouragement of immoral behavior is prohibited. The substantiality of the burden in *Thomas* was not negated by the independent decisions of various individuals as to whether and how the objectionable weapons would be used. Likewise, the substantiality of the burden that the Mandate imposes upon Plaintiffs is not dependent upon an employee's decision whether to use the objectionable goods and services that Plaintiffs are required to make readily available to them without cost-sharing.

Just as the denial of unemployment benefits in *Thomas* "put[] substantial pressure on [the claimant] to modify his behavior and to violate his beliefs" by participating in the manufacture of objectionable goods, the significant penalties for non-compliance with the Mandate put substantial pressure on

Plaintiffs to modify their behavior and violate their beliefs by directly facilitating the provision of objectionable goods and services.[9]/

III. There Is No Business Exception Under RFRA.

As explained previously, RFRA protects "a person's exercise of religion," 42 U.S.C. § 2000bb-1(a), and a corporation is a "person" for purposes of federal law where, as here, the term is not otherwise defined and the context does not require a different reading of the term. Hobby Lobby and Mardel are no less substantially burdened by the Mandate than a non-profit corporation would be that is also run in accordance with the same religious principles.

Even assuming *arguendo* that Hobby Lobby and Mardel are incapable of engaging in religious exercise, the Greens have independent claims of their

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[9]/ Also, Plaintiffs' religious objection is entirely different from an objection to how employees choose to spend their salaries. Paying money *with no strings attached* as compensation for an employee's work, which the employee may decide to save, donate, or spend on one of a thousand different goods or services, is completely different from Plaintiffs being forced to enter a contract and pay money for the express purpose of making *a specific good or service that they morally object to* readily available to others without cost-sharing.

own since the Mandate will prevent them from continuing to run their family companies pursuant to the tenets of their Christian faith and will require them, under pain of penalty, to violate their faith. Moreover, any penalties the companies have to pay for non-compliance with the Mandate will have a direct financial impact on the Greens. As such, the Mandate substantially burdens the religious exercise of the Greens and their companies. *See Korte*, 2012 U.S. App. LEXIS 26734, at *8–9; *cf. EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 319 (4th Cir. 2008) ("Free religious exercise would mean little if restricted to places of worship or days of observance, only to disappear the next morning at work.").

Business owners who operate their businesses in accordance with religious principles do not consent to the imposition of any and all substantial burdens upon their religious exercise by entering the commercial marketplace. In *United States v. Lee*, 455 U.S. 252, 261 (1982), for example, the Supreme Court held that the requirement to pay social security taxes substantially burdened a for-profit Amish employer's religious exercise. The Court held that "[b]ecause the payment of the taxes

or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights." *Id*. at 257. Although the Court noted in the context of applying strict scrutiny that religious adherents who enter the commercial marketplace do not have an *absolute* right to receive a religious exemption from *all* legal requirements that conflict with their faith, *id*. at 261, the Court's conclusion that there was a substantial burden and its application of strict scrutiny illustrates that the government does not have *carte blanche* to substantially burden the religious exercise of business owners.

Under the district court's reading of RFRA, a business operated with religious values, like Hobby Lobby and Mardel, would be foreclosed from ever challenging a law that imposes a substantial burden on religious exercise, no matter how extreme, and no matter how trivial the government's asserted interests. For example, a kosher deli would have no possible claim against a mandate forcing it, under pain of penalty, to sell pork, and a physicians' practice operated by pro-life doctors would have no possible claim against a mandate forcing it, under pain of penalty, to

perform abortions, regardless of how attenuated those mandates were to the protection of any important, let alone compelling, governmental interest.

To be clear, RFRA does not give businesses an unbounded right to ignore anti-discrimination laws, refuse to pay payroll taxes, violate OSHA requirements, etc. in the name of religious freedom. Any such claims—assuming a substantial burden were present—should be resolved based on whether applying the law at issue to the claimant satisfies strict scrutiny, *not* on the grounds that the employer could *never* have its religious exercise substantially burdened. Thus, the district court's conclusion that RFRA categorically excludes certain employers, like Plaintiffs, whose religious tenets dictate that some action is required or forbidden by their faith is clearly erroneous.

IV. Applying The Mandate To Plaintiffs Does Not Withstand Strict Scrutiny.

Because the district court held that the Mandate does not substantially burden Plaintiffs' religious exercise, it did not apply RFRA's strict scrutiny test. This test, which requires "the most rigorous of scrutiny," *Church of*

Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993), "is the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

When the Supreme Court applied strict scrutiny in both *Sherbert* and *Yoder*, it "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 431. It is therefore not enough for the government to describe a compelling interest in the abstract or in a categorical fashion; the government must demonstrate that the interest "would be adversely affected by granting an exemption" to the religious claimant. *Id.*

1. The government cannot demonstrate a compelling need to apply the Mandate to Plaintiffs.

Just two years ago, the Supreme Court described a compelling interest as a "high degree of necessity," noting that "[t]he State must specifically identify an 'actual problem' in need of solving, and the curtailment of [the asserted right] must be actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738, 2741 (2011) (citations omitted). The

"[m]ere speculation of harm does not constitute a compelling state interest." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 543 (1980).

While recognizing "the general interest in promoting public health and safety," the Court has held that "invocation of such general interests, standing alone, is not enough." *O Centro*, 546 U.S. at 438. The government must demonstrate "some substantial threat to public safety, peace, or order" (or an equally compelling interest) that would be posed by exempting the claimant. *Yoder*, 406 U.S. at 230. In this context, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Sherbert*, 374 U.S. at 406. Also, "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (internal quotation marks omitted).

Here, Defendants have proffered two governmental interests in support of the Mandate: health and gender equality. 77 Fed. Reg. 8725, 8729. What radically undermines the government's claim that the Mandate is needed to address a compelling harm to its asserted interests, however, is the

massive number of employees, tens of millions in fact, whose employers are not subject to the Mandate and whose health and equality interests are left untouched by the Mandate. *See Newland v. Sebelius*, 2012 U.S. Dist. LEXIS 104835, at *23 (D. Colo. July 27, 2012); *Tyndale House Publ'rs*, 2012 U.S. Dist. LEXIS 163965, at *57–61.

For example, Defendants cannot sufficiently explain how their asserted interests can be of the highest order in this context when the Mandate does not apply to plans grandfathered under the Affordable Care Act. Grandfathered plans have a right to permanently maintain their grandfathered status (and thus to permanently ignore the Mandate). *See, e.g.*, 42 U.S.C. § 18011 ("Preservation of *right to maintain* existing coverage") (emphasis added); 45 C.F.R. § 147.140 (same); Cong. Research Serv., RL 7-5700, *Private Health Insurance Provisions in PPACA* (May 4, 2012) ("Enrollees could continue and renew enrollment in a grandfathered plan *indefinitely*.") (emphasis added).

The district court in *Newland v. Sebelius* found, based on government estimates, that "*191 million* Americans belong to plans which may be

grandfathered under the [Affordable Care Act]," 2012 U.S. Dist. LEXIS 104835, at *4 (emphasis added), and the government has estimated that "*98 million* individuals will be enrolled in grandfathered group health plans in 2013." 75 Fed. Reg. 41726, 41732 (emphasis added). This broad exemption from the Mandate leaves appreciable damage to the government's asserted interests untouched and indicates the lack of any compelling need to apply the Mandate to Plaintiffs in violation of their consciences. *See Newland*, 2012 U.S. Dist. LEXIS 104835, at *23 ("[T]his massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs."); *Tyndale House Publ'rs*, 2012 U.S. Dist. LEXIS 163965, at *61 ("[C]onsidering the myriad of exemptions . . . the defendants have not shown a compelling interest in requiring the plaintiffs to provide the specific contraceptives to which they object."); *Am. Pulverizer*, 2012 U.S. Dist. LEXIS 182307, at *14 (explaining that the significant exemptions to the Mandate "undermine any compelling interest in applying the preventative coverage mandate to Plaintiffs").

In addition, although grandfathered plans have a right to indefinitely ignore the Mandate, they must comply with other provisions of the Affordable Care Act.[10]/ The *government's decision* to impose the Affordable Care Act's prohibition on excessive waiting periods on grandfathered plans, for example, but not require them to comply with the Mandate, indicates that the *government itself* does not think the Mandate is necessary to protect interests of the highest order. *See Lukumi*, 508 U.S. at 547.

Defendants also cannot explain how there is a compelling need to apply the Mandate to Plaintiffs when employers with fewer than fifty full-time employees (employing millions of individuals)[11]/ can avoid the Mandate entirely by not providing insurance.

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[10]/ For a summary of which Affordable Care Act provisions apply 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*, http://www.dol.gov/ebsa/pdf/grandfatherregtable.pdf (last visited Feb. 11, 2013).

[11]/ More than twenty million individuals are employed by firms with fewer than twenty employees. *Statistics about Business Size (including Small Business) from the U.S. Census Bureau*, http://www.census.gov/econ/smallbus.html (last visited Feb. 11, 2013).

With respect to the interests offered in support of the Mandate, there is no principled difference between an employer with fifty or more full-time employees that is subject to the Mandate, such as Hobby Lobby or Mardel, and an employer with forty-nine full-time employees that can avoid the Mandate without penalty by not providing an employee health plan. This further illustrates that the Mandate is not a necessary means of protecting any compelling governmental interest. *See O Centro*, 546 U.S. at 432–37 (granting relief under RFRA to a church to allow its approximately 130 members to use a Schedule I drug in their religious ceremonies because the government allowed hundreds of thousands of Native Americans to use a different Schedule I drug in their religious ceremonies).

Furthermore, the government has failed to meet its burden of demonstrating a "high degree of necessity" for the Mandate, that there is "an 'actual problem' in need of solving," and that substantially burdening Plaintiffs' religious exercise is "actually necessary to the solution." *Brown*, 131 S. Ct. at 2738. For example, according to a recent study, cost is not a prohibitive factor to contraceptive access. Among women currently not

using birth control, only 2.3% said it was due to birth control being "too expensive," and among women currently using birth control, only 1.3% said they chose their particular method of birth control because it was "affordable."[12]/

Even if one assumed *arguendo* that cost was a prohibitive factor to contraceptive access, there is no evidence that substantially burdening Plaintiffs' religious exercise by enforcing the Mandate is *actually necessary* (*i.e.*, that none of the various less restrictive alternatives discussed in the next section of this brief would be sufficient). *See Brown*, 131 S. Ct. at 2738; *cf. Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) ("The Government simply has not provided sufficient justification here. If the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try.").

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[12]/ *Contraception in America, Unmet Needs Survey, Executive Summary*, http://www.contraceptioninamerica.com/downloads/Executive_Summary.pdf at 14 (Fig. 10), 16 (Fig. 12) (2012) (last visited Feb. 11, 2013).

In sum, Defendants cannot demonstrate a compelling need to require Plaintiffs to comply with the Mandate while employers of millions of individuals nationwide are exempt from the Mandate. Although health and equality are important interests in the abstract, exempting Plaintiffs from the Mandate poses no compelling threat to those interests in actuality.

2. The Mandate is not the least restrictive means of achieving any compelling governmental interest.

The existence of a compelling interest in the abstract does not give the government *carte blanche* to promote that interest through any regulation of its choosing particularly where, as here, a fundamental right is substantially burdened. *See, e.g., United States v. Robel*, 389 U.S. 258, 263 (1967) (noting that compelling interests "cannot be invoked as a talismanic incantation to support any [law]"). Even where, for example, an interest as compelling as the protection of children is the object of government action, "the constitutional limits on governmental action apply." *Brown*, 131 S. Ct. at 2741. If the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly

stifles the exercise of fundamental personal liberties." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983).

Assuming *arguendo* that the interests proffered by Defendants were compelling in this context, the Mandate is not the least restrictive means of furthering those interests. Defendants could directly further their interest in providing free access to contraceptive services in a myriad of ways without violating Plaintiffs' consciences. Indeed, of the various ways the government could achieve its interests, it has chosen perhaps the *most burdensome* means for non-exempt employers with religious objections to contraceptive services, such as Plaintiffs.

For example, the government could (1) offer tax deductions or credits for the purchase of contraceptive services, (2) expand eligibility for already existing federal programs that provide free contraception, (3) allow citizens who pay to use contraceptives to submit receipts to the government for reimbursement, or (4) provide incentives for pharmaceutical companies that manufacture contraceptives to provide such products to pharmacies, doctor's offices, and health clinics free of charge. Each of these options

would directly further Defendants' proffered interests without substantially burdening Plaintiffs' religious exercise, and Defendants cannot prove that *all* of these options would be insufficient or unworkable.

To illustrate, the federal government already provides low-income individuals with free access to contraception through Title X and Medicaid funding. It could raise the income cap to make free contraception available to more Americans.[13]/ *See Newland*, 2012 U.S. Dist. LEXIS 104835, at *26–27 ("'[T]he government already provides free contraception to women.' . . . 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."); *see generally Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 800 (1988) (explaining that a more narrowly

[13]/ In 2010, public expenditures for family planning services totaled $2.37 billion, and Title X of the Public Health Service Act, devoted specifically to supporting family planning services, contributed $228 million during this same year. Guttmacher Institute, *Facts on Publicly Funded Contraceptive Services in the United States*, May 2012, http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited Feb. 11, 2013).

tailored approach to requiring fundraisers to disclose financial details during a solicitation would be for the State "itself [to] publish the detailed financial disclosure forms it requires professional fundraisers to file").

Even if Defendants claim these options would not be as effective as the Mandate, "a court should not assume a plausible, less restrictive alternative would be ineffective." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 824 (2000). If a less restrictive alternative would serve the government's purposes, "the legislature must use that alternative." *Id.* at 813.

In sum, Plaintiffs have shown a substantial likelihood of success on the merits on their RFRA claim, and the district court reversibly erred in concluding otherwise.

CONCLUSION

For the reasons stated above, amicus curiae respectfully requests that this Court reverse the decision of the district court and remand this case with instructions that the district court enter a preliminary injunction in favor of Plaintiffs.

Respectfully submitted on this 15th day of February, 2013,

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CERTIFICATE OF COMPLIANCE WITH RULE 32

In reliance on the word court feature of the word processing system used to prepare this brief, Microsoft Word 2007, this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,698 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), which is no more than one-half the maximum length of 14,000 words authorized by Fed. R. App. P. 29(d) and 32(a)(7)(B)(i).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in Palatino Linotype 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I certify that on February 15, 2013, I caused the foregoing brief to be served electronically via this Court's electronic filing system on the following counsel of record for the parties who are registered in the system:

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ATTACHMENT

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Amy J. St. Eve	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	12 C 6756	DATE	1/3/2013
CASE TITLE	Triune Health Group, Inc vs. United States Dept of Health & Human Services et al		

DOCKET ENTRY TEXT

The Court grants Plaintiffs' motion for a preliminary injunction [36].

■[For further details see text below.] Notices mailed by Judicial staff.

STATEMENT

Before the Court is Plaintiffs' motion for a preliminary injunction. (R. 36, Inj. Mot.) Plaintiffs filed a memorandum of law supporting both their motion for preliminary injunction and in opposition to Defendants' motion to dismiss. (R. 37, Inj. Mem.) The Court addresses only the preliminary injunction at this time. For the following reasons, the Court grants Plaintiffs' motion.

BACKGROUND

"Plaintiffs[] Christopher and Mary Anne Yep are ardent and faithful adherents of the Roman Catholic religion." (R. 21, Amend. Compl. ¶ 2.) The Yeps own and control Plaintiff Triune Health Group, Inc., a for-profit corporation. (*Id.* ¶¶ 3, 12.) Triune is a corporation that specializes in facilitating the re-entry of injured workers into the workforce. (*Id.* ¶ 19.)

The 2010 Patient Protection and Affordable Care Act ("the PPACA") included regulations mandating that employers include in their group health benefit plans coverage for preventative care for women that Plaintiffs deem "wholly at odds with their religious and moral values and sincere religious beliefs and sacred commitments." (*Id.* ¶ 5); *see also* 42 U.S.C. § 300gg-13(a)(4). Plaintiffs specifically believe that abortion, contraception (including abortifacients), and sterilization are "gravely wrong and sinful." (*Id.* ¶ 33.) "Plaintiffs believe that providing their employees with coverage for drugs and services that facilitate such immoral practices constitutes cooperation with evil that violates the laws of God." (*Id.* ¶ 34.) Under the PPACA's mandate, however, Triune would be required to provide a group health plan covering the full range of Food and Drug Administration approved contraceptive methods, sterilization procedures, and to provide education and counseling with respect to these matters for all women with reproductive capacity. (*Id.* ¶ 40); *see also* 42 U.S.C. § 300gg-13(a)(4); 45 C.F.R. § 147.130.

Courtroom Deputy Initials:	KF

The PPACA provides exemptions for religious employers and exempts some organizations through a "grandfathering" provision, however, Triune does not qualify for any exemption. (*Id*. ¶¶ 43-45.) Triune's health plan was due for renewal on January 1, 2013. (*Id*. ¶ 47.) According to Plaintiffs, they, therefore, must "either choose to comply with the federal mandate's requirements in violation of their religious beliefs, or pay ruinous fines that would have a crippling impact on their business and force them to shut down." (*Id*. ¶ 53.) As a result, Plaintiffs allege that the PPACA's mandate violates the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq* ("RFRA"), the First and Fifth Amendments of the United States Constitution, and the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*.

Triune's current group health plan includes coverage for contraceptives, sterilization, and abortion. (Inj. Mem. at 9.) According to Plaintiffs, this coverage is an error and contrary to what Plaintiffs want based on their religious beliefs. (*Id*.) Plaintiffs have been unable to find a group healthcare policy that comports with both the PPACA and their religious beliefs. (*Id*. at 9-10.) Plaintiffs, therefore, seek an injunction from the PPACA's mandate so that they may purchase an insurance policy that excludes coverage for drugs and services to which they object based on their religious convictions. (Amend. Compl. ¶ 48.)

LEGAL STANDARD

"To obtain a preliminary injunction, the moving party must demonstrate a reasonable likelihood of success on the merits, no adequate remedy at law, and irreparable harm absent the injunction." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dept. Health,* 699 F.3d 962, 972 (7th Cir. 2012) (citing *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006); *Joelner v. Village of Washington Park, Ill.*, 378 F.3d 613, 619 (7th Cir. 2004)). "If the moving party makes this threshold showing, the court 'weighs the factors against one another, assessing whether the balance of harms favors the moving party or whether the harm to the nonmoving party or the public is sufficiently weighty that the injunction should be denied.'" *Alvarez*, 679 F.3d at 589 (quoting *Ezell v. City of Chi*., 651 F.3d 684, 694 (7th Cir. 2011)).

ANALYSIS

The Seventh Circuit recently granted a preliminary injunction pending appeal in favor of a for-profit employer challenging the PPACA's preventative care mandate on the same grounds as presented here. *See Korte et al. v. Sebelius et al*., No. 12-3841 (7th Cir. Dec. 28, 2012). The plaintiffs in *Korte*, as here, challenge the PPACA under the RFRA, the First and Fifth Amendments, and the Administrative Procedure Act. Similar to Triune and the Yeps, the plaintiffs in *Korte* discovered this summer that the company's health insurance plan covered women's health services that contradict the owners' deeply-held religious beliefs, and therefore sought an injunction from the application of the PPACA in order to enroll in a conscience-compliant plan on January 1, 2013. The Seventh Circuit concluded that the *Korte* plaintiffs established a reasonable likelihood of success on the merits and irreparable harm, with the balance of harms tipping in their favor. In light of this binding precedent, the Court grants Triune's motion for a preliminary injunction.