No. 12-6294

In the United States Court of Appeals for the Tenth Circuit

HOBBY LOBBY STORES, INC., MARDEL, INC., DAVID GREEN, BARBARA GREEN, STEVE GREEN, MART GREEN, AND DARSEE LETT,

Appellants—Movants,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, HILDA SOLIS, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY,

Appellees—Respondents.

On Appeal from the United States District Court for the Western District of Oklahoma

APPELLANTS' MOTION FOR INJUNCTION PENDING APPEAL

Luke W. Goodrich
S. Kyle Duncan
Mark L. Rienzi
Eric S. Baxter
Lori H. Windham
Adèle Auxier Keim
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K Street, N.W., Suite 220
Washington, D.C. 20007
(202) 349-7209
lgoodrich@becketfund.org
Attorneys for Appellant

Dated: November 20, 2012

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants make the following disclosure:

Hobby Lobby Stores, Inc. is a privately-held company that is wholly owned by trusts controlled by the Green family. No publicly-held corporation owns 10% or more of its stock.

Mardel, Inc. is a privately-held company that is wholly owned by trusts controlled by the Green family. No publicly-held corporation owns 10% or more of its stock.

Respectfully submitted,

s/ *Luke W. Goodrich*

Luke W. Goodrich
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K Street, N.W., Suite 220
Washington, D.C. 20007
(202) 349-7209
lgoodrich@becketfund.org
Attorney for Appellant

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INTRODUCTION

Appellants engage in an undisputed exercise of religion: they refrain from providing insurance coverage for abortion-inducing drugs. Yet the government puts Appellants to an impossible choice: either give up the religious exercise, or pay millions in fines.

The trial court mistakenly denied Appellants' request for a preliminary injunction, finding that government imposition of crippling penalties is not a "substantial" enough pressure to justify protection for religious liberty. That error leaves Appellants exposed to the precise predicament religious liberty laws exist to prevent—enormous government pressure to violate their sincere religious beliefs. Appellants therefore need urgent relief from this Court in the form of an injunction pending appeal.

FACTUAL BACKGROUND

I. THE GREEN FAMILY AND HOBBY LOBBY

The facts of this case are not in dispute. Appellants are the Green family and the companies they own and operate: Hobby Lobby Stores, Inc. and Mardel, Inc. Verified Compl. ("VC") ¶¶ 18-24 (Ex. A). Founded by David Green in 1970, Hobby Lobby has grown from a small picture frame company into one of the nation's leading arts and crafts chains, operating some 514 stores in 41 states with over 13,000 employees. VC ¶¶ 2, 18, 32-36. David and his wife Barbara co-own Hobby Lobby and a chain of Christian bookstores known as Mardel, with their three children. VC ¶¶ 18-22, 36-38. The Green family operates Hobby Lobby and Mardel through a management trust. VC ¶¶ 38.

The Greens run Hobby Lobby according to their Christian faith. VC ¶¶ 39-52. As explained in Hobby Lobby's statement of purpose, the company is committed to

"[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." VC ¶ 42. Family members sign a Statement of Faith and a Trustee Commitment to conduct the businesses according to Christian religious beliefs. VC ¶ 38.

Appellants regularly engage in what can only be called exercises of religion. For example, Hobby Lobby takes out hundreds of full-page ads every Christmas and Easter celebrating the religious nature of the holidays, and inviting people to learn more about Jesus Christ. VC ¶ 47.[1] The company monitors merchandise, marketing, and operations to make sure all reflect Christian beliefs, and does not support anything they believe is immoral or harmful to others. VC ¶¶ 43-44. Chaplains, spiritual counseling, and religiously-themed financial management classes are available for employees. VC ¶ 51. And, as is well-known, the stores close on Sundays—at significant cost—to give employees a day of rest. VC ¶ 45.

Appellants also offer comprehensive self-funded employee health insurance. VC ¶ 52. Because of their beliefs about unborn human life, Appellants' prescription coverage excludes contraceptive devices that can cause abortion (such as IUDs) and pregnancy-terminating drugs like RU-486, Plan B and Ella. VC ¶¶ 53-54. Neither the district court nor the government questioned the sincerity of these religious beliefs, or the fact that the Greens have incorporated their faith into the fabric of their family businesses. Op. 5, 20.

[1] This year's latest holiday ad, which invites readers to "call Need Him Ministry at 1-888-NEED-HIM" if they "would like to know Jesus as Lord and Savior," can be found at http://www.hobbylobby.com/assets/pdf/holiday_messages/current_message.pdf.

II. THE HHS MANDATE

Federal regulations now mandate that employer health insurance include free coverage for all FDA-approved contraceptive drugs and sterilization methods. 42 U.S.C § 300gg-13(a)(4); 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011); VC ¶¶ 86-96. This mandate includes drugs and devices—such as Plan B, Ella and certain IUDs—that may prevent implantation of a fertilized egg in the womb. VC ¶ 95; Op. 2-3. The mandate is enforceable by government penalties, regulatory action, and private lawsuits. 26 U.S.C. §§ 4980H, 4980D; 29 U.S.C. §§ 1185d, 1132; VC ¶¶ 135, 144. Certain non-profit religious employers—essentially houses of worship under the Internal Revenue Code—are exempt from the mandate. *See* 45 C.F.R. § 147.130(a)(1)(iv)(B)(1)-(4); VC ¶ 123. Also exempt are "grandfathered" plans—that is, plans that have not undergone significant changes since 2010. 42 U.S.C. § 18011(a)(2); VC ¶ 68-70.[2]

III. THE MANDATE'S IMMINENT IMPACT ON APPELLANTS

The mandate takes effect against Hobby Lobby when its new plan year begins on January 1, 2013. *See* 42 U.S.C. § 300gg-13(b); 76 Fed. Reg. 46621, 46623; VC ¶¶ 121, 132. Consequently, in less than six weeks, Appellants must either violate their faith by covering abortion-causing drugs, or be exposed to severe penalties—including fines of up to $1.3 million per day, 26 U.S.C. § 4980D, annual penalties of about $26 million, § 4980H, and exposure to private suits. 29 U.S.C. §§ 1185d(a)(1), 1132; VC ¶¶ 134-44.

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[2] Appellees acknowledge that exempt grandfathered plans will cover tens of millions of people in the coming years. *See* Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans, *available at* http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html); http://www.census.gov/econ/smallbus.html.

The fast-approaching mandate has cast uncertainty on Appellants' ability to provide insurance for thousands of employees and their families in January—now less than six weeks away. VC ¶ 142. A lapse in coverage would be extremely serious for Appellants and these employees who depend on Appellants' insurance. VC ¶¶ 142-44.

IV. PROCEDURAL HISTORY

Appellants filed their complaint on September 12, 2012, challenging the mandate under the Religious Freedom Restoration Act (RFRA), the First Amendment, and the Administrative Procedure Act, Dkt. 1, and simultaneously moving for a preliminary injunction. Dkt. 6 (Ex. B); Dkt. 42 (Reply) (Ex. C). Appellants moved for expedited consideration, Dkt. 18, and the district court heard oral argument on November 1, 2€012. Based solely on legal conclusions, and without disputing any of Appellants' facts, the court denied the preliminary injunction on November 19, 2012. Dkt. 45 (Ex. D). Appellants filed their notice of appeal that same day.[3]

STANDARD

Under Rule 8 of the Federal Rules of Appellate Procedure, this Court[4] should grant an injunction pending appeal upon a showing of (1) substantial likelihood of success on

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[3] The district court had jurisdiction under 28 U.S.C. sections 1331 and 1361, and had authority to issue an injunction under 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. § 2000bb *et seq*. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291(a). Counsel for the government opposes this motion.

[4] Although a party "must ordinarily move first" for such relief "in the district court," *see* Fed. R. App. P. 8(a)(1)(C), that requirement is waived where going to the district court "would be impracticable," *see* Fed. R. App. P. 8(a)(2)(A)(i). Here, Appellants will be forced to either violate their religious convictions or pay fines of up to $1.3 million dollars *per day* beginning January 1, 2013—just six weeks from the filing of this motion. Briefing a motion and response in the district court would require at least twenty-one

appeal; (2) the threat of irreparable harm if the stay or injunction is not granted; (3) the absence of harm to opposing parties if the stay or injunction is granted; and (4) any risk of harm to the public interest. The district court made numerous errors in denying preliminary relief. Accordingly, for the reasons set forth more fully in the following section, this Court should grant Appellants' motion for a stay pending appeal.

ARGUMENT

I. THE DISTRICT COURT APPLIED THE WRONG INJUNCTION STANDARD.

As set forth in detail below, the trial court erred by improperly applying the relevant religious liberty law. When that law is properly applied, Appellants are entitled to a preliminary injunction under any standard. The trial court exacerbated its substantive error, however, by also applying the wrong preliminary injunction standard. The court should have applied this Court's "modified" preliminary injunction standard.

In *O Centro Espirita Beneficiente Uniao do Vegetal* v. *Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004), this Court—acting *en banc*—identified three types of "specifically disfavored" preliminary injunctions, none of which are at issue in this matter: (1) injunctions that "alter the status quo"; (2) "mandatory preliminary injunctions"; and (3)

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days. W.D. Okla. LCvR 7.1(g). This, plus time for filing a reply and awaiting the district court's order, would make it impossible to seek relief from this Court—if necessary—before the January 1 deadline. Considering the immediacy of the government's crippling penalties and religious exercise rights at stake, filing first in the district court is impracticable. *See Homans* v. *City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) (excusing requirement where First Amendment rights were at stake and harm was just weeks away and where "the district court would essentially make the same inquiry it made before"); *McClendon* v. *City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996) (waiving requirement where "the district court's resolve [was] demonstrated" by prior orders); *see also* Fed. R. App. P. 8(a)(2).

"preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." This case does not involve a disfavored injunction. The district court acknowledged that Appellants seek to "preserve the status quo," not alter it. Op. 7. Appellants are not seeking a "mandatory" preliminary injunction, which would "affirmatively require the [government] to act in a particular way." *Id*. at 979. Nor would the injunction Appellants seek grant them the permanent relief that would be available following trial. They seek only a temporary injunction pending appeal. Accordingly, an injunction should issue under the Court's "modified" standard for showing likelihood of success on the merits. *Id* at 975-76. "Under the modified test, a movant need only show 'questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation.'" *RoDa Drilling Co.* v. *Siegal*, 552 F.3d 1203, 1209 (10th Cir. 2009).

The district court held that the Appellants satisfied this modified standard. Op. 7 ("The court agrees with plaintiffs that the questions presented here are 'serious, substantial, difficult and doubtful."); *see also Newland* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 3069154, at *8 (D. Colo. July 27, 2012) (Kane, J.) (granting injunction against mandate to for-profit corporation under modified standard) (Ex. E).[5] Nevertheless, it ultimately declined to apply the modified standard on the ground that it should not apply "where a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme." Op. 7 (quoting *Nova Health Sys.* v.

[5] The district court's ruling in *Newland* is also on appeal before this Court. *See Newland* v. *Sebelius*, Case No. 12-1380 (filed Sept. 26, 2012).

Edmonson, 460 F.3d 1295, 1298 n.6 (10th Cir. 2006)). This was error. Here, there are two competing "statutory or regulatory schemes" at issue. RFRA protects Appellants' right to exercise their religion by not purchasing abortion-causing drugs, while the ACA would force them to purchase the drugs. Because there is—at minimum—public interest in enforcing both statutes, the fact that Appellants seek to enjoin a "statutory or regulatory scheme" should not have deprived the benefits of the modified standard.

Indeed, the facts of this case are a clear example of why the modified standard is needed. The significant harms facing Appellants are uncontested—no one disputes that they must violate their faith or pay crippling fines. In addition, the district court acknowledged that this case required it to navigate questions that are "serious, substantial, difficult, and doubtful," Op. 7, through "largely unchartered waters," Op. 12, and "treacherous terrain," Op. 20, with existing precedent that is "considerably less than crystal clear." Op. 26. Thus, applying the modified standard furthers the "primary purpose" of preliminary injunctions, which is to "preserve the . . . status quo" pending a final adjudications on the merits. *RoDa Drilling Co.*, 552 F.3d at 1208; *see also O Centro*, 389 F.3d at 1018 (McConnell, J., concurring) (stating "[a] particularly important category of cases where the status quo will often be determinative of whether a court should provide preliminary relief is challenges to the constitutionality of statutes," where the statute is "newly enacted, and its enforcement will restrict rights citizens previously had exercised and enjoyed"). For these reasons, the modified standard should apply.

Nevertheless, as set forth below, even under the heightened standard requiring a full showing of likelihood of success, Appellants are entitled to an injunction pending appeal.

II. APPELLANTS ARE LIKELY TO SUCCEED ON THEIR RFRA[6] CLAIM.

A. Appellants are likely to prove that their sincere religious exercise is substantially burdened by the mandate.

RFRA broadly defines "religious exercise" to "include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" 42 U.S.C. § 2000bb-2(4), *as amended by* 42 U.S.C. § 2000cc-5(7)(A); *see also Kikumura* v. *Hurley*, 242 F.3d 950, 960 (10th Cir. 2001). The district court accepted that the Green family engages in a religious exercise by refusing to cover abortion-causing drugs in their self-funded health plan. Op. 10, 20. There was thus no question that the Green family engages in "religious exercise" protected by RFRA.

The court's decision turned solely on the "critical question," Op. 20, of whether the mandate "substantially burdens" that religious exercise. But the district court erred as a matter of law in this analysis by creating a novel "substantial burden" standard from stray language in a widely-criticized Seventh Circuit decision, one which contradicts governing Tenth Circuit precedent and introduces a distinction between "direct" and "indirect" burdens long rejected by the Supreme Court.

The substantial burden analysis should have been easy. The district court accepted as "obvious" and "unquestionable" the principle that the Green family exercises religion

[6] The district court also erred in denying an injunction with respect to Appellants' Free Exercise challenge. Op. 9-16. Due to space constraints, and because the RFRA challenge is independently sufficient to grant the injunction pending appeal, the Free Exercise claims are not discussed in this motion. Appellants intend to address the Free Exercise claims during briefing on the appeal.

under the Free Exercise Clause and RFRA.[7] The court also accepted as sincere the Greens' belief that they cannot "deliberately provid[e] insurance coverage for . . . abortion-causing drugs and devices," Op. 5, 20, and emphasized that "it is not the province of the court to tell the plaintiffs what their religious beliefs are," Op. 21. Moreover, the court recognized that the mandate "burdens, at least indirectly" the Greens' exercise of those beliefs. Op. 20 (citing *Abdulhaseeb* v. *Calbone*, 600 F.3d 1301, 1314 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 469 (2010)).

From these premises, the conclusion should have followed that the mandate substantially burdens the Greens' religious exercise of not covering abortion drugs in their self-funded insurance. The mandate "requires [the Greens'] participation in an activity prohibited by a sincerely held religious belief," *Abdulhaseeb*, 600 F.3d at 1315, which *alone* constitutes a substantial burden under Tenth Circuit precedent.[8] And, by penalizing their businesses with crippling fines for refusing to give in, the mandate *additionally* "places substantial pressure on [the Greens] … to engage in conduct contrary to a sincerely held religious belief." *Id.* Indeed, the very *point* of imposing these fines is presumably to "place substantial pressure" on business owners to make them provide the required drugs. On either ground recognized by this Circuit—forced participation or substantial pressure—Appellants have shown a substantial burden under RFRA.

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[7] Op. 10 (finding "[a]s to the Greens, the answer . . . is obviously yes" to the question whether "the particular plaintiffs have constitutional 'free exercise' rights"); *id.* at 17 (concluding "[t]he Greens are unquestionably 'persons' under [RFRA]").

[8] *Abdulhaseeb* is a RLUIPA case, but the district court correctly recognized that a substantial burden is the same under RLUIPA or RFRA. Op. 21 n.16.

The district court avoided this straightforward conclusion by creating a new substantial burden standard. Citing the Seventh Circuit's decision in *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("*CLUB*"), the court wrongly limited a "substantial" burden to one that "operates *directly and primarily* on the individual's religious exercise." Op. 22-23 (emphasis added). The court reasoned that, by contrast, the mandate's burden on the Greens is "indirect and attenuated," because it applies to their businesses and not to them personally, and, moreover, is triggered only by an employee's decision to use abortion drugs. Op. at 23 (citing *O'Brien* v. *HHS*, __ F.Supp.2d __, 2012 WL 4481208, at *6 (E.D. Mo. Sept. 28, 2012)).

The district court's conclusion was wrong both on the law and on the undisputed facts. First, the "directly and primarily" standard from *CLUB* contradicts Tenth Circuit law. The proper Circuit standard is expressed by *Abdulhaseeb*, which finds a substantial burden when a law commands participation in activities forbidden by sincere belief (which the mandate does), *or* when it substantially pressures participation (which the mandate also does). *See* 600 F.3d at 1315.[9] *Abdulhaseeb* recognizes no distinction between "direct" and "indirect" burdens.[10]

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[9] The district court mistakenly thought the Tenth Circuit "cited *[CLUB]* with approval" for its problematic standard. Op. 23. It has never done so. The Tenth Circuit's opinion in *Grace United Methodist Church* v. *City of Cheyenne*, 451 F.3d 643, 661 (10th Cir. 2006) (citing *CLUB*, 342 F.3d at 760-61)—the lower court's sole support for this proposition, Op. 23—merely cited *CLUB* in passing for the principle that RLUIPA's definition of substantial burden tracks the definition under RFRA jurisprudence.

[10] At least three Circuits have expressly rejected the *CLUB* standard: *see Adkins* v. *Kaspar*, 393 F.3d 559, 568-70 (5th Cir. 2004) (declining to adopt *CLUB*); *Guru Nanak Sikh Soc'y* v. *Cnty. of Sutter*, 456 F.3d 978, 988 & n.12 (9th Cir. 2006) (same); *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (same). And the

Second, the Supreme Court has long rejected any distinction between "direct" and "indirect" burdens in evaluating whether regulations infringe religious exercise. In *Sherbert* and *Thomas*, the plaintiffs were not directly commanded to violate their beliefs but were penalized indirectly through loss of unemployment benefits. *See, e.g.*, *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963) (noting that burden was "only an indirect result" of unemployment laws). Yet, in both cases, the Supreme Court rejected the government's argument that "the burden upon [plaintiffs'] religion … is only the indirect consequence of public welfare legislation." *Thomas* v. *Review Bd.*, 450 U.S. 707, 717 (1981); *see id.* (noting that "a similar argument was made and rejected in *Sherbert*"). As *Thomas* explained, "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." 450 U.S. at 718. And it must not be forgotten that the mandate's compulsion of the Greens takes the form—not merely of indirect pressure such as ineligibility for a government benefit—but of the direct imposition of ruinous fines, which *Sherbert* identified as the paradigm substantial burden. *See* 374 U.S. at 404 (making appellant choose between observing Sabbath or receiving benefits "puts the same kind of burden upon the free exercise of religion *as would a fine imposed against appellant for her Saturday worship*") (emphasis added).

Finally, even under the district court's flawed test, the mandate burdens the Greens' religious exercise in a "direct and personal" manner. Op. 23. The Greens alleged—and

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Seventh Circuit *itself* has significantly limited *CLUB*. *See Saints Constantine and Helen Greek Orth. Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 899-900 (7th Cir. 2005) (distinguishing *CLUB*); *see also World Outreach Conf. Ctr.* v. *City of Chicago*, 591 F.3d 531, 537-38 (7th Cir. 2009) (analyzing substantial burden under *Constantine* standard).

neither the court nor the government disputed—that they founded and operate Hobby Lobby and Mardel to proclaim and promote their personal religious faith. The family—who alone decide how the businesses reflect that faith—sign a Statement of Faith and Trustee Commitment obligating them to "honor God with all that has been entrusted to them" and to "use the Green family assets to create, support, and leverage the efforts of Christian ministries." VC ¶ 38. Their beliefs are exercised through the businesses in numerous, concrete, and public ways. They make chaplains available to employees, VC ¶ 51, give millions from profits to fund ministries, VC ¶ 6, and buy hundreds of religious ads every Christmas and Easter. VC ¶ 47. They monitor merchandise and avoid allowing their property to support activities they believe to be immoral. VC ¶ 6, 43-44. Part of those religious practices is the family's decision to exclude abortion-causing drugs from their self-funded insurance. VC ¶¶ 54-55.

Forcing the Greens to cover such drugs is just as "direct and personal" an imposition on their faith, Op. 23, as would be a mandate to sell alcohol in their stores, VC ¶ 44, to stock risqué greeting cards, VC ¶ 43, or to stop proclaiming in Christmas and Easter ads that Jesus is "Lord and Savior." VC ¶ 47; *see* http://www.hobbylobby.com/holiday_messages/holiday_messages.cfm (last visited November 20, 2012). Thus, even if there were a distinction between "direct" and "indirect" burdens (and there is not), on the undisputed facts, the mandate's command to insure abortion drugs is a direct burden. The fact that the mandate is backed by fines of *over $1.3 million per day* means that the burden is not only direct, but crippling. *Cf. Wisconsin* v. *Yoder*, 406 U.S. 205, 208, 218 (1972) (*five* dollar fine on religious practice was "not only severe, but inescapable").

By denying that the Greens' religious exercise could be substantially burdened by regulation of their closely-held businesses, the district court overlooked two squarely on-point cases from the Ninth Circuit. That Circuit has twice confirmed that "a corporation has standing to assert the free exercise rights of its owners." *Stormans, Inc.* v. *Selecky*, 586 F.3d 1109, 1120-21 (9th Cir. 2009) (relying on *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619-20 (9th Cir. 1988)). While *Stormans* and *Townley* declined to decide whether the corporations *themselves* could exercise religious rights, Op. 19 n.13,[11] they squarely recognized that the businesses could assert their owners' rights. Here, indeed, Appellants' case is easier than *Stormans* and *Townley*, because the Greens *themselves* have sued on their own behalf as owners, trustees, and officers of the companies.

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[11] The district court's holding that Hobby Lobby is incapable of exercising religion is legally unsupported and factually wrong. The court simply declared Hobby Lobby to be "secular" and therefore incapable of exercising religion. Op. at 11-12. But the court offers no support for the notion that a corporation cannot exercise religion, or for its implicit holding that only non-profit corporations can do so. Nor does the court offer any support for its *ipse dixit* that corporations cannot engage in religious exercise as "persons" under RFRA. *But see* 1 U.S.C. § 1. Hobby Lobby takes out advertisements encouraging people to learn more about Jesus Christ, provides spiritual counseling, and is openly operated upon declared Christian principles. These are obviously religious exercises.

In any case, the Supreme Court has rejected this type of categorical approach to limiting constitutional rights. *See First Nat. Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776 (1978) ("The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead the question must be whether [the challenged law] abridges expression that the First Amendment was meant to protect."); *Citizens United* v. *Federal Election Comm'n*, 130 S. Ct. 876, 900 (2010) ("Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster"); *id*. at 906 (even between media and non-media corporations, "differential treatment cannot be squared with the First Amendment"). Thus, while this Court can enter an injunction solely on the basis of the Greens' interests, Hobby Lobby and Mardel likewise engage in religious exercise and are entitled to protection from government compulsion in violation of RFRA and the First Amendment.

Further, the court also glossed over the fact that the Supreme Court has twice allowed commercial proprietors to assert religious exercise claims against regulations impacting their businesses. *See United States* v. *Lee*, 455 U.S. 252, 256-57 (1982) (recognizing that an Amish employer could object to paying his share of social security taxes); *Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961) (allowing Jewish merchants to challenge a Sunday closing law because it "operate[d] so as to make the practice of their religious beliefs more expensive"). The court merely said that "neither case appears to have involved a corporation and, in any event, it is clear that the religious beliefs that were allegedly being interfered with were those of the owners." Op. 18-19 n.13. But neither case indicated that the *form* of the plaintiffs' business had any bearing on whether they properly asserted a substantial burden caused by regulations impacting their businesses. *See, e.g.*, *Braunfeld*, 366 U.S. at 601 (observing simply that plaintiffs were "merchants in Philadelphia who engage[d] in the retail sale of clothing and home furnishings"). And the fact that *Lee* and *Braunfeld* both allowed personal religious claims by business *owners* is precisely the point—the Greens bring the same kind of claims here.

Finally, the district court failed to account for the fact that, in identical litigation, three other federal district courts have already granted preliminary injunctions on the premise that the mandate is likely to substantially burden the religious exercise of business owners under RFRA. *See Newland*, 2012 WL 3069154, at *8-9; *Legatus* v. *Sebelius*, __ F. Supp. 2d ___, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); *Tyndale House Pub., Inc.* v. *Sebelius*, Doc. No. 27, No. 12-cv-1635 (D.D.C. Nov. 16, 2012) (Ex. F). The *Tyndale* decision is most instructive on the proper treatment of the issue. First, on the

strength of *Stormans* and *Townley*, Judge Reggie Walton held that, where the beliefs of a closely-held for-profit corporation and its owners are "indistinguishable," the corporation itself "has 'standing to assert the free exercise rights of its owners.'" *Tyndale*, slip op. at 13-14 (quoting *Stormans*, 586 F.3d at 1120). Second, Judge Walton ruled that the mandate "places the plaintiffs in the untenable position of choosing either to violate their religious beliefs … or to subject their business to the continual risk of the imposition of enormous penalties for its noncompliance." *Tyndale*, slip op. at 22. Judge Walton therefore concluded that "[s]uch a threat to the very continued existence of the plaintiffs' business necessarily places substantial pressure on the plaintiffs to violate their beliefs" and therefore "substantially burdens [their] religious exercise." *Id.* at 22-23. The *Tyndale* plaintiffs, it should be noted, faced the prospect of $26,000 in fines per day; Appellants here face over $1.3 *million* per day. VC ¶ 144; *see* Compl. ¶¶ 71, 96, *Tyndale House Pubs. v. Sebelius*, No. 1:12-cv-1635 (D.D.C. Oct. 2, 2012).[12]

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[12] The district court relied instead on the erroneous analysis in *O'Brien*. *See* Op. 23 (reasoning that the burden is "indirect and attenuated" because the Greens merely contribute funds to a group plan which—through "independent decisions" by employees—"might … subsidize *someone else's* participation in an activity … condemned by the plaintiff's religion") (quoting *O'Brien*, 2012 WL 4481208, at *6) (emphasis in original). But *O'Brien*, which is currently on appeal to the Eighth Circuit, is distinguishable: the plaintiffs there had a group plan separately administered by an insurance company, whereas the Greens directly fund their own insurance plan. *See, e.g.*, *Tyndale*, slip op. at 24; *see* Notice of Appeal, *O'Brien* v. *U.S. Dep't of Health & Human Servs.*, No. 12-3357 (8th Cir. Oct. 4, 2012). Second, the court used *O'Brien* to import the same "direct / indirect" distinction rejected by *Thomas*. *See* 450 U.S. at 718. Finally, two other district courts have rejected *O'Brien* because it invites courts to insert artificial distinctions into plaintiffs' religious beliefs. *See, e.g. Newland*, 2012 WL 3069154, at *9 (rejecting an *O'Brien* approach "out of hand" because it requires "impermissible line drawing"); *Tyndale*, slip op. at 25 ("respectfully disagree[ing]" with *O'Brien* if it means a

B. Appellees are unlikely to justify the mandate under strict scrutiny.

RFRA requires that Appellees to prove that application of the burden to plaintiffs is "the least restrictive means of advancing a compelling interest." *Gonzales*, 546 U.S. at 423 (citing 42 U.S.C. § 2000bb-1(b)); *id.* at 429 (government bears burden even at preliminary injunction stage). This is "the most demanding test known to constitutional law," *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997), and Appellees cannot meet it.

An interest is not compelling where, as here, the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Lukumi*, 508 U.S. at 546-47; *United States* v. *Friday*, 525 F.3d 938, 958 (10th Cir. 2008). Moreover, where a less restrictive alternative would serve the government's purpose, "the legislature *must* use that alternative." *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (emphasis added). As other courts have emphatically found, the government cannot carry these burdens where, as here, it has exempted plans covering millions of people, it has offered no evidence of a compelling interest in the drugs at issue here, and it has other mechanisms for providing access.[13]

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plaintiff's religious exercise is never substantially burdened by a "law that forces it to pay for services to which it objects that are ultimately chosen and used by third parties").

[13] *See Tyndale*, slip op. at 28-35 ("Lacking from [the government's case] is *any* proof that mandatory insurance coverage for the specific contraceptives to which *the plaintiffs* object—Plan B, ella, and intrauterine devices—furthers the government's compelling interests"); *Newland*, 2012 WL 3069154, at *7-8 (citing 42 U.S.C. § 18011; 26 U.S.C. § 4980H(c)(2) ("The government has exempted over 190 million health plan participants and beneficiaries from the preventive care coverage mandate; this massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs."); *id.* at 17 ("Given the existence of government programs" distributing contraceptives directly, "the government has failed to meet [its]

III. APPELLANTS WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION PENDING APPEAL.

The government's mandate for Appellants to include abortion-causing drugs in their insurance plan puts them in an unconscionable position. By January 1, 2012—less than six weeks away—they must either violate their deeply held religious convictions concerning the sanctity of life and pay for their employees' free access to abortion-causing drugs or pay penalties of over one million dollars per day for staying true to their faith. Few laws in American history have imposed such a severe daily penalty on any conduct, and *none* has ever imposed such a fine on the exercise of religion. It is well settled that pressuring a party to violate their religion in this manner constitutes irreparable harm. *See, e.g.*, *Kikumura* v. *Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (noting that "courts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA"); *Newland*, 2012 WL 3069154, at *5-6; *see also Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Heideman* v. *S. Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (finding irreparable harm for even "minimal" restrictions on nude dancing because "our precedents dictate that we treat alleged First Amendment harms gingerly").

Because there is no dispute that Appellants will suffer this irreparable harm beginning January 1, 2013—"before a decision on the merits can be rendered"—this factor weighs

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burden" of showing that the mandate is the least restrictive means of providing access); *See also* PI Br. at 11-17 and Reply Br. at 16-21.

strongly in favor of preliminary injunctive relief. *Newland*, 2012 WL 3069154, at *4 (quoting *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)).

IV. THE BALANCE OF EQUITIES TIPS DECIDEDLY IN APPELLANTS' FAVOR.

There is no real dispute that, absent an injunction, Appellants face grievous harm—namely, government compulsion to violate their religious beliefs or face crippling fines. The district court stated that "[n]o one questions that the Greens' beliefs are sincerely held." *See* Op. 20. Nor has anyone questioned the reality and severity of the fines the Greens face for exercising those sincerely held religious beliefs. In contrast, granting the injunction will merely prevent the government from enforcing one element of the mandate (the requirement to cover emergency contraceptives) against one employer, during the pendency of this appeal.

In other words, as acknowledged by the District Court, an injunction would only temporarily "preserve the status quo," Op. 7, to give this Court appropriate time to navigate important constitutional and civil rights questions that the lower court recognized as "serious, substantial, difficult and doubtful." *Id.* Preserving the status quo in such circumstances is the very purpose of the preliminary injunction. *RoDa Drilling Co.* 552 F.3d at 1208 ("[T]he primary goal of a preliminary injunction is to preserve the pre-trial status quo … ."); *O Centro*, 389 F.3d at 1018 (McConnell, J., concurring) (stating that "[a] particularly important category of cases where the status quo will often be determinative" concerns "of whether a court should provide preliminary relief is challenges to the constitutionality of statutes," where the statute is "newly enacted, and its enforcement will restrict rights citizens previously had exercised and enjoyed").

The fact that the government has already exempted a number of churches and church-related entities from the mandate, delayed enforcement of the mandate against many religious organizations until August 2013, and given many non-religious employers an open-ended exemption in the form of grandfathering confirms that granting an injunction pending appeal would not injure the government in any way.

V. AN INJUNCTION IS IN THE PUBLIC INTEREST.

Finally, a preliminary injunction will serve the public interest by protecting Appellants' religious exercise rights. The district court's suggestion that the public interest in enforcement of a "statutory or regulatory scheme" (here, the ACA) weighs against an injunction, *see* Op. 7, is simply mistaken. In this matter, there are two statutory schemes in potential conflict with each other. While the ACA requires Appellants to purchase abortion-causing drugs for any interested employees, RFRA would protect them in exercising their religion by not purchasing those same drugs. The public interest in enforcing long-standing First Amendment and religious freedom protections versus a new law that creates a "substantial expansion of employer obligations" and raises "concerns and issues not previously confronted," Op. 27, certainly weighs in favor of temporary injunctive relief while the potential conflict is resolved. *Newland*, 2012 WL 3069154, at *5 (finding "'there is a strong public interest in the free exercise of religion even where that interest may conflict with [another statutory scheme]'") (quoting *O Centro*, 389 F.3d at 1010); *see also, e.g.*, *Pac. Frontier* v. *Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005) ("Vindicating First Amendment freedoms is clearly in the public interest."). Furthermore, any government interest in uniform application of the mandate is again

"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." *Newland*, 2012 WL 3069154, at *7.

CONCLUSION

Appellants respectfully ask the Court to enter an injunction against Appellees during the pendency of this appeal.

Respectfully submitted,

s/ Luke W. Goodrich

Luke W. Goodrich
S. Kyle Duncan
Mark L. Rienzi
Eric S. Baxter
Lori H. Windham
Adèle Auxier Keim
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K Street, N.W., Suite 220
Washington, D.C. 20007
(202) 349-7209
lgoodrich@becketfund.org

Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify that on November 20, 2012, I caused the foregoing *Motion for Injunction Pending Appeal* to be served electronically via the Court's electronic filing system on the following parties who are registered in the system:

Michelle Renee Bennett
Email: michelle.bennett@usdoj.gov

Alisa B. Klein, Attorney
Email: alisa.klein@usdoj.gov

Mark B. Stern, Attorney
Email: mark.stern@usdoj.gov

All other case participants will be served via the Court's electronic filing system as well.

s/ *Luke W. Goodrich*
Luke W. Goodrich
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K Street, N.W., Suite 220
Washington, DC 20007
(202) 349-7209
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to this Court's guidelines on the use of the CM/ECF system, I hereby certify that:

(1) all required privacy redactions have been made;

(2) no hard copies are required to be filed;

(3) the ECF submission was scanned for viruses with the most recent version of Symantec Endpoint Protection (last updated November 20, 2012) and, according to the program, is free of viruses.

s/ *Luke W. Goodrich*

Luke W. Goodrich
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K Street, N.W., Suite 220
Washington, DC 20007
(202) 349-7209