No. 12-2673

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AUTOCAM CORPORATION; AUTOCAM MEDICAL, LLC; JOHN KENNEDY; PAUL KENNEDY; JOHN KENNEDY, IV; MARGARET KENNEDY; THOMAS KENNEDY
Plaintiffs – Appellants

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; HILDA L. SOLIS, names as Hilda Solis; Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; TIMOTHY GEITHNER, Secretary of the United States Department
Defendants – Appellees

On Appeal from the United States District Court
for the Western District of Michigan
Case No. 1:12-CV-1096
Hon. Robert J. Jonker

APPELLANTS' REPLY BRIEF

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SUMMARY OF ARGUMENT

The arguments made in Appellees Brief ("Br.") reflect the fatal flaws in the district court's analysis and should be rejected. The HHS Mandate imposes a substantial burden on the Plaintiffs' exercise of religion for reasons that are straightforward and painfully simple. Their actual religious beliefs are undisputed and prohibit them from providing the coverage in question. The Mandate forces them to violate those beliefs or pay a $19 million fine. And there is no question the fine at issue, a quintessential burden, is crippling: the penalty would destroy the livelihood of those who own and operate Autocam as well as the jobs held by their employees. The Federal Government does not disagree with the size of the fine. Instead, the Federal Government presumes to question the Plaintiffs' religious beliefs on material cooperation with evil. It cannot do so.

The Federal Government also attempts to minimize the burden at issue by focusing on the corporate form through which the Plaintiffs exercise their faith in the world. But its arguments must be rejected. The Federal Government appears to accept that the statutory definition of "person" in the RFRA covers at least some corporations, but seeks to imply a distinction between for-profit and non-profit corporations not found in the text of the RFRA. The notion that the owners of Autocam surrender their religious freedom because they choose to operate as a corporation finds no support in Michigan law and would be the epitome of an

unconstitutional condition. And religious freedom is not lost simply by entrance into the marketplace. For these reasons, RFRA applies to the mandate challenged in this case, and as a result, the mandate is required to survive strict scrutiny.

The HHS Mandate cannot survive scrutiny under the RFRA. The Federal Government was required to offer evidence as to why it had a compelling interest against granting an exception to *these Plaintiffs*. These Plaintiffs provide generous wages and a $1,500 contribution towards a Health Savings Account (HSA). The Federal Government does not even try to show that this fails to meet its objectives. Furthermore, the parties do not dispute that the HHS Mandate is riddled with exceptions. The Federal Government argues that the exceptions are slightly smaller than the Plaintiffs claim, but the point remains that the interest behind not granting an exception to the Plaintiffs can hardly be called compelling when so many others enjoy an exception or exemption. Finally, the Federal Government fails to sufficiently address the alternatives offered by the Plaintiffs as less restrictive means. The Federal Government makes a strange argument that public provision of the mandated benefits would amount to a subsidy of religious practice, and ignores options that cost the taxpayers nothing, such as imposing a mandate on the contraception industry (rather than employers) or following the obvious choice in allowing employers to provide a generous HSA just as these Plaintiffs have done.

ARGUMENT

I. The HHS Mandate substantially burdens the Plaintiffs' exercise of religion.

A. *The HHS Mandate is a substantial burden that seeks to change the Plaintiffs' behavior.*

The Federal Government argues that the HHS Mandate should not be treated as a burden on the Plaintiffs' free exercise of religion simply because the Plaintiffs allege that it is a burden. The crucial question is: who says what counts? Is it the Plaintiffs, here supported by their Church as an amicus, or is it the Federal Government that decides what counts as a substantial burden on the Plaintiffs' religion? Here, the undisputed facts demonstrate that the Government seeks to enforce a $19 million penalty on the Plaintiffs if they exercise their religion as understood by the Plaintiffs (and their Church). If undisputed evidence establishing that the Plaintiffs face of a multi-million dollar fine unless they violate their religious beliefs does not establish a substantial burden on that religion, then nothing does, and the RFRA makes a mockery of the religious liberty it claims to claims to protect. Fortunately, the opposite is true: the HHS Mandate is a substantial burden on the free exercise of religion within the meaning of RFRA.

1. The HHS Mandate burdens the Plaintiffs' exercise of religion by pressuring them to modify their behavior.

The Federal Government argues that the HHS Mandate imposes no burden because it targets the health plan and involves the decisions of employees. Indeed,

the Federal Government (and the amici that support it) focuses on the choices of employees and beneficiaries. But this misses the point.

The Plaintiffs did not *cover* abortion, contraception, or sterilization because of their religious beliefs. And the Federal Government is forcing the Plaintiffs to change their coverage. Where a government regulation places "substantial pressure on an adherent to modify his behavior and to violate his beliefs," this is a substantial burden. *Thomas v. Review Bd. of Ind. Empt' Sec Div.*, 450 U.S. 707, 719 (1981). The Federal Government is pressuring the Plaintiffs to modify their behavior related to this coverage and to violate their beliefs on pain of a $19 million fine. This is substantial pressure.

The Federal Government argues that because this pressure is directed to the company and its health plan, and not the individuals who own and operate the company, it is not a burden. But the Plaintiffs "are called to live out the teachings of Christ in their daily activity." (Verif. Compl., R.1 at ¶ 32, Page ID # 7.) Although the Federal Government insists that the HHS Mandate does not compel the Kennedys to do anything, it threatens to destroy their business and their livelihood if they, as owners and operators, do not take actions inconsistent with their religious views—Autocam's actions are determined by the Kennedys' decisions. *Robinson v. Cheney*, 876 F.2d 152, 159 (D.C. Cir. 1989) ("[A] corporation cannot act except through the human beings who may act for it."). The

idea that targeting their livelihood does not pressure them is like arguing that a threat to bulldoze a home does not coerce a family that lives there because the property, rather than the person, is targeted for destruction. Indeed, one frequent goal of holding a corporation liable for anything is to incentivize—that is, pressure—its owners to act in a certain way. *See, e.g.*, Richard A. Posner, Economic Analysis of the Law 397-98 (3d ed. 1986).

The legal test is whether pressure is applied in a way that prods the Plaintiffs to violate their beliefs, and a $19 million fine does just that in forcing the Plaintiffs to cover drugs and services they object to. In this regard, it is important to keep in mind that the penalties here are incurred because the Plaintiffs exercise their religion by not providing *coverage*. For this reason the Federal Government's focus on the decisions of what others might do if coverage is provided misses the mark. The Plaintiffs' object to providing the coverage itself because they believe that such direct facilitation of conduct that they believe to be intrinsically wrong makes them culpable.

There can be no more telling (or damning) indication of the true thrust of the Federal Government's claim then it effort to cite *Zelman* in order to undercut the Plaintiffs' religious objection. Reduced to its essence, the Federal Government argues that because the Supreme Court has decided that individual decisions regarding school vouchers are not properly attributable to the government, this

Court should disregard the Plaintiffs' belief that providing coverage for these benefits is sinful. The message is clear: the Plaintiffs' understanding of what Christ forbids counts for nothing because Caesar has decided otherwise.

This makes it painfully clear that at bottom the Federal Government simply disagrees with the Plaintiffs' religious beliefs, denying that a link between an ultimate action by the employee and the Plaintiffs' direct funding could be being "meaningful," and claiming that it would be "inappropriate to attribute" an employee's actions under plan coverage to the employer. (Br. at 29, 30.) But courts cannot decide whether the Plaintiffs' views are simply wrong-headed and therefore not entitled to the protection of the First Amendment.[1] *See Thomas*, 450 U.S. at 716; *see also Askew v. Trs. of the Gen. Assembly*, 684 F.3d 413, 418 (3d Cir. 2012) ("The First Amendment `severely circumscribes' the role that civil courts may play in resolving disputes touching on matters of faith."); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976) ("religious controversies are not the proper subject of civil court inquiry"); *Kaufmann v. Sheehan*, 707 F.2d 355, 359 (8th Cir. 1983) ("*Milivojevich* and its underlying rationale prevent this court from deciding what are inherently religious issues."). And this Court should not repeat the district court's mistake on this point.

[1] It is strange indeed that the Federal Government advances this line of argument while mustering cases that recognize the government cannot "troll through religious beliefs" in another portion of its brief. (Br. at 20.)

2. This burden is substantial, and the only basis to conclude otherwise is based on a fundamental disagreement with the Plaintiffs' religious principles.

The Federal Government suggests that the Plaintiffs' face a "slight burden." (Br. at 31.) But when the Federal Government's illicit second-guessing of religious beliefs is set aside, it is clear that to fine the Plaintiffs $19 million dollars and destroy their business for the exercise of their religion is a substantial burden. *See Wisconsin v. Yoder*, 406 U.S. 205, 208, 218 (1972) (holding that $5 fine substantially burdened religious exercise). The Plaintiffs have also explained the substantial spiritual burden they face for engaging in what they believe to be material cooperation with evil. (Verif. Comp., RE #1 at ¶¶ 38-40, 81-82, Page ID # 8, 16.) The only way to disregard the Plaintiffs' alleged spiritual burden is to simply disagree with their religious beliefs. The Federal Government asks the Court to disbelieve the Plaintiffs or pronounce their religion is simply wrong. The Court cannot do so.

B. ***The RFRA protects the Plaintiffs' exercise of religion, even though a for-profit corporation is involved.***

The Government presents three threshold challenges to the application of the RFRA. First, the Federal Government asserts that Autocam's *for-profit* corporate status is a problem for the company because for-profit corporations are excluded from the RFRA. Second the Federal Government asserts that Autocam's *corporate* status is a problem for its owners and operators, who supposedly

forfeited their religious freedom in exchange for the benefits of incorporation. Third, the Federal Government asserts that the profit-making and commercial aspect of the Plaintiffs' business places their conduct outside the free exercise of religion. Each of these arguments fails.

As an initial matter, RFRA's definition of person includes corporations. The Federal Government appears to recognize this, at least when it comes to non-profit corporations. But 1 U.S.C. § 1, which provides that the term "person" in a statute includes corporations, does not distinguish between for-profit and non-profit corporations. Thus, if the RFRA protects any corporations, it should be read to cover all corporations.

Recognizing that the RFRA includes all corporations by its terms, the Federal Government seeks to create an implied exception that removes corporations engaged in profit-making activity from the RFRA by patching pre-RFRA cases together with precedent addressing statutory exemptions and the canon of avoidance. But the patchwork argument fails on multiple grounds.

For one thing, the Federal Government's effort to harness pre-RFRA cases contradicts the fundamental proposition that the RFRA "is not a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions." H.R. Rep. No. 103-88 (1993); *see also* S. Rep. No. 103-111, at 9 (1993), *reprinted at* 1993 U.S.C.C.A.N. 1892, 1898. The RFRA's

purpose was simply 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)." 42 U.S.C. § 2000bb(b)(1); *see also Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) ("O Centro II") (explaining that RFRA restored the compelling interest test rejected in *Smith*). Contrary to the Federal Government's suggestion, the RFRA's protection is not confined to the specific holdings of previous free exercise cases. *See* S. Rep. No. 103-111 at 8-9 (noting that prior free exercise cases would provide "guidance" in applying RFRA, while "express[ing] neither approval nor disapproval of that case law").

In addition, *NRLB v. Catholic Bishop of Chicago*, 440 US 490 (1979) and precedent addressing statutory exemptions really cut against the Federal Government's position. After all, it was the accepted convention that "person" includes corporations, both for-profit and non-profit, that explains why non-profits fell within the scope of the statutes involved in the cases the Federal Government cites. And it was this convention that required Congress to provide the express statutory exemptions the Federal Government highlights from Title VII and ADEA. *See* 42 USC § 2000e(a) (Title VII definition of "person" includes all corporations); 29 USC § 630(a) (ADEA definition of "person" includes any type of corporation "or any organized group of persons"). Likewise, it was the inclusion of all corporations within the scope of the NLRA that required the Supreme Court

to employ the doctrine of constitution avoidance in *Catholic Bishop* and construe the statute so as to avoid constitutional questions akin to those presented in this case. The case law does not support the Federal Government's arguments.

Seen this way, the Federal Government's effort to harness these cases is as inexplicable as it is insupportable. The Federal Government seeks to use cases interpreting explicit statutory exemptions in service of religious liberty to support an implicit exemption from RFRA that undermines religious liberty. (Br. at 18-20). It seeks to use a case glossing the NLRA to provide an implicit exception in service of religious liberty in order to gloss an implicit exception from the RFRA that limits religious liberty.

This strange logic explains why the interpretation of the RFRA offered by the Federal Government flies in the face of the well-established canon that "remedial statutes should be construed broadly to extend coverage and their exclusions or exceptions, should be construed narrowly." *In re Carter*, 553 F.3d 979, 985 (6th Cir. 2009). The result required by this canon is all the more certain where, as here, the statute includes no exclusions or exceptions. The truth of the matter is as plain as the text of the RFRA. Nothing in the RFRA excludes for-profit companies or for-profit activities from its coverage.

Furthermore, the suggestion that if the First Amendment provides special protection to religious organizations it does not protect others has no root in the

text of the First Amendment or the RFRA. Suggesting that a "special solicitude" for religious organizations means others are not protected would mean that a lay person lacks protection under the First Amendment or the RFRA and only her church could seek redress in the courts. The Supreme Court has said no such thing. Quite the contrary, although the respondent in *Hosanna-Tabor* repeatedly emphasized the "commercial" nature of the Lutheran school to minimize its protection under the religion clauses,[2] the Supreme Court refused to strip the school of the protection provided by the First Amendment on such shabby grounds.[3]

The Government's second argument also fails. Here, it asserts that because Autocam's owners chose to incorporate their business, they lack religious rights. (Br. at 23-24.) In other words, Plaintiffs' religious freedom was given up as a condition of receiving the benefit of the corporate form.

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[2] *See* Br. for Respondent Cheryl Perich, *Hosanna-Tabor*, 132 S. Ct. 694 (2012) (No. 10-553) 2011 WL 3380507 (referring to Lutheran school as "a commercial enterprise" and using the term "commercial" 28 times).

[3] The Federal Government also raises a confusing and irrelevant argument about Title VII. Congress chose not to include Title VII's definitional limits of a religious exemption when adopting the RFRA. Moreover, there is no authority for reading Title VII's exemption language into the First Amendment or RFRA. Even under Title VII's exemption, profit making does not categorically exclude religious exercise; it is just one factor among many in determining when an organization is a "religious corporation" for Title VII purposes. *See, e.g.*, *Leboon v. Lancaster Jewish Comm. Ctr. Ass'n*, 503 F.3d 217, 226,-227 (3d Cir. 2007) (explaining nine-factor Title VII test). While it may be true that nonprofit status is sufficient to require an exemption, the Federal Government cites no case holding it is a necessary condition to protection under the RFRA or the First Amendment.

But the claim that the Plaintiffs forfeited their rights when they chose to incorporate has no grounding in the state law that governs their incorporation. The State of Michigan has not imposed such a devil's bargain, and if it did so, such an exaction of individual liberty in exchange for the benefits of the corporate form would violate the doctrine of unconstitutional conditions. "'It is rudimentary that [a] State cannot exact as the price of those special advantages [granted corporations] the forfeiture of First Amendment rights.'" *Citizens United v. F.E.C.*, 130 S. Ct. 876, 905 (2010) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting)); *see also Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (government "may not deny a benefit to a person on a basis that infringes his constitutionally protected [First Amendment rights] even if he has no entitlement to that benefit"); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government . . . .").

Finally, the Federal Government asserts that religious liberty is forfeited by entering the world of commerce because exercising religion and for profit activity

are incompatible. But this is not what the Plaintiffs' religious beliefs hold.[4] Autocam's for-profit status is merely "the business form through which the individual Plaintiffs endeavor to live their vocation as Christians in the world." (Verif. Compl., R.1 at ¶ 33, Page ID # 7.) This commercial activity is a part of its owners' religious. (*Id.*)

The law does not support the Federal Government's claim either. The Supreme Court has never held that a person loses religious freedom merely because the person is trying to earn a living. As Plaintiffs noted earlier, the Supreme Court did not reject claims advanced by the religious believers in *Lee* or *Braunfeld*. (Appellant's Br. at 19.) As noted above, the Supreme Court refused to deny *Hosanna-Tabor* refuge in the First Amendment on this ground. *See* Br. for Respondent Cheryl Perich, *Hosanna-Tabor*, 132 S. Ct. 694 (2012) (No. 10-553) 2011 WL 3380507. It is safe to say that no court would permit the Federal Government to dictate what books with religious content might say merely because the books are sold for a profit. A Jewish deli owner who declines to serve pork—even if done in the face of a mandate pushed by the pork lobby—does not lose the

[4] Indeed the claim is incompatible with the RFRA in part because the RFRA fits so comfortably within the broad sweep of our legal system's treatment of for-profit and non-profit entities. *See* Mark Rienzi, *God and the Profits: Is There Religious Liberty for Money-Makers?, forthcoming* George Mason Law Review (fall 2013), available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229632* (last visited March 28, 2013) (analyzing treatment of profit-making businesses and religious exercise by profit-makers across varying contexts).

right to practice her faith simply because she sells pastrami for payment. It is just as certain that the Plaintiffs do not lose the right to exercise their religious beliefs concerning material cooperation with evil simply because Autocam seeks to earn a profit.

Moreover, the decisions in *Citizens United*, 130 S. Ct. 876 , and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), reject the categorical for-profit exclusion the government urges here. *Bellotti* explained that "[t]he proper question . . . 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." 435 U.S. at 776. *Citizens United* explained that "political speech does not lose First Amendment protection simply because its source is a corporation," and that the same rule applies to government "limits on the political speech of nonprofit or for-profit corporations." 130 S. Ct. at 913 (quotations omitted). Thus the Supreme Court has squarely rejected the notion of creating different constitutional rights for different corporations based on for-profit status. *See also id.* at 906 (rejecting proposed special treatment of "media corporations" because "[t]his differential treatment cannot be squared with the First Amendment.").

The same logic negates any effort to create a for-profit/non-profit distinction in the context of religious exercise, which has also provided an essential element of social reform. The reason is simple and the proof runs through all of American History. Religiously inspired action has proven an invaluable source of social reform movements, whether addressing slavery, intemperance, the problems of city slums and ghettos, juvenile delinquency, or the civil rights movement. *See, e.g.*, *United States v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008) ("'Freedom of religion, no less than freedom of speech, is a promise of the First Amendment . . . essential to the common quest for truth and the vitality of society as a whole.'") (citation omitted); *see also* William G. McLoughlin, Revivals, Awakenings, and Reform (University of Chicago Press 1980) (showing the important role that religiously inspired action has played in social reform movements throughout American history).

C. *Protecting the religious liberty of these Plaintiffs will not eliminate the ability of the Government to regulate corporations.*

Finally, the Federal Government seeks to secure a favorable decision in this case based on its suggestion that anti-discrimination laws, taxes, and OSHA will all be cast aside if an exception covering for-profit corporations is not read in the RFRA by the judiciary. (*See* Br. at 10.) But that claim is pure speculation—and also inconsistent with precedent. As detailed below, the HHS Mandate cannot survive judicial scrutiny because it does not advance a compelling interest, is

overly broad, and is not the least restrictive means. But reason and experience indicate that other federal regulatory schemes, like OSHA and taxes, may well survive the relevant degrees of scrutiny because they advance very different purposes under circumstances very different from those present in this case. For example, the Supreme Court has allowed commercial proprietors to assert religious exercise claims—and then rejected those claims on the merits. *See United States v. Lee*, 455 U.S. 252, 256-57 (1982) (employer's objecting to social security taxes); *Braunfield v. Brown*, 366 U.S. 5699, 605 (1961) (upholding Sunday closing law despite allowing merchants to challenge it). The point here is that those decisions on the merits simply go to show that nothing in the RFRA or earlier precedent under the First Amendment supports the claim that a plaintiff receives no protection from RFRA or the First Amendment simply because the person is trying to make a living in a manner consistent with their religious convictions.

II. The HHS Mandate cannot survive scrutiny under the RFRA.

A. *The Federal Government fails to offer any proof that it has a compelling interest in applying the HHS Mandate to <u>these</u> Plaintiffs.*

The Federal Government was required to offer *actual evidence* that it has a compelling interest and cannot grant an exception for *these* Plaintiffs.[5] *See United*

[5] It is worth noting that the Federal Government's case law supporting its compelling interest says the right to privacy involves being free from "unwanted <u>governmental</u> intrusion" into the decision of whether or not to have a child. (Br. at 33.) (emphasis added).

States v. Playboy Ent'mt Group, Inc, 529 U.S. 803, 821 (2000). The Government has presented no argument, let alone any evidence, as to why Autocam's HSA does not meet the goal of its purported compelling interest.

The Federal Government again points to generic studies about the benefits of contraception.[6] It appears from the Federal Government's arguments that none of these studies discuss employees who have HSAs or high wages. (*See* Br. at 34-35.) The Federal Government does not present any evidence or a study about why or how an HSA like Autocam's is insufficient. The Federal Government does say that Autocam's HSA will not meet the objectives, but it does not explain how or why this is the case. Instead, the Federal Government faults the Plaintiffs for failing to explain their legal principles, but it is the Federal Government that bears the burden under this test. (*See* Br. at 36.) The Federal Government simply cannot come up with an *explanation* as to why an HSA like Autocam's is insufficient.

B. *The HHS Mandate is riddled with exceptions, and the Federal Government has not shown otherwise.*

The Federal Government does not seem to contest the basic legal principle that numerous exceptions to a rule undermine a purported compelling interest against granting another exception. (Br. 36.) Instead, the Federal Government quibbles about how many plans are currently exempted. (*Id.* at 36-37.) The

[6] The Federal Government also claims that contraception coverage is widespread and standard, while claiming creating coverage is a compelling interest. (Br. at 37.) The HHS Mandate seems like a solution in search of a problem.

Federal Government states that small businesses that "elect" to offer coverage must provide coverage in compliance with the HHS Mandate. (Br. at 37.) But of course small businesses simply do not have to offer coverage at all, and the Federal Government does not dispute its own numbers that 96% of all employers fall into this category.[7] Instead, the Federal Government suggests that *only* 58% of plans were grandfathered in 2012. (Br. at 38.) And it justifies the exception for non-profits. But the Federal Government misses the key point here: there are a lot of exceptions.

The parties may quibble about the exact numbers involved with these exceptions, how these exceptions work in practice, or whether these exceptions are justified, but the point is that the HHS Mandate is riddled with exceptions and not universally applicable. And the Federal Government cannot prove that the HHS Mandate provides a compelling interest against granting an exception to the Plaintiffs when it has exempted so many others.

C. *The Federal Government offers no proof that other means would not achieve its goals.*

To prove that the HHS Mandate is the least restrictive means, the Federal Government needs "to prove" that the alternatives offered by the Plaintiffs "will be

[7] The Affordable Care Act Increases Choice and Saving Money for Small Businesses at p. 1: http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf

ineffective to achieve its goals." *Playboy Entm't Group*, 529 U.S. 803, 816 (2000). The Federal Government offers a half-hearted response to Plaintiffs' proposals and certainly offers no proof. Instead, the Federal Government asserts, in rhetoric worthy of "Big Brother," that if the federal government provided the benefits at issue, this would amount to subsidizing the Plaintiffs' free exercise of religion.[8] (Br. at 41.) The Federal Government does not even attempt to respond to the Plaintiffs' third proposal (*see* Br. at 40), which suggests imposing the mandate on the contraception manufacturing industry itself to provide the drugs to those whose insurance do not cover it, the very strategy it purports to employ with respect to non-profits. Where the Federal Government offers no proof, and indeed no actual argument, it has not carried its obligation to show that the HHS Mandate is not the least restrictive means.

More simply, though, the Federal Government has offered no argument as to why the most obvious alternative here would fail—using the plan the Plaintiffs already have in place. The Federal Government could simply mandate that all plans either cover contraception or provide funds to an HSA as the Plaintiffs do. This would accomplish the Federal Government's goal, and the Federal Government has offered no evidence, argument, or proof showing otherwise.

[8] The Federal Government's claim that it subsidizes employee benefits by not taxing them is just as totalitarian. On this theory, the household budget of every American citizen is "subsidized" to the extent the Federal Government decides not to tax it.

CONCLUSION

For these reasons, the district court's decision denying a preliminary injunction should be reversed and the case remanded with instructions to issue a preliminary injunction.

Respectfully submitted,

Dated: April 1, 2013

/s/ Jason C. Miller
Patrick T. Gillen (P47456)
Fidelis Center for Law and Policy
CatholicVote Legal Defense Fund
Attorney for Plaintiffs
1025 Commons Circle
Naples, FL 34119
(734) 355-4728
ptgillen@avemarialaw.edu

/s/ Jason C. Miller
Jason C. Miller (P76236)
MILLER JOHNSON
250 Monroe Avenue N.W. Ste 800
PO Box 306
Grand Rapids, Michigan 49501
(616) 831-1700
millerj@millerjohnson.com

Peter Breen
Thomas More Society
Attorneys for Plaintiffs
29 South LaSalle St. – Suite 440
Chicago, IL 60603
Tel. 312-782-1680
pbreen@thomasmoresociety.org

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(c) and 6 CIR. R. 32(a), the undersigned hereby certifies that this brief complies with the type-volume limitation. The brief was prepared using proportionally spaced font, with serifs, to wit: Times New Roman in 14-point type. This brief contains 4807 words, excluding any corporate disclosure statement, table of contents, table of authorities, statement with respect to oral argument, certificate of service, this certificate of compliance and the addenda. The word count was determined using Microsoft Office Word 2010 for Windows. All footnotes were included in the word count.

/s/ Jason C. Miller

Dated: April 1, 2013

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2013 I served a true and correct copy of the foregoing on all counsel appearing in this case.

MILLER JOHNSON
Counsel for Plaintiffs

Dated: April 1, 2013

/s/ *Jason C. Miller*
Jason C. Miller (P76236)
250 Monroe Avenue, N.W., Suite 800
PO Box 306
Grand Rapids, Michigan 49501-0306
Telephone: (616) 831-1700

DESIGNATION OF RELEVENT DISTRICT COURT DOCUMENTS

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