NO. 13-13879

UNITED STATES COURT OF APPEALS
FOR THE
ELEVENTH CIRCUIT

BECKWITH ELECTRIC COMPANY, INC., AND THOMAS R. BECKWITH,

Plaintiffs-Appellees,

v.

KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; THOMAS E. PEREZ, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR; JACK LEW, IN HIS OFFICIAL CAPACITY AS SECRETARY OF TREASURY, UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
HONORABLE ELIZABETH A. KOVACHEVICH
Civil Case No. 8:13-cv-648

BRIEF FOR THE PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, the undersigned counsel certifies that, to the best of our knowledge, the following persons, firms, and associations may have an interest in the outcome of this case:

ACLU of Florida

American Association of Pro-Life Obstetricians and Gynecologists

American Association of University Women

Americans United for Separation of Church and State

Association of American Physicians and Surgeons, Inc.

Association of Christian Schools International

Association of Gospel Rescue Missions

Beckwith Electric Co., Inc.

Beckwith, Thomas R.

Bentley, Arthur Lee III

Brinkman, Beth C.

C12 Group

Catholic Medical Association

Christian Legal Society

Christian Medical Association

Davidow, Charles E.

Delery, Stuart F.

Ethics & Religious Liberty Commission of the Southern Baptist Convention

Florida Association of Planned Parenthood Affiliates, Inc.

Fowler White Boggs P.A.

Gannam, Roger K.

Gershengorn, Ian Heath

Goldsmith, Andree

Hogan Lovells US LLP

Ibis Reproductive Health

Institutional Religious Freedom Alliance

Jed, Adam C.

Kayanan, Maria

Khan, Ayesha

Kenneth, Michael

Kovachevich, Elizabeth A. (District Court Judge)

Klein, Alisa B.

Lambda Legal Defense and Education Fund, Inc.

Lew, Jack, as Secretary of the Treasury

Lieber, Sheila

Lindell & Farson, P.A.

Lipper, Gregory M.

Mach, Daniel

MacMillan, Yvette Acosta

Mersino, Erin Elizabeth

NARAL Pro-Choice America

National Association of Evangelicals

National Catholic Bioethics Center

National Women's Law Center

O'Neill, Robert E.

Ovarian Cancer National Alliance

Paul Weiss Rifkind Wharton & Garrison, LLP

Perez, Thomas E., as Secretary of Labor

Physicians for Life and National Association of Pro Life Nurses

Physicians for Reproductive Health

Planned Parenthood Southeast, Inc.

Pizzo, Mark A. (Magistrate Judge)

Pizzo, Paul R.

Pollack, Michael C.

Population Connection: Raising Women's Voices for the Health Care We Need

Prison Fellowship Ministries

Richards, Scott

Ricketts, Jennifer

Schneider, Bruce Harvey

Sebelius, Kathleen, as Secretary of Health & Human Services

Service Employees International Union

Smith, Mailee R.

State of Florida, Office of the Attorney General

Stern, Mark B.

Stroock & Stroock & Lavan LLP

Taylor, Camilla

Thomas More Law Center

Thompson, Richard

United States Department of Health & Human Services

United States Department of Justice

United States Department of Labor

United States Department of the Treasury

Waxman, Ilana D.

Wimberly, Mary Helen

Winship, Blaine H.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellees, Beckwith Electric Company, Inc. and Thomas R. Beckwith (hereinafter "Plaintiffs") state the following:

None of the Plaintiffs are subsidiaries or affiliates of a publicly owned corporation. There are no publicly owned corporations, party to this appeal, that have a financial interest in the outcome.

REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 11th Cir. R. 34(a)-1(c), Plaintiffs respectfully request that this Court hear oral argument. This case presents for review important questions of law arising under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb through 2000bb-4 ("RFRA").

Thus far the Seventh, Eighth, Tenth, and D.C. Circuits have ruled in favor of enjoining the law at issue in this case because it violates the Religious Freedom Restoration Act. *Korte v. Sebelius*, Case No. 12-3841, 2013 U.S. App. LEXIS 22748 (7th Cir., Nov. 8, 2013) (holding a corporation can exercise religion and both business owners and their corporations were likely to succeed on their RFRA claims); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (holding *en banc* that corporations showed a substantial likelihood of success of their RFRA claims); *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069, 2013 U.S. App. LEXIS 22256 (D.C. Cir. Nov. 1, 2013) (holding individual business owners showed a substantial likelihood of success of their RFRA claims, but that a corporation could not exercise religious in its own right); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, order (8th Cir. Nov. 28, 2012); *but see Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3rd Cir. 2013) (holding a corporation cannot exercise

religion and an individual owner lacks standing to bring a challenge to the mandate); *Autocam Corp. v. Sebelius*, 12-2673, 2013 U.S. App. LEXIS 19152, *11 (6th Cir. Sept. 17, 2013) (holding a corporation is not a "person" under the RFRA and an individual owner lacks standing to bring a challenge to the mandate); *Eden Foods Inc. v. Sebelius*, No, 13-1677, 2013 U.S. App. LEXIS 21590 (6th Cir. Oct. 24, 2013) (same).

This appeal considers the application and scope of RFRA and First Amendment freedoms for all business owners and corporations. Given this importance, Appellees respectfully believe that oral argument is appropriate. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this court deems relevant.

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STATEMENT OF JURISDICTION

Plaintiffs agree that this Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

I. Whether the district court properly granted a preliminary injunction for Plaintiffs Beckwith Electric and Thomas R. Beckwith because the Mandate unconstitutionally strips Plaintiffs of their religious freedom guaranteed under RFRA?

STATEMENT OF THE CASE AND THE FACTS

PRELIMINARY STATEMENT

This is a case about religious freedom. R.1 at ¶1. The Mandate requires Plaintiffs Thomas R. Beckwith and Beckwith Electric Company, Inc. ("Beckwith Electric") to directly violate the tenets of their faith. *See* R.39 at 1-37. As the district court explained,

> Religious tolerance serves as an important foundational tenet in the governance of any society. A commonly misunderstood term, to "tolerate" does not mean with which to agree; it does not mean to understand; and it most certainly does not mean to adopt a belief as one's own. By definition, to tolerate means "to respect (others' beliefs, practices, etc.) without sharing them. . . ." This case tests whether the challenged federal laws are "true to the spirit of practical accommodation that has made the United States a nation of unparalleled pluralism and religious tolerance."

See R.39 at 5 (internal citations omitted).

The overwhelming majority of similar cases across the country have granted injunctive relief from the Mandate, as the district court did here, to halt the religiously intolerant mandate.[1] *See* HHS Information Central, *available at* (http://www.becketfund.org/hhsinformationcentral/, last visited Nov. 16, 2013). (reporting that of the 38 cases where plaintiffs sought injunctive relief from the Mandate, courts granted injunctive relief in 32 cases). In the appellate courts, the Seventh, Eighth, Tenth, and D.C. Circuits have held that the mandate violates RFRA. *Korte v. Sebelius*, Case No. 12-3841, 2013 U.S. App. LEXIS 22748 (7th Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013); *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069, 2013 U.S. App. LEXIS 22256 (D.C. Cir. Nov. 1, 2013); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, order (8th Cir. November 28, 2012). Plaintiffs seek for this Court to uphold the factual and legal findings of the district court, which granted proper relief to Plaintiffs' religious beliefs under RFRA.

STATEMENT OF THE CASE

On March 12, 2013, Plaintiffs filed their Complaint against all Defendants, alleging violations of the First and Fourteenth Amendments to the United States

[1] The "Mandate" refers to the Health and Human Services Mandate, 45 C.F.R. § 147.130, promulgated pursuant to 42 U.S.C. § 300gg-13 et seq., of the Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Healthcare and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("Affordable Care Act" or "Act").

Constitution and 42 U.S.C. § 1983. R.1 at 1-48. Specifically, Plaintiffs asserted that Defendants violated their rights to free exercise of religion under the First Amendment and the Religious Freedom Restoration Act, violated their freedom of speech, and violated the Administrative Procedures Act by forcing business owners and their businesses to violate their sincerely held beliefs which forbid providing insurance coverage for abortifacients and emergency contraceptives.

On May 13, 2013, Plaintiffs filed a motion for a preliminary injunction to enjoin the Mandate under RFRA and the First Amendment. R.10 at 1-25 and Exs. 1-3; R.13 at 1-4 and Ex. A; R.38 at 1-2. On June 25, 2013, the district court entered its memorandum opinion granting Plaintiffs' motion for preliminary injunction. R.39 at 1-37. The district court held that both the individual plaintiff Thomas R. Beckwith and the corporate plaintiff Beckwith Electric satisfied standing and evidenced a substantial likelihood of success on their claims under RFRA. *Id.* The district court held that the Mandate failed to satisfy strict scrutiny. *Id.* at 30-34.

STATEMENT OF FACTS

A. Plaintiffs' Background and Religious Beliefs

Beckwith Electric is a for-profit company. R.10 at Ex. 1, Beckwith Decl. at ¶ 3.[2] Thomas R. Beckwith is its Chief Executive Officer and 92% voting shareholder. R.10 at Ex. 1, Beckwith Decl. at ¶¶ 3, 8-9. Plaintiffs strive to follow the teachings and values of the Southern Baptist Faith. R.10 at Ex. 1, Beckwith Decl. at ¶¶ 6-7, 10-15, 20-26, 29-32. Plaintiffs believe that a company managed under God's direction and by God's principles cannot engage in activities that are contrary to such direction, principles, or moral compass. R.10 at Ex. 1, Beckwith Decl. at ¶ 13 at Ex. 1. Plaintiffs believe that the act of terminating an innocent human life and providing, purchasing, encouraging, or facilitating the use of devices, drugs, or services that are capable of killing innocent human life is a clear violation of such direction, principles, or moral compass. *Id.* Plaintiffs believe that abortion-causing drugs (abortifacients and emergency contraceptives) are contrary to their Southern Baptist Faith. *Id.* Plaintiffs therefore cannot provide or fund through their private group health insurance plan abortifacients or emergency contraceptives.[3] *Id.*

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[2] The material facts are based on the Complaint, the sworn affidavits attached to the preliminary injunction motion R.1 at 1-48; R.10 at 1-25 and Exs. 1-3; R.13 at 1-4 and Ex. A; R.38 at 1-2, and were incorporated in part in the district court's June 25, 2013 preliminary injunction opinion. R.39 at 1-37. The material facts are undisputed.

[3] Defendants claim that emergency contraception and abortifacients are not "abortifacients" under Defendants' own legal definition. However, it is clear from the FDA's

Plaintiffs employ 163 full-time employees. R.10 at Ex. 1, Beckwith Decl. at ¶¶ 4-5. Thomas R. Beckwith is responsible for setting and implementing all policies governing Beckwith Electric. R.10 at Ex. 1, Beckwith Decl. at ¶ 8. In accordance with the Southern Baptist Faith, Plaintiffs specifically excluded abortifacients from their group health insurance plan.[4] R.10 at Ex. 2, Long Decl. at ¶¶ 5-8. After the mandate was implemented in August 2012, Humana added coverage for emergency contraception and abortifacients to its group health plans. R.10 at Ex. 2, Long Decl. at ¶ 16. This was done without any knowledge of, consent by, or notice to Plaintiffs. R.10 at Ex. 2, Long Decl. at ¶11. Plaintiffs unwaveringly tried to remove objectionable coverage of abortifacients and emergency contraception from their plan. R.10 at Ex. 2, Long Decl. at ¶ 13. The Office of Insurance Regulation in Florida ("OIR") issued a determination that Plaintiffs' plan must exclude emergency contraceptives and abortifacients. R.13 at 1-3. Humana asserted that none of Plaintiffs' plan participants had ever used Plaintiffs' group insurance for abortifacient or emergency contraceptive coverage.

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guide that both IUDs and emergency contraceptives such as Plan B, to which Plaintiffs object, "work by preventing attachment (implantation)" of the fertilized egg to the mother's womb—this makes these drugs and devices abortifacients as they dispose the fertilized egg (a.k.a.- a life) from the womb after his/her moment of conception. FDA, *Birth Control: Medicines To Help You*, http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm 313215.htm, last visited Nov. 19, 2013). In the district court, Defendants did not contest that these emergency contraceptives and abortifacients violated Plaintiffs' sincerely held religious beliefs, and there is no basis for disturbing that accurate record now.

[4] Plaintiff Beckwith Electric exercises religion by, for example, contributing large donations to charitable causes respecting the sanctity of life and offering on-site corporate chaplains. R.10 at Ex. 1, Beckwith Decl. at ¶¶16-22.

R.10 at Ex. 2, Long Decl. at ¶ 12. Additionally, the OIR required retroactive removal of any abortifacient or emergency contraceptive coverage. R.13 at 1-3. The Mandate was set to officially affect Plaintiffs at the beginning of their plan year on June 1, 2013. R.10 at Ex. 2, Long Decl. at ¶ 15.

B. Statutory and Regulatory Background of RFRA

RFRA was enacted to protect religious freedom from partisan political considerations. The original proponents of RFRA worried how partisan politics could take the place of reasoned legal consideration under the *Smith* approach and sought for RFRA to directly reverse *Smith*. *See Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. On Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 123 (1993) (statement of Rep. Solarz, chief sponsor of H.R. 2797) ("Religion will be subject to the standard interest-group politics that affect our many decisions. It will be the stuff of postcard campaigns, 30-second spots, scientific polling, and legislative horse trading."). Therefore, Congress walled off religious freedom from the "vicissitudes of political controversy." *West Virgina State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

RFRA accomplished this protection "by legislating all at once, across the board, a right to argue for religious exemptions and make the government prove the cases where it cannot afford to grant exemptions." *Religious Freedom*

Restoration Act of 1991: Hearing before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary, 102d Cong. 340 (1993) (statement of Douglas Laycock, Professor of Law, University of Texas). Pursuant to RFRA, Defendants *must* demonstrate that their application of a substantial burden on Plaintiffs' religious freedom complies with a compelling government interest and uses the least restrictive means. 42 U.S.C. § 2000bb-1(b); 42 U.S.C. § 2000bb-2(3).

C. The Mandate

Imposition of the Mandate will strip Plaintiffs of their ability to make health insurance decisions consistent with their religious beliefs. R.10 at Ex. 1, Beckwith Decl. at ¶ 30-34, 40-46; Ex. 2, Long Decl. at ¶ 16. The Mandate requires all employers with over fifty full-time employees, such as Plaintiffs, to pay, fund, contribute, provide, or support abortifacients and certain contraception, including related education and counseling, in violation of their constitutional rights and deeply held religious beliefs. *See* 45 C.F.R. § 147.130 (a)(1)(iv), as confirmed at 77 Fed. Register 8725 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration (HRSA) Guidelines, (http://www.hrsa.gov/womensguidelines).

The Affordable Care Act called for health insurance plans to provide coverage and "not impose any cost sharing requirements for . . . with respect to

women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines" and directed the Secretary of the United States Department of Health and Human Services, Defendant Sebelius, to determine what would constitute "preventive care." 42 U.S.C § 300gg-13(a)(4). Defendants published an interim final rule under the Act, 75 Fed. Reg. 41726 (2010), requiring providers of group health insurance to cover "preventive care" for women as provided in guidelines to be published on a later date.[5] *Id.* Prior to adopting those guidelines, Defendants accepted public comments. Defendants disregarded comments warning of the potential conscience implications of requiring religious individuals and groups to pay for contraception and abortifacients.

Congress did not decide that contraception, sterilization, and abortifacients would be mandatorily included in all employee health benefits plans — Defendants did. 42 U.S.C § 300gg-13(a)(4) (Defendants determining that all FDA approved contraception, sterilization, and abortifacients would be mandatory). Congress allowed Defendants to determine what would constitute "preventive care." In doing so, Congress did not exclude the Affordable Care Act and the

[5] Defendants directed the Institute of Medicine ("IOM") to compile recommended guidelines describing which drugs, procedures, and services should be covered as preventative care for women. (http://www.hrsa.gov/womensguidelines). IOM invited select groups to make presentations on the preventive care that should be mandated by all health plans. (http://www.nap.edu/openbook.php?record_id=13181&PAGE=217). No religious groups or groups opposing government-mandated coverage of contraception, abortion, and related education and counseling were invited to present. Defendants adopted the IOM recommendations in full. 76 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. § 147.130.

implementation of the women's preventive health service requirement from RFRA. *See* 42 U.S.C. § 2000bb-3(b) ("Federal statutory law adopted after November 16, 1993, is subject to [RFRA] unless such law explicitly excludes such application by reference to this chapter."). Defendants promulgated interim final regulations that authorized an exemption, but only to "certain religious employers from the Guidelines where contraceptive services are concerned." Interim Final Rule, 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011).

On February 15, 2012, Defendants promulgated the Mandate that group health plans include coverage for all FDA-approved contraceptive methods and procedures, patient education, and counseling for all women with reproductive capacity in plan years beginning on or after August 1, 2012. *See* 45 C.F.R. § 147.130 (a)(1)(iv), as confirmed at 77 Fed. Register 8725 (Feb. 15, 2012), adopting and quoting HRSA Guidelines, (http://www.hrsa.gov/womensguidelines). All FDA-approved contraceptives included contraception, abortion, and abortifacients such as birth-control pills; prescription contraceptive devices, including IUDs; Plan B, also known as the "morning-after pill"; and ulipristal, also known as "ella" or the "week-after pill"; and other drugs, devices, and procedures. *Id*.

The Mandate applies to most group health plans and health insurance issuers, 42 U.S.C. § 300gg-13 (a)(1),(4), and forces Plaintiffs to provide "preventive care" by making available and subsidizing contraception, abortion, and

abortifacients such as the "morning-after pill," "Plan B," and "ella." The Mandate also requires group health care plans and insurance issuers to provide education and counseling for all women beneficiaries with reproductive capacity—even if paying for or providing such "services" violates one's consciences and deeply held religious beliefs.

The Act and the Mandate include a number of exemptions; however, Plaintiffs do not fall under any of these exemptions. Exemptions have been granted to: grandfathered plans, 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. §147.140 (exempting plans that qualify for "grandfathered" status by meeting criteria such as abstaining from plan changes since the date of March 23, 2010); non-profit companies that qualify as a "religious employer," 45 C.F.R. § 147.130 (a)(iv)(A) and (B) (exempting non-profit companies which adopt certain hiring practices and exist to further the organization's religious doctrine); and individuals of certain religions that disapprove of insurance in its entirety, such as the Muslim or Amish religion, 26 U.S.C. § 5000A(d)(2)(A)(i)-(ii) (exempting members of "recognized religious sect or division" that conscientiously object to acceptance of public or private insurance funds).

Plaintiffs' health insurance plan is not "grandfathered." R.10 at Ex. 2, Long Decl. at ¶ 15.[6] Plaintiffs do not qualify for the "religious employer" exemption contained in 45 C.F.R. § 147.130 (a)(iv)(A) and (B).[7] The Mandate indicates that the HRSA "may" grant religious exemptions to certain religious employers. 45 C.F.R. § 147.130(a)(iv)(A). Plaintiffs are not eligible for such an exemption because Beckwith Electric is a for-profit business. On January 20, 2012, Defendant Sebelius announced that there would be no change to the religious exemption. She added that "[n]onprofit employers who, based on religious beliefs, do not currently provide contraceptive coverage in their insurance plan, will be provided an additional year, until August 1, 2013, to comply with the new law," on the condition that those employers certify they qualify for the extension. This announcement provided no relief to Plaintiffs because a for-profit company could

[6] Plaintiffs' health insurance plan is not a grandfathered plan as: (1) the health care plan does not include the required "disclosure of grandfather status" statement; (2) Plaintiffs do not take the position that its health care plan is a grandfathered plan and thus do not maintain the records necessary to verify, explain, or clarify its status as a grandfathered plan nor will it make such records available for examination upon request; and (3) the health care plan has an increase in a percentage cost-sharing requirement measured from March 23, 2010. *See* 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. §147.140; R.10 at Ex. 2, Long Decl. at ¶ 15.

[7] The Mandate allows HRSA to grant exemptions for "religious employers" who "meet[ ] all of the following criteria: (1) The inculcation of religious values is the purpose of the organization. (2) The organization primarily employs persons who share the religious tenets of the organization. (3) The organization serves primarily persons who share the religious tenets of the organization. (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.130(a)(iv)(B).

not even be considered for the temporary safe-harbor provision. 77 Fed. Register 8725 (Feb. 15, 2012).

Defendant Sebelius also announced on January 20, 2012, that HHS "intend[s] to require employers that do not offer coverage of contraceptive services to provide notice to employees, which will also state that contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support," inherently acknowledging that contraceptive services are readily available without mandating Plaintiffs subsidize them. HHS Statement, *available at* (http://www.hhs.gov/news/press/2012pres/01/20120120a.html, *last visited* Nov. 16, 2013). Yet, Defendants have forced Plaintiffs to provide emergency contraceptives and abortifacients in violation of their sincerely held religious beliefs.

Without injunctive relief, Plaintiffs are forced to choose: comply with the Mandate and violate their deeply held religious beliefs, or disobey federal law and incur ruinous financial penalties. If Plaintiffs terminate health insurance entirely to comply with their religious beliefs, they will incur a $2,000 annual fine *per employee*, and with 163 employees this fine amounts to $266,000 per year. 26 U.S.C. § 4980H; R.10 at Ex. 1, Beckwith Decl. at ¶ 35. The fines are even more insurmountable if Plaintiffs decide to offer insurance that does not comply with the Mandate. If Plaintiffs provide insurance that excludes emergency contraceptives

and abortifacients, they will incur a $100 per day per employee tax penalty—totaling $5,949,500 per year. 26 U.S.C. § 4980D(b); R.10 at Ex. 1, Beckwith Decl. at ¶ 36.

If Plaintiffs discontinue employee health insurance they will suffer substantial competitive disadvantages in employee recruitment and retention. R.10 at Ex. 1, Beckwith Decl. at ¶¶ 41-50. Plaintiffs and their employees would be forced to seek expensive insurance on the private market. *Id*. All Plaintiffs wish to do is simply continue providing health insurance in compliance with their sincere and deeply held religious beliefs, as they have done since Beckwith Electric's inception. *Id*.

D. Findings of the District Court

The district court correctly recognized that Plaintiffs should not be forced to choose between abandoning their faith or violating the Mandate and incurring devastating financial consequences. R.39. RFRA protects the citizens of this country from such government oppression. *Id*.

The district court thoroughly analyzed each of the preliminary injunction factors noting the important issues at stake in this case. *Id*. at 5-6. First, the district court found that Plaintiffs have standing to bring their claims. *Id*. at 8-26. In making this finding, the court realized the inconsistency in the government's position stating, "to say that a corporation has standing to assert a claim

challenging the contraceptive mandate, on the one hand, and then, on the other hand, argue later that it is not 'substantially burdened' by the contraceptive mandate because it does not have the right to exercise religion seems to not fully appreciate an important component of the pending claims – that compliance with the contraceptive mandate is violative of its religious beliefs." *Id.* at 10-11. The district court then acknowledged that "the Supreme Court has interpreted the Constitution to provide corporations with a wide array of what may often be considered individual rights protections." *Id.* at 13. This includes recognizing that corporations are persons under the First Amendment for free speech purposes, corporations are entitled to double jeopardy protection, corporations have Fourth Amendment rights, and corporations are considered persons under the due process and equal protection clauses of the Fourteenth Amendment. *Id.* at 13-14. The court then looked to the text of the First Amendment, correctly noting that "there is nothing to suggest that the right to exercise religion, which immediately precedes the right to free speech in the First Amendment, was intended to treat any form of the 'corporate personhood' including corporations, sole proprietorships and partnerships, any differently than it treats individuals." *Id.* at 15. Accordingly, the district court found that a corporation is a "person" under the First Amendment and the RFRA. *Id.*

Next, the district court held that closely-held corporations, including Beckwith Electric, can assert the free exercise rights of their owners under the RFRA and the First Amendment. *Id.* at 16. In reaching this conclusion, the district court reviewed the "nature, history, and purpose of the Free Exercise Clause and the role of corporations during the founding era." *Id.* at 16-17. This review led to the inescapable conclusion that the purpose of the right to exercise religion as recognized by this country's founders, was to protect the individual's "liberty of conscience without government interference" and that this liberty of conscience does not disappear when the individual chooses to participate in free enterprise. *Id.* at 17-18. The court stated that to hold differently "that one's unalienable 'liberty of conscience' rests entirely on the form in which that individual elects to participate in free enterprise," would be counter to the court's "understanding of, and appreciation for, the right to the free exercise of religion guaranteed by the Constitution." *Id.* at 21. Thus, the district court concluded that "[w]hen an individual is acting through an incorporeal form, whether secular or religious, nonprofit or for-profit, incorporated or a partnership, the individual does not shed his right to exercise religion merely because of the 'corporate identity' he assumed." *Id.* at 22-23.

The district court found that "the facts in this case show that Beckwith Electric is inculcated with the beliefs of its owner and CEO" and that "Beckwith's

personal beliefs, those of the Southern Baptist faith, pervade the corporate atmosphere at Beckwith Electric." *Id.* at 24. The court noted that "Beckwith allocates corporate resources to fund weekly visits by corporate chaplains to visit the premises of Beckwith Electric" to counsel willing employees on important life issues, that "Beckwith Electric, at the behest of Beckwith" donates to religious charities, and that "[i]mportantly, Beckwith, according to his religious beliefs, established Beckwith Electric's corporate policy that it will not obtain a group insurance policy that provides emergency contraceptive drugs or devices." *Id.* The district court found based on this record that "Beckwith's unalienable right to freely exercise his religion is not relinquished simply because he chooses to engage in free enterprise using an available corporate form" and that "the contraceptive mandate does not, at this stage, seem to accommodate the notion of religious tolerance that is embedded in the Constitution and made applicable here through RFRA." *Id.* at 25-26.

The district court found that Beckwith Electric "is merely the instrument through and by which Beckwith expresses his religious beliefs, and, therefore, has a sufficient nexus with Beckwith to surpass the constitutional and prudential limitations of the Court's jurisdiction." *Id.* at 26. The district court then held that "Beckwith Electric has shown an actual or imminent injury, that is 'concrete and

particularized,' 'fairly traceable' to the contraceptive coverage mandate, and one that can be redressed by a decision of this Court." *Id.*

Next, the district court found that Plaintiffs are likely to prevail on the merits of their claims. The court found that the contraceptive mandate places a substantial burden on Plaintiffs by putting substantial government pressure on them to perform acts that are contrary to their religious beliefs, and that the government failed to demonstrate a compelling interest to justify the burden. *Id.* at 26-30. The court also noted that "forcing private employers to violate their religious beliefs in order to supply emergency contraceptives to their employees is more restrictive than finding a way to increase the efficacy of an already established [family planning] program that has a reported revenue stream of $1.3 billion." *Id.* at 34, n. 16.

Evaluating the next prong of the preliminary injunction factors, the district court cited well-settled Supreme Court precedent that "[t]he loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 33 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Based on this unquestionable principle, the district court found that Plaintiffs will suffer irreparable harm without an injunction. *Id.*

Next, the district court found that the balance of harms tips in favor of Plaintiffs, stating that "[i]f the government is willing to grant exemptions for no

less than one third of all Americans, and it is willing to consent to injunctive relief in cases that do not fall within those exemptions, then it can suffer no appreciable harm by permitting an additional 168 employees (i.e., less than .0002 percent of those already exempted) to be exempted." *Id.* at 35.

Lastly, the district court found that it is in the public interest to grant an injunction to Plaintiffs in this case because "it is never in the public interest to enforce unconstitutional laws." *Id.* The court issued its injunction after finding that Plaintiffs satisfied all four elements for entry of a preliminary injunction. It correctly realized the danger posed by the contraceptive mandate stating "any action that debases, or cheapens, the intrinsic value of the tenant of religious tolerance that is entrenched in the Constitution cannot stand." *Id.* at 36.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's well-reasoned decision that injunctive relief is appropriate in this case. The Mandate is an extreme, unwarranted, and unconstitutional governmental intrusion into the lives of working Americans. It strips business owners and the companies they animate of the ability to make decisions rooted in faith and directed by conscience.

The First Amendment and RFRA protect all citizens. Consequently, Defendants may not use their authority to impose the will of unelected officials on faithful Americans by forcing them to include coverage for emergency

contraceptives and abortifacients in the health plans they sponsor, in violation of those American's sincerely held religious beliefs. The district court recognized the truth of this statement, and acknowledged its sense in light of this country's history and founding principles. It then conducted a thorough and logical analysis of the laws involved in this case, and correctly found that Plaintiffs are likely to succeed on the merits of their claims. Further, the district court correctly recognized that the burden the Mandate places on Plaintiffs, and other faithful Americans, to choose between following their faith and facing financial ruin, or complying with the Mandate and sacrificing their spiritual well-being, is substantial and unjustified. Defendants have wholly failed to establish that the Mandate serves a compelling government interest and have completely failed to demonstrate it is the least restrictive means of accomplishing Defendants' objectives.

Based on well-settled Supreme Court case law, it is clear that Plaintiffs will suffer irreparable harm without an injunction. It is also clear, considering all of the exemptions to the Mandate already in place and the availability of contraceptive services from other sources, Defendants have failed to prove that anyone will be harmed by the issuance of the injunction protecting Plaintiffs from the Mandate. Because the Mandate is an unconstitutional law, the public interest favors granting the injunction. Accordingly, this Court should affirm the district court's decision.

STANDARD OF REVIEW

Granting of a preliminary injunction is a decision within the sound discretion of the district court, and subject to the "abuse of discretion" standard of review. *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983). Review of such a decision by the Appellate Court is narrow; much deference is given to the district court. The district court should not be reversed absent a clear abuse of discretion. *Harris Corp. v. National Iranian Radio & Television*, 691 F. 2d 1344, 1354 (11th Cir. 1982). The Appellate Court should not "review the intrinsic merits of the case." *Lambert*, 695 F.2d at 539. As,

> [L]imited review is necessitated because the grant . . . of a preliminary injunction is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success at final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief. Weighing these considerations is the responsibility of the district court.

Allied Veterans of the World, Inc. v. Seminole County, 468 Fed. Appx. 922, 923 (11th Cir. 2012) (citations omitted).

ARGUMENT

Defendants present the same, unsupported arguments that the district court and Seventh, Eighth, Tenth, and D.C. Circuits have found unavailing. *Korte v. Sebelius*, Case No. 12-3841, 2013 U.S. App. LEXIS 22748 (7th Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013); *Gilardi v. U.S.*

Dep't of Health & Human Servs., No. 13-5069, 2013 U.S. App. LEXIS 22256 (D.C. Cir. Nov. 1, 2013); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, order (8th Cir. November 28, 2012). And Defendants certainly have fallen short of carrying their burden to establish that the district court abused its discretion or misapplied the RFRA to merit reversal. R.39 at 1-37.

The district court issued a well-reasoned opinion and its decision to grant an injunction should be affirmed to maintain the status quo and protect the constitutional rights of Plaintiffs. This decision is consistent with the thirty-two preliminary injunctions granted nationally for similar challenges to the Mandate in cases involving for-profit companies and their owners.

I. The District Court did not abuse its discretion in holding Plaintiffs are Likely to Succeed on their RFRA Claims.

As the district court properly held, Plaintiffs have demonstrated a likelihood of success on the merits because the Mandate violates RFRA. In its holding, the district court thoroughly addressed Defendants' three main contentions, finding that: 1) a corporation is a person under RFRA, 2) the Mandate substantially burdens the religious exercise rights of any plaintiff, individual or corporate, and 3) an individual does not forfeit the unalienable right of freedom of religion by operating his/her company through the corporate form. R. 39 at 8-30. The district court rightfully found that none of Defendants' arguments defeated the RFRA's protection.

Congress enacted RFRA in response to *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), purposefully adopting a statutory rule comparable to that rejected in *Smith*.[8] RFRA strictly prohibits the federal government from substantially burdening a person's exercise of religion, "even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb-1(a), except when the government can "demonstrate[] that application of the burden to the person--(1) [furthers] a compelling government interest; and (2) is the least restrictive means of furthering that . . . interest." 42 U.S.C. § 2000bb-1(b); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). Indeed, any "person" whose religious practices are burdened in violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief." *Id.* at 424 (quoting 42 U.S.C. § 2000bb-1(c)).

As the district court noted "the congressional findings enumerated in RFRA," discuss that "'the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment' and the Supreme Court in *Smith* 'virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.'" R.39 at 7 (quoting 42 U.S.C. 2000bb(a)(l)).

[8] Religious Freedom Restoration Act of 1993, 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb et seq.

RFRA is a "sweeping 'super-statute' cutting across all other federal statutes (now and future) unless specifically exempted." Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253 (1995). RFRA applies to "all Federal law" unless such law "explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb-3(a), (b). As the Seventh Circuit stated, "RFRA operates as a kind of utility remedy for the inevitable clashes between religious freedom and the realities of the modern welfare state, which regulates pervasively and touches nearly every aspect of social and economic life." *Korte v. Sebelius*, Case No. 12-3841, 2013 U.S. App. LEXIS 22748 at *47 (7th Cir. 2013).[9]

In its formulation of RFRA, Congress expressly adopted the compelling interest test of *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In both cases, the Court "looked beyond broadly formulated interests justifying the general applicability of government mandates, scrutinized the asserted harms, and granted specific exemptions to particular religious claimants." *Gonzales* at 431; *see Yoder* at 213, 221, 236; *Sherbert* at 410. In *Sherbert*, the Court held that the State's denial of unemployment benefits to an employee who refused to work on Saturdays because of her religious beliefs was

[9] It is undisputed that the Mandate and the ACA do not "explicitly exclude" the application of RFRA. Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Healthcare and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010); 45 C.F.R. § 147.130; 42 U.S.C. § 300gg-13 *et seq*.

an impermissible burden on her free exercise of religion because it "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." *Id.* at 404. In *Sherbert* the court held that the government could not impose the same kind of burden upon the free exercise of religion as it would impose a fine against noncompliant parties of the law. *Id.* at 402 ("Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit the dissemination of particular religious views.") (internal citations omitted).

In *Yoder*, Amish and Mennonite parents of teenaged children held religious beliefs that prohibited them from sending their children to high school. *Yoder* at 207. Each parent was fined $5 per child for failing to comply with Wisconsin state law for not sending their children to school beyond the eighth grade in accordance with their sincerely held religious belief that "higher learning tends to develop values they reject as influences that alienate man from God." *Id.* at 208-13. The Supreme Court held that the impact of the Wisconsin law, while recognizing the "paramount" interest in education that the law sought to promote, impermissibly compelled the parents to perform acts undeniably at odds with the fundamental tenets of their religious beliefs. *Id.* at 218, 213, 221; *see Braunfeld v. Brown*, 366

U.S. 599, 605 (1961). The Court found that this compulsion "carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Yoder* at 218. Plaintiffs in the instant case are being subjected to the same constitutionally forbidden compulsion present in *Yoder* and *Sherbert*.

In accordance with the Supreme Court rulings in *Sherbert* and *Yoder*, and in light of the plain language of RFRA, which was expressly enacted by Congress to protect religious freedom, the Mandate substantially burdens Plaintiffs' sincere exercise of religion. Furthermore, Defendants cannot demonstrate that the application of the Mandate to Plaintiffs furthers a compelling government interest and uses the least restrictive means. 42 U.S.C. § 2000bb-1(b).

A. District Court properly held that Plaintiffs are protected under RFRA.

Thomas R. Beckwith and Beckwith Electric do not lose all of the rights Congress sought to protect when it implemented RFRA simply by entering the workforce. RFRA protects "any" free exercise of religion. 42 U.S.C. § 2000bb-2 (referencing 42 U.S.C. § 2000cc-5). Conduct constitutes the exercise of religion if it is based upon a religious belief that is both sincere and founded on an established religious tenet. *Yoder* at 210-19.

Defendants seek to exclude an entire class of people, here corporations and their owners, from First Amendment freedoms protected under RFRA. But

Defendants fail to provide any logical support for the notion that Plaintiffs forfeit their rights to religious liberty by earning a living by running a corporation. As the district court properly held, "[i]t is not sound . . . to rely on the premise that individuals bartered for the privilege of limited personal liability in exchange for the relinquishment of their free exercise rights when engaging in commerce under the corporate form." *Beckwith*, 2013 U.S. Dist. LEXIS 94056, *34.[10]

In *United States v. Lee*, the Supreme Court reached a logical conclusion when considering whether a business owner can exercise religious beliefs: "Because 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." 455 U.S. 252, 257 (1982). The same is true here: because providing coverage of abortifacients and contraception violates beliefs that the government concedes are sincerely held, compulsory compliance with the Mandate interferes with Plaintiffs' free exercise rights. Unlike *U.S. v. Lee*, Defendants cannot justify its interference with Plaintiffs' free exercise rights because they have

[10] Defendants conceded that if a business owner brought a suit on behalf of his company which was organized as a partnership, instead of in the corporate form, the business owner would be able to bring this claim. *See Gilardi v. Sebelius*, Audio File of Oral Argument, Sept. 24, 2013, *available at* http://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByMonday?OpenView&StartKey=20130920130923&Count=13&scode=1, last visited Nov. 17, 2013. Therefore, Defendants' argument boils down to whether the corporate form eviscerates religious freedom under RFRA.

failed to demonstrate the Mandate is necessary to further a compelling government interest and that it is the least restrictive means to accomplish its goal.[11]

As in the many injunctions issued against the Mandate, multiple other courts across the country have recognized that business owners can bring religious exercise claims. Business owners are impacted by government burdens on their businesses and there is no distinction between committing an immoral act as an individual or using one's company to commit the act.

i. The District Court correctly enjoined the Mandate against Beckwith Electric.

RFRA applies to "persons," 42 U.S.C. § 2000bb(b), and "persons" as defined by 1 U.S.C. § 1 includes corporations. A plain reading of the United States Code requires the conclusions that corporations can exercise religion. Concluding otherwise would mean that churches, religious hospitals, and religious non-profit corporations cannot bring claims either under RFRA.

Reading the definition of person to cover corporations is consistent with the statutory scheme because corporations already benefit from other civil rights

[11] Defendants rely on dicta from *U.S. v. Lee*. App. Br. at 21. Their reliance is misplaced. As the D.C. Circuit in *Gilardi* explained "*Lee* was a rare case in which the government fended off a strict-scrutiny challenge by proving exemptions would 'present an administrative problem of such magnitude . . . that such a requirement would have rendered the entire statutory scheme unworkable.'" *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069, 2013 U.S. App. LEXIS 22256, at *30-31 (D.C. Cir. Nov. 1, 2013). U.S. v. Lee was decided on the premise that the government cannot survive without taxes. In contrast, we have survived without the Mandate since our country's inception. Further, Lee dealt with a universal tax—such is not the case with the Mandate which deals with a private contract and is ridden with exemptions.

provisions and from the First Amendment Rights RFRA was designed to restore. *See, e.g. Thinket Ink. v. Sun Microsystems, Inc.*, 368 F. 3d 1053, 1058-60 (9th Cir. 2004)(corporations may bring § 1981 actions for racial discrimination); *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 867 (9th Cir. 1984)(corporations may bring § 1983 actions and qualify as "persons" under the 14th Amendment, the equal protection clause, and the due process clause); *NAACP v. Button*, 371 U.S. 415, 428-430 (1963)(corporations can assert the rights of others). Corporations qualify as "persons" under the 14th Amendment, the equal protection clause, and the due process clause. *Id.* And corporations have brought free exercise cases before. *See, e.g. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993)(claim involving a "not-for-profit corporation organized under Florida law"); *Okleveuha Native American Church of Hawaii, Inc. v. Holder*, 676 F.3d 829 (9th Cir. 2012); *Mirdrash Sephardi, Inc. v. Town of Surfside*, 367 F. 3d 1214 (11th Cir. 2004); *see also Durham & Smith, 1 Religious Organizations and the Law* § 3:44 (2012) (explaining reasons religious organizations use the corporate form).

The Supreme Court has emphasized that "First Amendment protection extends to corporations," and a First Amendment right "does not lose First Amendment protection simply because its source is a corporation." *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 899 (2010); *see also Monell v.*

Dept. of Social Services, 436 U.S. 658, 687 (1978) ("corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis"). For-profit corporations such as the New York Times could never have won seminal cases without possessing First Amendment rights. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Courts have long allowed for-profit companies to bring free exercise claims on behalf of itself or its owners. *McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985) (finding that a health club and its owners could assert free exercise claims). The Ninth Circuit has allowed for-profit corporations to assert free exercise claims on behalf of their owners. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119–20 & n.9 (9th Cir. 2009) (pharmacy and its religious owners); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988) (manufacturer on behalf of its religious owners). The Second Circuit in *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194 (2d Cir. 2012), allowed a kosher deli and its owners to bring Free Exercise and Establishment Clause claims. *Id.* at 200. *See also Tyndale House Publishers, Inc. v. Sebelius, et al.*, No. 12-1635, slip op. at 5-9 (D.D.C. Nov. 16, 2012).

It is not a requirement of any state that in order to take advantage of the state's incorporation laws, the company must abstain from religious activities. A corporation is free to hold optional religious services at an on-site chapel, donate to

a church or religious charity, hire corporate chaplains, or implement policies and practices in line with religious tenets. Here, the district court noted that Beckwith Electric exercises its religious beliefs in several ways,

> Beckwith personally arranges for corporate chaplains to visit Beckwith Electric on a weekly basis to assist employees with difficult issues of bereavement, marriage, children, finances, addictions, eldercare, and other types of crises. Beckwith Electric also donates to various charities, both secular and religious, including New Life Solutions' Family Ministries, which is a Christ-centered ministry offering hope, help, and healing for women, teens and families by promoting healthy lifestyle choices and relationships.

R.39 at 3 (internal quotations and citations omitted).

In applying the undisputed record and the applicable law, the district court correctly found that Beckwith Electric was person under RFRA and could exercise religious freedom.[12]

Defendants argue that one cannot exercise religion while engaging in business. This is contrary to a significant body of case law, and perhaps more importantly, ignores reality. An individual does not shed his/her conscience or somehow become immune to moral decision-making and its eternal consequences simply by assuming a corporate role. Furthermore, the free exercise clause is often invoked in the commercial sphere. In *Sherbert*, an employee's religious beliefs

[12] The district court warned that "[t]he intersection of corporate form with individual rights is even more central when dealing with a closely held corporation, such as the case here. It would truly be form over substance to say there is a meaningful distinction between Beckwith Electric and Beckwith when it comes to religion" R.39 at 22.

were burdened by not receiving unemployment benefits. 374 U.S. at 399. The same occurred in *Thomas*, 450 U.S. at 709. In *U.S. v. Lee*, the Court held that an employer's beliefs were burdened by paying taxes for workers. 455 U.S. at 257. In *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (Alito, J.), an employee's bid to continue his employment was burdened by discriminatory grooming rules.

Congress has rejected Defendants' argument in many ways. For example, the Affordable Care Act lets employers and "facilit[ies]" assert religious beliefs for or against "provid[ing] coverage for" abortions, without requiring them to be nonprofits. 42 U.S.C. § 18023; *see* http://www.aha.org/research/rc/stat-studies/fast-facts.shtml, last visited Nov. 19, 2013. Congress has repeatedly authorized similar objections. *See*, *e.g.*, Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, Title VII, Div. C, § 727; *id.* at Title VIII, Div. C, § 808; 42 U.S.C. § 300a-7; 42 U.S.C. § 2996f(b)(8); 20 U.S.C. § 1688; 42 U.S.C. § 238n; 42 U.S.C. § 1396u-C.F.R. § 1609.7001(c)(7). These protections cannot be reconciled with the unrealistic view that religious exercise cannot occur in the world of commerce.

ii. Federal employment statutes, which bear no legal relevance to Plaintiffs' RFRA claim, do not gut RFRA's protection of religious freedom.

Defendants' central argument is that laws such as the Civil Rights Act prevent Plaintiffs from exercising religion under RFRA. Many of Defendants' case citations interpret terms such as "religious employer" in Title VII—not "free exercise." This contention is a non sequitur. RFRA's concept of "free exercise" is entirely coextensive with the First Amendment, and no justification exists for imposing Title VII's narrow scope on RFRA.

Defendants argue that RFRA was enacted upon the background principles in federal employment statutes which silently declared that Title VII of the Civil Right Act diminished the exercise of religion to exclude business. This misconstrues RFRA, Title VII, and ordinary canons of statutory interpretation. Title VII contains explicit language limiting its religious exemption from applying beyond "religious corporations." This background is an argument for, not against, Plaintiffs' ability to exercise religion under RFRA. Congress, when enacting RFRA, easily could have used or adopted Title VII's language, but chose not to. Since these sections are so near each other in the U.S. Code (42 U.S.C. § 2000e & 2000bb), the term "religious employer" in Title VII should be given a different meaning than "*any* exercise of religion" in RFRA. It is a "well established axiom of statutory construction 'that a statute is to be interpreted so that no words shall be

discarded as meaningless, redundant, or mere surplusage'" *United States v. Castrillon-Gonzalez*, 77 F.3d 403, 406 (11th Cir. 1996) (quoting *United States v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11th Cir. 1991). Additionally, "[i]t is contrary to common sense as well as sound statutory construction to read the later, more general language to incorporate the precise limitations of the earlier statute. Where the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444 (D.C. Cir. 1988).

Moreover, RFRA explicitly declares that it trumps other statutes unless those statutes explicitly exempt themselves from RFRA. 42 U.S.C. § 2000bb-3. Title VII cannot be read to trump RFRA when RFRA insists the opposite. The fact that Congress felt the need in Title VII to explicitly limit its religious protections suggests that Congress believed that if it had not done so, the default of free exercise belonging to all would have ruled the day. Title VII addresses only one issue, employment discrimination—it does not address the myriad ways a businesses can and should be able to exercise religion. Title VII has not been canonized into the Bill of Rights.

Defendants try to support their argument by citing to *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), but the Seventh Circuit aptly rejected this contention,

> The government also relies on the Supreme Court's decision in . . . *Amos*. We do not understand why. *Amos* rejected an Establishment Clause challenge to Title VII's religious-employer exemption. The case does not advance the government's position here.
>
> To the contrary, the church labor-relations cases illuminate a fundamental flaw in the government's argument—its failure to recognize that RFRA protects religious liberty more broadly than the religious-employer exemptions in Title VII and the ADA.

Korte v. Sebelius, Case No. 12-3841, 2013 U.S. App. LEXIS 22748 at *55 (7th Cir. 2013). This Circuit should agree with the Seventh Circuit's on-point analysis of this issue.

iii. The District Court properly found no conflict between RFRA and the "Bedrock Tenets of American Corporate Law."

The corporate structure cannot be used to strip employers of their constitutional rights. There is no factual or sound legal basis for the notion that Plaintiffs forfeit their constitutional rights when they chose to conduct business through a form authorized by state law. This is as it should be because any effort to make Plaintiffs surrender their fundamental rights in order to use the corporate form would itself be unconstitutional. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) ("our modern 'unconstitutional conditions' doctrine holds that the 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").

In trying to define religion as wholly separate from business, the government asserts a view best characterized as essentially theological and unsupported by legal precedent. No case exists which holds that religious exercise should be confined to the four walls of a person's church, home, or mind. Defendants try to support their argument by also pointing to *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) — a case which has absolutely nothing to do with RFRA and certainly does not exclude categories of persons from RFRA. In *Cedric Kushner*, the Court examined liability under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 when the president of the corporation acted within the scope of his employment to commit a pattern of fraud or other RICO predicate crimes. The Court recognized that the acts of the owner created liability for the corporation, and the Court even stated in its holding that "[i]t does not deny that a corporation acts through its employees [or sole owner]; it says only that the corporation and its employees are not legally identical." *Id.* at 166.

In *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 438 (1946), quoted by Defendants, the Court stated "[w]hile corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages *and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person*." Carving out corporations and their owners from RFRA defies and is violent to the legislative purpose of RFRA—which is quite obviously to protect religious freedom.

Religion is not an isolated category of human activity. Religion is, among other things, a viewpoint from which people engage in any kind of activity or purpose, not excluding business. *See Goods News Club v. Milford Central School*, 533 U.S. 98, 107-12 (2001) (activities of any kind, whether "social," "civic," "recreational," or educational, are not different kinds of activities when religious, they are the same kind of activity simply done from a religious perspective). Plaintiffs exhibit their religious exercise here through adherence to Southern Baptist tenets, funding of the corporate chaplaincy, tithing, and funding of Pro-life pregnancy causes. R.39 at 3.

The First Amendment has never contained a dichotomy between religious and secular employers and case law dictates the same. Corporations are no more

purely "secular" or purely religious than are the people that run them. It is essential to freedom in America for its citizens to be able to live out their faith in their everyday lives, which includes such things as being employed and running a business.

iv. The District Court correctly found that Thomas R. Beckwith could advance a RFRA Claim against the Mandate in his Individual Capacity.

It is well established in our RFRA and First Amendment jurisprudence that an employee may practice his or her religion while pursuing commercial goals. In *Sherbert v. Verner*, the plaintiff, a Seventh Day Adventist holding her Sabbath on Saturdays, was fired because she could not violate the tenets of her faith by working on Saturdays. 374 U.S. 398, 401 (1963). The government refused her unemployment benefits. *Id*. Under Free Exercise jurisprudence, the State in *Sherbert* had to yield because it could not demonstrate a compelling interest in enforcing this law against her. This was so even though the plaintiff was engaged in a "secular" occupation. The plaintiff was not forced to leave her religious convictions at the corporate door. *See also Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981). Here Defendants have not articulated any justification for allowing an employer, Thomas R. Beckwith, less freedom than an employee and have not offered any justification for straying from the precedent for

allowing religious freedom in the commercial sphere as protected in *Sherbert* and *Thomas*.

Without citing Eleventh Circuit precedent, Defendants argue the shareholder standing rule bars Thomas R. Beckwith from asserting his own RFRA claim. This argument was unconvincing at the district court level, and it is even more unconvincing now in light of the opinions in the Seventh and D.C. Circuits. *Korte v. Sebelius*, Case No. 12-3841, 2013 U.S. App. LEXIS 22748 (7th Cir. 2013) (holding that an individual business owners' claim is not barred by the shareholder standing rule); *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069, 2013 U.S. App. LEXIS 22256 (D.C. Cir. Nov. 1, 2013) (same).

There is an exception to the shareholder standing rule for shareholders who are injured as individuals. 12B *Fletcher Cyclopedia of Corporations* § 5911. In such cases, the shareholder may be said to hold a "direct, personal interest," and may pursue a direct action even if the wrongful act also implicates the corporation's rights. *Id.*; *see also Franchise Tax Bd.*, 493 U.S. at 336; Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 2.13 at 259 (3d ed. 1999). As the district court found, Thomas R. Beckwith has standing.

The district court noted that "[Thomas R.] Beckwith manages the day-to-day operations of Beckwith Electric and is responsible for establishing all its operational policies. . . [Thomas R.] Beckwith asserts that his religious beliefs

prohibit him from managing a company, or allocating its resources, in any manner inconsistent with those beliefs, and the government does not challenge the sincerity of those beliefs," and "the Southern Baptist faith doesn't give a pass to Mr. Beckwith because he's operating his business in the corporate form." R.39 at 24-25. These facts evidence a direct and personal interest.

The district court correctly found "that Beckwith's unalienable right to freely exercise his religion is not relinquished simply because he chooses to engage in free enterprise using an available corporate form. . . [t]o hold otherwise would place too great a burden on religious freedom based solely upon the manner and form in which an individual decides to conduct business." R.39 at 29-30.

B. Plaintiffs are Directly and Substantially burdened by the Mandate.

Pursuant to the teachings of the Southern Baptist Convention, Plaintiffs' sincerely held religious beliefs prohibit them from providing or purchasing health insurance coverage for emergency contraception, abortifacients, or related education and counseling. Plaintiffs' compliance with these beliefs is a religious exercise. The Mandate creates government-imposed coercive pressure on Plaintiffs to purchase insurance and provide contraception and abortifacients—or in other words, *to change or violate their beliefs*. The Supreme Court has stated that coercion against an individual's financial interests is a substantial burden on religion. *Sherbert*, 374 U.S. at 403-04. By failing to provide an exemption for

Plaintiffs' religious beliefs, the Mandate not only exposes Plaintiffs to substantial per employee fines for their religious exercise—annual fines significantly more severe than the $5 per student fine struck down by the Court in *Yoder*—, but also exposes all Plaintiffs to substantial competitive disadvantages if they are no longer permitted to offer or purchase health insurance due to their religious beliefs. 26 U.S.C. §§ 4980D & 4980H; *see also Sherbert* at 374 U.S. at 403-04 (finding "a fine imposed against appellant" to be a quintessential burden).

The coercion here is even more direct than in *Sherbet* because it requires Plaintiffs to purchase and provide coverage for medications and devices that can bring about early abortions. Not only is the religious belief of Plaintiffs clear—that they cannot in good conscience facilitate such coverage—the substantial burden is also clear—crippling annual tax penalties. Beckwith Electric employs 163 full-time employees. R.10 at Ex. 1, Decl. of Thomas R. Beckwith at ¶ 4. Therefore, with the calculations of the Affordable Care Act and the mandate, Plaintiff will sustain yearly penalties of $266,000 or $5,949,500. *Id*. at ¶ 35, 36. Such penalties are an intense burden on the sustainability of Beckwith Electric, as well as Thomas R. Beckwith's livelihood, property, employment, and family well-being. The Mandate is an archetypal substantial burden, because it "make[s] unlawful the religious practice itself." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Plaintiffs exercise their religious beliefs in this case by refraining from

covering abortifacients, emergency contraception, and related counseling in their employee health insurance plan. To outlaw that religious exercise and "compel a violation of conscience," as here is a quintessential substantial burden. *Thomas v. Review Bd.*, 450 U.S. at 717.

Defendants inexplicably and remarkably conclude—contrary to Plaintiffs' knowledge and explanation of their own faith—that Plaintiffs' faith is not substantially burdened. Defendants conduct no true analysis, and blanketly assert that the mandate is "too attenuated." Defendants claim to know Plaintiffs' faith better than they do—to the contrary of the plain language of the teachings of the Southern Baptist Faith, the directives of the leaders of the Southern Baptist Convention, and the findings of the district court. Defendants' assertions are not based in fact or law.

The mandate substantially burdens Plaintiffs' free exercise of religion. As the Tenth Circuit recognized in *Hobby Lobby*, a plaintiff's exercise of religion "is substantially burdened with the meaning of RFRA" by the mandate's application to its health plan. *Hobby Lobby* at *17. In fact, the courts should not "characterize the pressure as anything but substantial." *Id.* at 10. Just as *Hobby Lobby* is substantially burdened by this mandate, Plaintiffs are presented with the same "Hobson's choice" of suffering the mandate's penalties or violating the tenants of their faith. *Id.* at 20. And a business does not make such decisions except through

human agency, i.e. through its managers, officers, and owners pursuant to the policies of the business established by these same individuals. Defendants cannot foreclose Plaintiffs' claim by alleging a nonexistent attenuation of the substantial burden at play here.[13]

Furthermore, Defendants are incorrect to assert that the substantial burden placed on Plaintiffs' free exercise is "too attenuated" because employees use the contraceptives. Plaintiffs do not object to the Mandate because their *employees* may use certain drugs; they object because the Mandate forces *them* to provide and subsidize those drugs. As the Court in *Tyndale* correctly noted, "Because 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. And even if this burden could be characterized as 'indirect,' the Supreme Court has indicated that indirectness is not a barrier to finding a substantial burden." R.39 at 29-30.

In *Thomas v. Review Board*, the plaintiff who objected to war was denied unemployment benefits after refusing to work in an armament factory. 450 U.S. 707, 714-16 (1981). The government argued that working in a tank factory was not a cognizable burden on the plaintiff's beliefs because it was "sufficiently

[13] ". . . one need not have looked past the first row of the gallery during the oral argument . . where the [plaintiffs] were seated and listening intently, to see the real human suffering occasioned by the government's determination to either make the [plaintiffs] bury their religious scruples or watch while their business gets buried." *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, Slip. Op. at *32 (3rd Cir. July 26, 2013) (Jordan) (dissent).

insulated" from his objection to war. *Id.* at 715. The Court rejected not only this conclusion, but the underlying premise that it is the court's business to draw moral lines. "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs. . . ." *Id.* Likewise here, it is plain legal error to contend that direct penalties are somehow not a "substantial" burden on an explicit religious belief (objecting to certain insurance coverage) because the government deems them theoretically attenuated. Finally, the argument that because the Mandate applies to Beckwith Electric, its owner and CEO, Thomas R. Beckwith is isolated from its effect,—is plainly wrong. As demonstrated by the district court, and the thirty-two injunctions granted nationally against the Mandate, the majority, commonsense view is that this imposition on a corporation is no less an imposition on the owner. The Mandate can only be implemented by Thomas R. Beckwith, majority shareholder, and CEO of Beckwith Electric. The corporate papers cannot implement the Mandate, nor can its brick-and-mortar buildings. It is Thomas R. Beckwith who will have to decide to either sacrifice his conscience or sacrifice his business to appease Defendants' demands. The pain and long-term consequences born from that decision will be devastating to both Plaintiffs. Neither Plaintiff will continue to exist in the way that they did prior to this extreme government intrusion if the Mandate is upheld. It is difficult to imagine a more substantial

burden than that created by Defendants' position in this case—if you are truly faithful, you must choose: do you want peace in this life, or peace in the next.

Defendants' assertion, that since a corporation has limited liability it cannot exercise religion, does nothing to negate religious freedom rights. As the district court held, limited liability is only one characteristic of a corporation, and not morally relevant here. The duty imposed by the Mandate falls directly onto Thomas R. Beckwith. The corporate form does not isolate Thomas R. Beckwith—it is actually the mechanism the Mandate uses to impose its burden. R.39 at 26-30. There is no factual basis for the notion that Plaintiffs forfeit their constitutional rights when they chose to conduct business through a business entity authorized by state law.

C. The Mandate is not narrowly tailored to advance a compelling governmental interest.

The district court properly found that the Mandate could not survive strict scrutiny review. R.29 at 34, n.16.

i. The Mandate does not further a compelling interest or use the least restrictive means to do so.

The Mandate furthers no compelling governmental interest and is not narrowly tailored to any compelling governmental interest, as emergency contraceptives are currently readily available through other means without forcing Plaintiffs to provide them.

It is Defendants, not Plaintiffs, who must demonstrate both a compelling interest and their use of the least restrictive means before this Court, even at the preliminary injunction stage. *Gonzalez*, 546 U.S. at 428-30. In order to prove that Defendants' substantial burden on Plaintiffs' religious liberties is justified, Defendants need to pass strict scrutiny—"the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Defendants are required to "specifically identify an 'actual problem' in need of solving" and show that substantially burdening Plaintiffs' free exercise of religion is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (June 27, 2011). Defendants bear the burden of proof—"ambiguous proof will not suffice." *Id.* at 2739.

Forcing Plaintiffs to provide and fund health insurance which makes emergency contraceptives and abortifacients available to their employees serves only an ambiguous, non-compelling interest, and *at best* would serve the interest of *marginally* increasing access to emergency contraceptives and abortifacients. There is "no actual problem in need of solving," and forcing Plaintiffs to violate their religious beliefs fails to offer any sort of "actually necessary solution." Defendant Kathleen Sebelius herself has admitted that contraceptive services are already readily available "at sites such as community health centers, public clinics, and hospitals with income-based support." Statement of HHS, *available at*

(http://www.hhs.gov/news/press/2012pres/01/20120120a.html, last visited Nov. 18, 2013). Physicians and pharmacies have traditionally also provided contraceptive and abortifacient services. There is no compelling reason for the Mandate to take the matter one step further by forcing employers objecting upon sincere religious grounds, to subsidize these services through the insurance plans they sponsor. If Defendants were truly concerned with the lack of access to contraceptives and abortifacients in this country, Defendants could provide those "preventative services" itself without burdening Plaintiffs' religious beliefs.

Furthermore, the Mandate fails to provide the least restrictive means of furthering Defendants' stated interests of providing contraceptives and abortifacients, as Defendant Health and Human Services has carved out a number of exemptions for secular purposes such as size of employer, the age and grandfathered status of a health insurance plan, waivers for high grossing employers, *etc*. Defendants have not carried their burden under *Gonzalez*, which requires that the government demonstrate a compelling interest *against* "granting specific exemptions to particular religious claimants." 546 U.S. at 431.

ii. By excluding tens of millions of women for various reasons, the government shows that its interest is not compelling.

What radically undermines the government's alleged compelling interest is the massive number of people who the government has voluntarily decided to omit from its supposedly paramount health and equality interests. *Gilardi v.*

United States HHS, 2013 U.S. App. LEXIS 22256, at *40 (D.C. Cir. Nov. 1, 2013) ("[T]he mandate is self-defeating."); *Korte v. Sebelius*, 2013 U.S. App. LEXIS 22748, at *86 (7th Cir. Nov. 8, 2013) ("Since the government grants so many exceptions already, it can hardly argue against exempting these plaintiffs."). By design, Defendants imposed the mandate on some religious companies or religious individuals but not on others, resulting in discrimination among religions. Defendants have created a number of categorical exemptions and individualized exemptions, none of which alleviate the chill imposed on Plaintiffs' free exercise of religion. The Affordable Care Act and the Mandate includes exemptions for:

- Individual members of a "recognized religious sect or division" that conscientiously object to acceptance of public or private insurance funds in their totality, such as members of the Islamic faith or the Amish. 26 U.S.C. § 5000A(d)(2)(A)(i) and (ii).

- Employers with fewer than 50 full time employees are not subject to certain fines and penalties. 26 USC § 4980H(c)(2)(B)(i). While employers with more than 50 full time employees must provide federal government-approved health insurance or pay substantial per-employee fines. 26 U.S.C. § 4980H.

- Employers with health care plans that are considered to be "grandfathered," which, amongst meeting other criteria, have been in place and remain unchanged since March 23, 2010. 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140. This exemption will cover *tens of millions* of women as far out as the government's data projects. 75 Fed. Reg. at 34,540-53.

- Non-profit employers who qualify under the narrow exemption of a "religious employer." 45 C.F.R. § 147.130 (a)(iv)(A) and (B).

- Non-profit employers who do not qualify under the narrow exemption of a "religious employer" but still object to complying with the Mandate. 77 Fed. Register 8725 (Feb. 15, 2012); *see also* (http://www.hhs.gov/news/press/2013pres/02/20130201a.html) (*last visited* May 6, 2013).

This scheme of exemptions demonstrates that the mandate is "a law [that] cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to the supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 520. No compelling interest exists when the government "fails to enact feasible measures to retract other conduct producing substantial harm or alleged harm of the same sort." *Id.* at 546-47.

If the government really possessed an interest "of the highest order" to justify coercing Plaintiffs to violate their sincerely held religious beliefs, the government could not voluntarily use grandfathering to omit tens of millions of women from the mandate. The pedestrian reason for the grandfathering exemption illustrates this point: it exists because "[d]uring the health reform debate, President Obama made clear to Americans that 'if you like your health plan, you can keep it.'" (HealthCare.Gov, "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, last visited Nov. 17, 2013). Yet, Congress considered

some of the Affordable Care Act's requirements (but not the Mandate) paramount enough to impose on grandfathered plans. *See* 75 Fed. Reg. at 34,542 (listing §§ 2704, 2708, 2711, 2712, 2715, 2718 as applicable to grandfathered plans). These include such requirements as dependent coverage until age 26, and restrictions on preexisting condition exclusions and annual or lifetime limits. These requirements surround the Mandate, § 2713, but Congress intentionally omitted the Mandate from the requirements it made necessary for all plans. Moreover, Congress did not consider coverage for abortifacients and all FDA approved contraception important enough to list in § 2713. As far as Congress was concerned, the Affordable Care Act need not impose any mandate that employers provide abortifacients or contraception. The government even admits that Congress gave HHS authority to exempt any religious objectors it wanted to exempt from this mandate. 76 Fed. Reg. at 46,623-24; 77 Fed. Reg. at 8,726. As far as Congress is concerned, the government could have exempted Plaintiffs. Congress deemed certain interests in the Affordable Care Act to be "of the highest order" for all health plans, but not the Mandate.

It cannot be claimed that the grandfathering exclusion is transitory; as such a claim contradicts the text of the Affordable Care Act, which gives no expiration date for the grandfathering provision, the government's website, and its own data. The government boasts that grandfathering "preserves the ability of the American

people to keep their current plan if they like it" and that "[m]ost of the 133 million Americans with employer-sponsored health insurance through large employers will maintain the coverage they have today." (http://www.healthreform.gov/newsroom/keeping_the_health_plan_you_have.html, last visited Nov. 17, 2013). There is no sunset on grandfathering status in the Affordable Care Act. Instead, the government affirmed that it is a "right" for a plan to maintain grandfathered status. 75 Fed. Reg. 34,538; 34,540; 34,558; 34,562; & 34,566.

The Mandate is *not* uniform, and RFRA insists on uniformity:

> The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operated by mandating consideration, under the compelling interest test, of exceptions to "rules of general applicability."

Gonzalez, 546 U.S. at 436.

iii. The government failed to present evidence that its interests are compelling.

Defendants must demonstrate both a compelling interest and their use of the least restrictive. *Gonzales*, 546 U.S. at 428-30. *See also Newland*, slip op. at 11 ("The initial burden is borne by the party challenging the law. Once that party establishes that the challenged law substantially burdens her free exercise of religion, the burden shifts to the government to justify that burden. The nature of this preliminary injunction proceeding does not alter these burdens.") (quoting

Gonzales, 546 U.S. at 429). The government presents no evidence that the mandate will work or that it is necessary; therefore, the government's "evidence is not compelling." *Brown v. Entm't Merchs.*, 131 S. Ct. at 2739. Twenty-eight states have similar mandates, but the government has cited zero evidence that health and equality has improved for women in any of those states, much less that one of those laws did so more than "marginal[ly]" as required by *Brown v. Entm't Merchs*. *Id.* at 2741.

The government points only to generic interests, marginal benefits, correlation not causation, and uncertain methodology. The Institute of Medicine ("IOM") report on which the mandate is based does not demonstrate the government's conclusions.[14] These studies lack the specificity required by *Gonzalez*, 546 U.S. 430-31. IOM does nothing to evidence that contraceptive use will increase, which would be a necessary corollary for the government's argument. Instead the IOM shows that most women are already practicing contraception, and lack of access or cost is not the reason the remaining women are not using contraceptives.[15] The studies cited at 2011 IOM pp. 109 referred to

[14] Inst. Of Med., *Clinical Preventative Services for Women: Closing the Gaps* (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181, last visited Nov. 16, 2013).

[15] *See* The Guttmacher Institute, *Facts on Contraceptive Use in the United States* (June 2010), *available at* http://www.guttmacher.org/pubs/fb_contr_use.html, last visited Nov. 17, 2013); R. Jones et al, Contraceptive Use Among U.S. Women Having Abortions, 34 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 294 (2002) (Guttmacher Institute publication); Prepregnancy Contraceptive Use Among Teens with Unintended Pregnancies Resulting in Live Births—Pregnancy Risk Assessment Monitoring System

by the government do not show that cost leads to non-use generally, but instead relate only to women switching from one contraception method to another. The government also fails to show how the Mandate has any effect on its target population, women who are employed with health insurance. The government asserts that women incur more preventive care costs generally, 2011 IOM at 19-20, but IOM's studies don't say they specifically include contraception as part of that cost, nor at what percentage.

Defendants cannot show that the mandate would prevent negative health consequences. "Nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology." *Brown v. Entm't Merchs.*, 131 S. Ct. at 2739 (quotes omitted). IOM admits that for negative outcomes from unintended pregnancy, "research is limited." 2011 IOM at 103. IOM therefore cites its own 1995 report, which similarly emphasizes the fundamental flaws in determining which pregnancies are "unintended," and "whether the effect is caused by or merely associated with unwanted pregnancy." Institute of Medicine, *The Best Intentions* (1995) ("1995 IOM"), *available at* http://books.nap.edu/openbook.php?record_id=4903 &page=64, last visited Nov. 17, 2013).

(PRAMS), 2004-2008, 61 MORBIDITY AND MORTALITY WEEKLY REPORT 25 (Jan. 20, 2012), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6102a1.htm?s_cid+mm 6102a1_e, last visited Nov. 17, 2013).

The 1995 IOM Report admits that no causal link exists for most of its alleged factors. For example, the government states that contraception and abortifacients should be provided free of charge because it helps reduce premature birth and low birth rate due to being able to lengthen intervals between pregnancy. However, several studies show no connection between contraception and pregnancy-spacing. *Id.* at 70-71. Further studies showed that in 48% of all unintended pregnancies, contraception was actually used. L.B. Finer & S.K. Henshaw, Disparities in Rates of Unintended Pregnancy in the United States, 1994 and 2001, 38 PERSP. ON SEXUAL & REPROD. HEALTH 90(2006), *available at* http://www.guttmacher.org/pubs/journals/3809006.html (last visited Apr. 22, 2013).

Furthermore, IOM did not perform "an extensive science-based review." The sixteen member committee met only five times in the span of 6 months. 2011 IOM at 3. The committee stated "it should be noted that the committee did not have adequate time or resources to conduct its own meta-analyses or comprehensive systematic review of each preventative service." 2011 IOM at 6. As recognized by the dissenting member of the committee, there was an "unacceptably short time frame for the PSW committee to conduct or solicit meaningful reviews of the evidence associated with the preventative nature of the services considered" and "the lack of time prevented a serious and systematic

review of evidence for preventative services." Dissenting Op., 2011 IOM at Appendix D at 231. The dissenting member warned that "[t]he process set forth in the [Affordable Care Act] was unrealistic in the time allocated to such an important and time-intensive undertaking" and that "[r]eaders of the Report should be clear on the fact that the recommendations were made without high quality, systematic evidence of the preventative nature of the services considered" and that "evidence that the use of the services in question leads to lower rates of disability or disease and increased rates of well-being is generally absent." *Id.* at 231-32. Rather than being a science-based review, the committee's review process "tended to result in a mix of objective and subjective determinations filtered through a lens of advocacy" where the "process for evaluation of the evidence lacked transparency and was largely subject to the preferences of the committee's composition." *Id.* at 232.

The IOM study relied upon by Defendants was conducted over a short period of time and the dissenting member commented on how it was partisan and not scientifically supported. Defendants have provided no evidence that any preventive services cost gap exists at Beckwith Electric with their comprehensive insurance coverage.

iv. The Mandate fails to employ the least restrictive means.

The mandate is also not the least restrictive means of furthering the cited interests. In *Riley v. National Federation of the Blind*, 487 U.S. 781, 799–800 (1988), the Court required the government to use alternatives rather than burden fundamental rights, even when the alternatives might be more costly or less directly effective to achieve the goal.

In *Riley*, North Carolina sought to curb fraud by requiring professional fundraisers to disclose during solicitations how much of the donation would go to them. 487 U.S. at 786. Applying strict scrutiny, the Supreme Court declared that the state's interest could be achieved by publishing the same disclosures itself online, and by prosecuting fraud. *Id.* at 799-800. Although these alternatives would be costly, less directly effective, and a restructuring of the governmental scheme, strict scrutiny demanded they be viewed as acceptable alternatives. *Id.*

Defendants could further their interests without coercing Plaintiffs in violation of their religious exercise. As proffered, the government could subsidize contraception itself and give it to employees at exempt entities. This in and of itself shows the mandate fails RFRA's least restrictive means elements. *Gonzalez*, 546 U.S. at 428-30. The government could offer tax deductions or credits for the purchase of contraceptives, reimburse citizens who pay to use contraceptives, provide these services to citizens itself, or provide incentives for pharmaceutical

companies to provide such products free of charge. The government does nothing to rebut these options other than providing conclusory statements that other options would not work. In fact the government *already* subsidizes contraception for certain individuals.[16] 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. *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (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").

Plaintiffs are *not* asking the government to subsidize their private religious practices. Plaintiffs *only* seek for the government to leave them alone, *not force them to violate their religious beliefs*, and *honor the freedoms granted by the First Amendment* which protects *all citizens' free exercise of religion*. Plaintiffs simply assert that if the government wants to give private citizens contraceptives and

[16] *See, e.g.*, Family Planning grants in 42 U.S.C. § 300, et seq.; the Teenage Pregnancy Prevention Program, Public Law 112-74 (125 Stat 786, 1080); the Healthy Start Program, 42 U.S.C. § 254c-8; the Maternal, Infant, and Early Childhood Home Visiting Program, 42 U.S.C. § 711; Maternal and Child Health Block Grants, 42 U.S.C. § 703; 42 U.S.C. § 247b-12; Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq.; the Indian Health Service, 25 U.S.C. § 13, 42 U.S.C. § 2001(a), & 25 U.S.C. § 1601, et seq.; Health center grants, 42 U.S.C. § 254b(e), (g), (h), & (i); the NIH Clinical Center, 42 U.S.C. § 248; the Personal Responsibility Education Program, 42 U.S.C. § 713; and the Unaccompanied Alien Children Program, 8 U.S.C. § 1232(b)(1).

abortifacients free of charge, it can do so itself instead of forcing Plaintiffs to do it. Such an alternative renders the mandate a violation of RFRA.

Defendants argue they want to promote women's health and equality, but their argument that women's health and equality can only be achieved through offering free contraception lacks any evidentiary support. Defendants' further weaken their claim by asserting that women's health and equality are harmed *depending on who gives them the free contraception*. There is no evidence that women are helped by getting free contraception, or by making sure that their religious employers are coerced into providing it for them. If women received free contraception from a different source, there is no evidence these women would face grave or paramount harms. "[T]he Government has not offered evidence demonstrating" compelling harm from an alternative. *Gonzalez*, 546 U.S. at 435-37.

D. Plaintiffs meet the other preliminary injunction qualifications.

Defendants stray far from the factual findings of the district court in order to provide their unsupported and baseless arguments against injunctive relief. Plaintiffs established all four factors to obtain injunctive relief in the district court and there is no reason for this Court to come to a different conclusion based upon the same factual record.

First, Plaintiffs established irreparable injury, which is "'the sine qua non of injunctive relief.'" *Northeastern Fla. Chapter of the Ass'n of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (quoting *Frejlach v. Butler*, 573 F.2d 1026, 1027 (8th Cir. 1978)). Plaintiffs showed a likelihood of success of the merit of their RFRA claim, and therefore established "[t]he loss of First Amendment freedoms, for even minimal periods of time," which "unquestionably constitute[d] irreparable injury." *KH Outdoor. LLC v. Trussville*, 458 F.3d 1261, 1271-72 (11th Cir. 2006) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Next, the district court properly found that since the Mandate violated RFRA, Defendants suffered no harm because the exercise of constitutionally protected expression can never harm any legitimate interests. *KH Outdoor* at 1272-73 (*quoting Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987) (finding that the public's interest is in "prevention of enforcement of ordinances which may be unconstitutional").

Lastly, the impact of the preliminary injunction on the public interest turns in large part on whether Plaintiffs' Constitutional rights are violated by the enforcement of Defendants' Mandate. As the Eleventh Circuit noted, "[I]t is always in the public interest to protect First Amendment liberties"—as such, preserving Plaintiffs' religious liberty under RFRA serves the public interest. *K.H*

Outdoors at 1272-73 (11th Cir. 2006) (*quoting Joelner v.Vil. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004)).

Defendants claim that the "balance of harms and public interest also preclude a preliminary injunction." Then, Defendants claim that Plaintiffs' religious exemption would come at the expense of Plaintiffs' employees—this is not based upon the record. It was undisputed in the lower court that no employee under Plaintiffs' plan had ever used the plan to obtain emergency contraceptives or abortifacients, even during the lapse in time when the plan included such coverage. R.10 at Ex. 2, Decl. of Joni R. Long at ¶ 12. Defendants do not support this assertion by evidence or by the factual record of the lower court. In their next argument, Defendants argue that the importance of providing free emergency contraception and abortifacients outweighs "whatever burden Mr. Beckwith may feel" from providing the free emergency contraception and abortifacient. This argument accomplishes little other than minimizing Plaintiffs' religious beliefs—this display of religious intolerance exhibits the importance of RFRA and why an injunction is needed here.

In the final analysis, Defendants' have not established that the district court abused its discretion in granting Plaintiffs a preliminary injunction against the Mandate. The Mandate forces Plaintiffs to violate their deeply held religious

beliefs of their Southern Baptist faith. Without an injunction, Plaintiffs will undoubtedly face irreparable harm.

CONCLUSION

Based on the foregoing, this Court should affirm the district court's decision granting Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 13,996 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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