NO. 13-1654

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

DOMINO'S FARMS CORPORATION AND THOMAS MONAGHAN, OWNER AND SOLE SHAREHOLDER OF DOMINO'S FARMS CORPORATION,
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 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 EASTERN DISTRICT OF MICHIGAN
HONORABLE Lawrence P. Zatkoff
Civil Case No. 2:13-cv-15488

BRIEF FOR THE APPELLEES

RICHARD THOMPSON, ESQ.
THOMAS MORE LAW CENTER
P.O. BOX 393
ANN ARBOR, MI 48106
(734)827-2001

ERIN ELIZABETH MERSINO, ESQ.
THOMAS MORE LAW CENTER
P.O. BOX 393
ANN ARBOR, MI 48106
(734)827-2001

Attorneys for Plaintiffs-Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellants, Domino's Farms Corporation (hereinafter "Domino's Farms") and Thomas Monaghan (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 6th Cir. R. 34(a), 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, and the First and Fourteenth Amendments to the United States Constitution—namely whether an individual and the company of which he is the sole owner have freedom from the government forcing them to directly provide insurance contrary to their deeply held religious beliefs.

Oral argument will assist this Court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this court deems relevant.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Rules

Publications

Websites

STATEMENT OF JURISDICTION

On December 14, 2012, Plaintiffs filed their initial Complaint against all Defendants, alleging violations of the First and Fourteenth Amendments to the United States Constitution, the Religious Freedom Restoration Act, and 42 U.S.C. § 1983. (R-1: Page ID #1-40). The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

On December 21, 2012, Plaintiffs filed a motion for a temporary restraining order, (R-8: Page ID #82-236), Defendants responded on December 25, 2012. (R-12: Page ID #241-340). On December 30, 2012, the court entered its memorandum opinion granting Plaintiffs' motion for a temporary restraining order for Plaintiffs Thomas Monaghan and Domino's Farms. (R-17: Page ID #414-26). The order was subsequently entered in favor of Plaintiffs Domino's Farms and Thomas Monaghan. (R-18: Page ID #427-28).

On January 8, 2013, Plaintiffs filed a motion for preliminary injunction, (R-20: Page ID #432-89), Defendants responded on January 28, 2013. (R-22: Page ID #491-621). On March 14, 2013, the court entered its memorandum opinion and order granting Plaintiffs' motion for preliminary injunction for Plaintiffs Thomas Monaghan and Domino's Farms. (R-39: Page ID #825-44).

On May 13, 2013, Defendants filed a timely notice of appeal. (R-41: Page ID # 848-50). This Court has jurisdiction of this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1).

PRELIMINARY STATEMENT

It is not surprising that in our country founded by individuals who sought refuge from religious persecution, the Supreme Court has succinctly avowed,

> If there is any *fixed star in our constitutional constellation*, it is that *no official, high or petty*, can prescribe what shall be *orthodox* in politics, nationalism, *religion*, or other matters of opinion *or force citizens to confess by word or act their faith therein*.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (emphasis added). The statement written by Justice Jackson in his majority opinion is considered one of the Court's greatest statements about our fundamental freedoms established by the Bill of Rights. It is against this backdrop, and resting upon this body of jurisprudence built upon deference to the inalienable freedom of religion, that the constitutionality of the HHS Mandate must be decided.

Plaintiffs Domino's Farms and Thomas Monaghan brought this motion for a preliminary injunction to enjoin the unconstitutional and illegal directives of the HHS Mandate. Currently, the Defendants are forcing businesses and organizations which hold sincerely held religious beliefs to violate those beliefs by supplying contraceptive and abortifacient coverage. Such action blatantly disregards religious freedom and the right of conscience, and is nothing short of irreconcilable

with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. and the First Amendment.

The burden forced on the Plaintiffs cannot be justified by the Defendants as using the least restrictive means or furthering a compelling interest. The Defendants offer numerous secular and even religious exemptions to the HHS Mandate, but fail to offer the same respect to the Catholic beliefs of the Plaintiffs—showing that Defendants either care so little about those professing religious beliefs that they will not be bothered to address their concerns or that Defendants are blatantly discriminating and disrespecting those holding such religious beliefs. Neither provides the Defendants with a constitutional justification for violating the law. The scheme of exemptions imposed by the Defendants is not neutral or generally applicable. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 432-87 (2006).

Defendants' illegal mandate threatens the irreparable harm of the loss of Plaintiffs' constitutional freedoms. Under the HHS Mandate, Plaintiffs are forced to choose between violating their religious beliefs and violating federal law. Plaintiffs Domino's Farms and Thomas Monaghan face draconian penalties for noncompliance of the law with fines of, at minimum, $2,000 per employee per year absent the District Court's injunction. 26 U.S.C. §§ 4980D & 4980H; 29

U.S.C. § 1132. The fines are even more onerous if Plaintiffs offered insurance without the objectionable coverage. Considering the imminent, irreparable harm to Plaintiffs' religious freedom and Constitutional rights, the District Court properly granted injunctive relief to Plaintiffs Thomas Monaghan and Domino's Farms. There is no necessity to disturb the injunctive relief granted by the District Court before a final decision is rendered in this case.

STATEMENT OF THE ISSUES FOR REVIEW

I. Did the District Court act within its discretion in granting a preliminary injunction for Plaintiffs Thomas Monaghan and Domino's Farms?

II. Whether the Religious Freedom Restoration Act ("RFRA") protects Plaintiffs' from governmental action which demands Plaintiffs' violate their religious beliefs?

STATEMENT OF THE CASE

On December 14, 2012, Plaintiffs filed their initial Complaint against all Defendants, alleging violations of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. (R-1: Page ID #1-40). Specifically, Plaintiffs allege 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 contraception, abortion, and abortifacients.

On December 21, 2012, Plaintiffs filed a motion for a temporary restraining order. (R-8: Page ID #82-236). On December 30, 2012, the District Court entered its memorandum opinion granting Plaintiffs' motion for a temporary restraining order. (R-17: Page ID #414-26); (R-18: Page ID #427-48).

Plaintiffs filed a motion on January 8, 2013 to convert the temporary restraining order into a preliminary injunction in order to protect Plaintiffs' constitutional and religious freedom rights during the pendency of this case. (R-20, Page ID #432-89). On March 14, 2013, the District Court entered its memorandum opinion and order granting Plaintiffs' motion for preliminary injunction. (R-39: Page ID #825-44). Defendants then appealed the District Court's order. (R-41: Page ID #848-50).

STATEMENT OF FACTS

The material facts are based on the Complaint and the sworn affidavits attached to the preliminary injunction motion (R-1: Page ID #1-40; R-20: Page ID #471-86), and were incorporated in the District Court's December 30, 2012 temporary restraining order opinion, (R-17: Page ID #414-25), and again in the March 14, 2013 preliminary injunction opinion and order, (R-39: Page ID #825-44).

Plaintiff Domino's Farms Corporation is the property management company for Domino's Farm Office Park, LLC and DF Land Development, LLC. (R-20: Page ID #478-86, Monaghan Decl. at ¶ 4). Domino's Farms Office Park, LLC is a premier office park, home to over fifty successful corporations, professional firms, non-profits, and entrepreneurial businesses. (*Id.* at ¶ 5). Domino's Farms Office Park is 937,203 sq. ft. and Plaintiff Domino's Farms provides numerous first class services and amenities throughout. (*Id.* at ¶ 6). Some of the amenities and services Domino's Farms funds and offers to its tenants include an on-site Catholic chapel, dining and catering, a bistro, a fitness center, and Catholic bookstore. (*Id.* at ¶ 7). The on-site chapel offers Mass four times daily and twenty three times a week. (*Id.* ¶ 8). Domino's Farms also offers several in-house services, including on-site property maintenance, a twenty-four hour work order request system, twenty-four hour security, telephone and data/internet services, maintenance and housekeeping, office suite build-outs and enhancements, and secure loading and storage. (*Id.* at ¶ 9). Plaintiffs employ 45 full-time employees and 44 part-time employees with regular part-time employees working approximately 28,800 hours per year. (*Id.* at ¶ 10).

Plaintiffs align their beliefs with Pope Paul VI's 1968 encyclical Humanae Vitae, which states "any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation, whether as an

end or as a means"—including contraception—is a grave sin. (*Id.* at ¶¶ 12-15, 24-25, 31; R-20: Page ID #472-76, Leipold Decl. at ¶ 14). Plaintiffs subscribe to authoritative Catholic teaching regarding the proper nature of health care and medical treatment. For instance, Plaintiffs believe, in accordance with Pope John Paul II's 1995 encyclical Evangelium Vitae, that "'[c]ausing death' can never be considered a form of medical treatment," but rather "runs completely counter to the health-care profession, which is meant to be an impassioned and unflinching affirmation of life." *Id.* Plaintiffs do not believe that contraception or abortion properly constitute health care, and involve immoral practices and the destruction of innocent human life. (R-20: Page ID #478-86, Monaghan Decl. at ¶¶ 24-25).

Due to these beliefs, Plaintiffs offer an insurance policy which specifically excludes coverage for contraception, sterilization, abortion, and abortifacients. (R-20: Page ID #472-76, Leipold Decl. at ¶¶ 13-14; R-20: Page ID #478-86, Monaghan Decl. at ¶ 23, 31-34). Plaintiffs designed its group health insurance plan through the Ave Maria Human Resources and Blue Cross/Blue Shield of Michigan which specifically excludes abortion, abortifcients, sterilization, and contraception from its insurance plan. (R-20: Page ID #472-76, Leipold Decl. at ¶¶ 13-14; R-20: Page ID #478-86, Monaghan Decl. at ¶ 23, 31-34).

On January 1, 2013, Plaintiffs were slated to lose the right to make health care insurance decisions in line with their Catholic views. (R-20: Page ID #472-76

Leipold Decl. at ¶¶ 12, 15; R-20: Page ID #478-86, Monaghan Decl. at ¶ 35-37). Absent an injunction on January 1, 2013, the Health and Human Services Mandate of the Affordable Care Act ("HHS Mandate") would have gone into effect against the Plaintiffs, and forced Plaintiffs to pay, fund, contribute, provide, or support artificial contraception, sterilization, abortion, abortifacients or related education and counseling, in violation of their Constitutional rights and deeply held religious beliefs beginning at the end of their plan year. *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, last visited Sept. 8, 2013).

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 United States Health and Human Services, United States Department of Treasury, and United States Department of Labor, published an interim final rule under the Affordable Care 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.[1] *Id.* Prior to adopting those guidelines, Defendants accepted public comments. Upon information and belief, a large number of groups filed comments, warning of the potential conscience implications of requiring religious individuals and groups to pay for contraception, abortion, and abortifacients.

On February 15, 2012, Defendant United States Department of Health and Human Services ("HHS") promulgated the mandate that group health plans include coverage for all Food and Drug Administration-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 (the "HHS Mandate" or "mandate"). *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, last visited Sept. 8, 2013). All FDA-approved contraceptives included contraception, abortion, and abortifacients such

[1] Defendants directed the Institute of Medicine ("IOM") to compile recommended guidelines describing which drugs, procedures, and services should be covered as preventive care for women. (http://www.hrsa.gov/womensguidelines, last visited Sept. 8, 2013). 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, last visited Sept. 8, 2013). 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.

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. (http://www.hrsa.gov/womensguidelines, last visited Sept. 8, 2013).

The HHS Mandate applies to almost all 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."[2] The HHS 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 Affordable Health Care Act and the HHS Mandate include a number of exemptions; however, Plaintiffs do not fall under any of these exemptions. The allowable factors for receiving exemptions under the Affordable Health Care Act include: the age of the plan, 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T;

[2] Defendants have made an exemption for all "non-profit" companies who hold a religious objection to the HHS Mandate. 78 Fed. Reg. 39870. Defendants have also granted waivers to numerous for profit companies with economic hardship associated with the Affordable Care Act and the HHS Mandate. 45 C.F.R. § 147.126(d)(3). Congress and their staff will likely not have to adhere to the Affordable Care Act and therefore the HHS Mandate. 78 Fed. Reg. 48,337 (Aug. 8, 2013). However, no such exemption or waiver is available to Plaintiffs.

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); a non-profit company which qualifies 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 which 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).

Defendants have predicted that a majority of large employers, employing more than 50 million Americans, will continue to use grandfathered plans through at least 2014, and that a third of medium-sized employers with between 50 and 100 employees may do likewise. 75 Fed. Reg. 34538 (June 17, 2010); (http://www.healthcare.gov/news/ factsheets/2010/06/keeping-the-health planyou-have-grandfathered.html, last visited Sept. 8, 2013) (noting that amendment to regulations "will result in a small increase in the number of plans retaining their grandfathered status relative to the estimates made in the grandfathering regulation").

Neither of Plaintiffs' health insurance plans is "grandfathered." (R-20: Page ID #472-76, Leipold Decl. at ¶¶ 7-8; R-20: Page ID #478-86, Monaghan Decl. at ¶ 38).[3] Plaintiffs do not qualify for the "religious employer" exemption contained in 45 C.F.R. § 147.130 (a)(iv)(A) and (B). (R-20: Page ID #472-76, Leipold Decl. at ¶ 9).[4] The HHS Mandate indicates that the Health Resources and Services Administration ("HRSA") "may" grant religious exemptions to certain religious employers. 45 C.F.R. § 147.130(a)(iv)(A). Plaintiffs cannot be considered for such an exemption as Domino's Farms is a for-profit business. (R-20: Page ID #472-76, Leipold Decl. at ¶ 10; R-20: Page ID #478-86, Monaghan Decl. at ¶ 40).

On January 20, 2012, Defendant Sebelius announced that there would be no change to the religious exemption.

[3] Plaintiffs' health care 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 does 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-20: Page ID #472-76, Leipold Decl. at ¶ 7-8, 10).

[4] The HHS 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).

(http://www.hhs.gov/news/press/2012pres/01/20120120a.html, last visited Sept. 9, 2013). 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 the Plaintiffs. Plaintiffs have not applied, as a for-profit company could 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. Yet, Defendants have forced the Plaintiffs to face this decision: comply with their deeply held religious beliefs or comply with federal law.

Plaintiffs' plan year began on January 1, 2013. (R-20, Page ID #472-76, Leipold Decl. at ¶ 12; R-20, Page ID #478-86, Monaghan Decl. at ¶¶ 50, 53). Without the injunctive relief of this Court, Plaintiffs would be immediately forced to choose: comply with the HHS Mandate and violate their deeply held religious

beliefs, or disobey federal law and incur the consequences. If Plaintiffs were to decide to terminate health care entirely in order to comply with their deeply held religious beliefs, the Plaintiffs face severe burdens. Plaintiffs face enormous penalties. Upon not providing insurance to its employees, Plaintiffs would incur a $2,000 annual fine *per employee*, of which they have 45 full-time employees and 44 part-time employees. 26 U.S.C. § 4980H. The fines are even more insurmountable if Plaintiffs were to decide to offer insurance that did not comply with the HHS Mandate. 26 U.S.C. § 4980D(a), (b); (R-39: Page ID #827).

Plaintiffs would face substantial competitive disadvantages upon discontinuing employee health insurance in that the Plaintiffs would no longer be able to offer health care and would face disadvantages in employee recruitment and retention. Plaintiffs and their employees would be forced to seek expensive insurance on the private market. Plaintiffs only seek to continue providing the same health insurance it has been doing since entering the marketplace, which complies with their sincere and deeply held religious beliefs. (R-20, Page ID #472-76, Leipold Decl. at ¶¶ 20-22; R-20, Page ID #478-86, Monaghan Decl. at ¶¶ 48-49). Unless the opinion of the District Court is upheld, Plaintiffs must choose between abandoning their faith to comply with federal law or violating federal law and incurring enormous consequences. (R-20, Page ID #472-76, Leipold Decl. at ¶ 13-22; R-20, Page ID #478-86, Monaghan at ¶¶ 50-56).

SUMMARY OF THE ARGUMENT

Of the thirty-three rulings on the likelihood of success of RFRA challenges to the HHS Mandate involving for-profit companies, twenty-six of them have issued preliminary injunctions, including the District Court addressing the unique fact scenario of the instant case.[5] The District Court did not abuse its discretion in

[5] *Legatus v. Sebelius*, No. 12-12061, slip op. (E.D. Mich. Oct. 31, 2012); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, order (8th Cir. Nov. 28, 2012); *Korte v. Sebelius*, No. 12-3841, slip op. (7th Cir. Dec. 28, 2012), *Grote Indus. LLC v. Sebelius*, No. 13-1077, slip op. (7th Cir. Jan. 30, 2013); *Annex Med. Inc. v. Sebelius*, No. 13-1119, slip op. (8th Cir. Feb. 1, 2013), *Am. Pulverizer Co. v. Dep't of Health & Human Servs*., No. 12-3459, slip op. (W.D. Mo. Dec. 20, 2012); *Newland v. Sebelius*, No. 12-1123, slip op. (D. Colo. July 27, 2012); *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, slip op. (D.D.C. Nov. 16, 2012); *Triune Health Group, Inc. v. U.S. Dep't of Health and Human Servs.*, No. 1:12-cv-06756 (N.D. Ill. Jan. 3, 2013); *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs.*, 12-92, slip op. (E.D. Mo. Dec. 31, 2012); *Sioux Chief Mfg. Co., Inc. v. Sebelius*, No. 13-36, order (W.D. Mo. Feb. 28, 2013); *Seneca Hardwood Lumber v. Sebelius*, No. 12-207, slip op. (W.D. Pa. Apr. 19, 2013); *Lindsay, Rappaport & Postel LLC v. Sebelius*, No. 13-1210, order (Mar. 20, 2013); *Gilardi v. Dep't of Health & Human Servs.*, No. 13-5069 , order (D.C. Cir. Mar. 29, 2013); *Bick Holding, Inc. v. Sebelius*, No. 13-462, order (E.D. Mo. Apr. 1, 2013); *Am. Manufacturing Co. v. Sebelius*, No. 13-295, slip op.(D. Minn. Apr. 2, 2013); *Hart Electric LLC v. Sebelius*, No. 13-2253, order (N.D. Ill. Apr. 18, 2013); *Tonn and Blank Construction v. Sebelius*, No. 12-325, order (N.D. Ill. Apr. 1, 2013); *Johnson Welded Products, Inc. v. Sebelius*, No. 13-cv-609, minute order (D.D.C. May 24, 2012); *Beckwith v. Sebelius*, No. 13-cv-648, Slip op. (M.D. Fla. June 25, 2013), *Hobby Lobby v. Sebelius*, 2013 WL 3216103 (10th Cir. July 18, 2013), *Ozinga v. Sebelius*, No. 13-cv-3292, order (N.D. Ill. July 16, 2013); *SMA, LLC v. Sebelius*, No. 13-cv-1375, order (D. Minn. July 8, 2013); *Trijicon, Inc. v. Sebelius*, No. 13-cv-1207, order (D.D.C. Aug. 14, 2103); *Willis Law v. Sebelius*, Case No. 13-cv-1124, order (D.D.C. August 23, 2013).

siding with this clear majority as it pertains to Plaintiffs Thomas Monaghan and Domino's Farms. The District Court ruling on this issue should be affirmed.

The government's appeal rests on the false premise which artificially constricts religious exercise: a business owner cannot exercise religion in business. There is *no* "business exception" in RFRA or the Free Exercise Clause. Nothing in the Constitution, precedent, or law requires—or even suggests—that a person forfeits religious liberty protection when he/she tries to earn a living by operating a business. The idea that "a corporation has no constitutional right to free exercise of religion" is "conclusory" and "unsupported." *McClure v. Sports and Health Club, Inc.*, 370 N.W. 2d 844, 850 (Minn. 1985).

The government proposes that specific limitations enacted in the Civil Rights Act, which is separate and distinct from RFRA, should constrain the meaning not only of RFRA but also the First Amendment itself. Of course, no statute can alter the First Amendment. Congress could have written into RFRA the government's proposed prohibition on free exercise of religion in business, but chose not to. Instead, RFRA protects "*any*" exercise of religion, and requires strict scrutiny when government tries to substantially burden that free exercise.

The HHS Mandate forces Plaintiffs and the entity through which they act to choose between violating their religious beliefs, paying crippling fines on their property and livelihood, or abandoning business altogether. Strict scrutiny as

required by RFRA cannot be satisfied where, as here, the government exempts so many other people and organizations. *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 433 (2006). In *Gonzales*, the government's exemption of "hundreds of thousands" led the Supreme Court to require a RFRA exemption for a few hundred more. *Id.* Here, the government has exempted tens of millions of women from the mandate under its politically motivated "grandfathering" clause. *Newland*, slip op. at * 14; 75 Fed. Reg. 34538 (June 17, 2010); (http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health planyou-have-grandfathered.html, last visited Sept. 8, 2013). The government cannot then claim that its interests will suffer from an injunction protecting Plaintiffs' religious beliefs. The government incorrectly labels its grandfathering exclusion as temporary, but in fact it lasts *indefinitely* and encompasses millions more than the few religious objecting entities.

The government could fully accomplish its purported interests in giving women free contraception to achieve its purported goals by providing such items instead forcing the Plaintiffs to do so against their beliefs. The government seeks to neuter the least-restrictive-means test by not actually considering alternative options. This is incompatible with RFRA and precedent.

STANDARD OF REVIEW

Much deference is given to the lower court in its decision to grant a preliminary injunction. A district court's grant of a preliminary injunction is reviewed on appeal only for *abuse of discretion*. *See Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004). Within that framework, this Court reviews fact findings for clear error and issues of law de novo. *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011). "This standard of review is 'highly deferential' to the district court's decision." *Id.* (*quoting Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007))(emphasis added)). "The injunction will seldom be disturbed unless the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Mascio v. Pub. Emps. Ret. Sys. of Ohio*, 160 F.3d 310, 312 (6th Cir. 1998).

The standard for issuing a preliminary injunction in this Circuit is well established. In *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), the court stated:

> In determining whether or not to grant a preliminary injunction, a district court considers four factors: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

Id.; see also Hamilton's Bogarts, Inc. v. Michigan, 501 F.3d 644, 649 (6th Cir. 2007).

ARGUMENT

The District Court's ruling should be affirmed. Such a holding would run consistent with the twenty six preliminary injunctions granted nationally for for-profit cases.

I. The District Court correctly enjoined the HHS Mandate against Plaintiffs Thomas Monaghan and Domino's Farms and did not commit an error of law

The District Court appropriately issued an injunction. The District Court examined the particular, unique fact scenario and determined that,

> [T]he Court finds the facts in this case much stronger [than other cases presenting similar challenges]. [Domino's Farms] does not present any free exercise rights of its own different from or greater than Monaghan's rights. . . . Monaghan is [Domino's Farms]'s sole shareholder, director, and decision-maker. As such, [Domino's Farms] is even more closely-held than those companies, making the beliefs of [Domino's Farms] and its owner even more indistinguishable. Moreover, Monaghan has provided examples of how he runs [Domino's Farms] with an eye towards his religion. Monaghan declares that he incorporates his religious beliefs into the daily operations of [Domino's Farms] by, among other ways, providing tenants with a Catholic chapel offering daily mass services, a Catholic bookstore, a Catholic credit union, and food service providing Catholic menu options.

(R-39: Page ID #832). There is no evidence that the District Court committed *clear error* in its determination that the *facts* of this unique case merited injunctive relief.

Furthermore, the District Court did not abuse its discretion in its legal analysis. The District Court weighed the likelihood of success on the merits with the other three factors to consider when granting an injunction: irreparable harm to the Plaintiffs, the probability the injunction would cause substantial harm to others, and whether the public interest was advanced by granting the injunction. *Id.* at Page ID # 825-44 ("the Court finds that the mandate pressures Monaghan to modify his behavior and violate his beliefs because Monaghan would be forced to refrain from or change the way he exercises his faith through [Domino's Farms]. His only other choice is to suffer severe financial harm to his company. . . . The Government . . . has failed to show that the mandate, as applied to Plaintiffs, serves a compelling interest. . . . the Government has not established its means as necessarily being the least restrictive.")

The Plaintiffs demonstrated that they would face irreparable harm absent an injunction:

> The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Moreover, when First Amendment freedoms are at risk, the irreparable harm factor "merges" with the likelihood of success, such that if the plaintiff shows he is likely to succeed on the merits, he has simultaneously proven he will suffer an

> irreparable harm. *See McNeilly v. Land*, 684 F.3d 611, 620–21 (6th Cir. 2012) ("Once a probability of success on the merits was shown, irreparable harm followed . . . . Because [the plaintiff] does not have a likelihood of success on the merits, . . . his argument that he is irreparably harmed by the deprivation of his First Amendment rights also fails.").

(R-39: Page ID #842-43).

The potential for harm to Plaintiffs is grave, and with the showing Plaintiffs have made thus far of being able to convincingly prove their case, it is proper to characterize this harm as irreparable. *Id.* The District Court found that it would best serve the public interest to issue the injunction. (R-39: Page ID # 843).

And lastly, the District held that when balancing whether the injunction would cause harm to others, the government faced "minimal harm." (R-39: Page ID #844). The Plaintiffs in contrast, however, faced the "substantial burden on Monaghan's right to free exercise of religion, since the mandate requires him to choose whether to comply and violate his beliefs, or accept the financial consequences of not doing so" which constitutes irreparable injury. *Id.* Since the court properly weighed the individual facts of the case at hand and found a likelihood of success on the merits, and properly balanced the four determining factors in issuing a preliminary injunction, the District Court's grant of injunctive relief should not be disturbed.

II. The HHS Mandate violates RFRA

Plaintiffs demonstrated a likelihood of success on the merits because the HHS Mandate violates the Religious Freedom Restoration Act (RFRA). In its argument, the government seeks to judicially amend RFRA and the Free Exercise Clause. The government wants to exclude certain categories of individuals from the free exercise of religion that Congress and the Constitution did not exclude. The government falsely seeks to create a new distinction under RFRA: profit vs. non-profit activity, corporate vs. individual activity, direct vs. indirect activity. However RFRA presents this question: *whether the government is imposing a substantial burden on the exercise of religion.* 42 U.S.C. § 2000bb-1. RFRA requires strict scrutiny analysis.

The Seventh and Eighth Circuits have echoed four times that analogous cases presented "a sufficient likelihood of success on the merits." *See Annex Medical*; *O'Brien*; *Grote*; *Korte*. The Tenth Circuit, en banc, held that a plaintiff's exercise of religion through its objection to the mandate's application to its health plan "is substantially burdened with the meaning of RFRA." *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 the violation of their religion. *Id.* at *20. The D.C. Circuit

held the same. *Gilardi*. And the E.D. of Michigan itself found it only proper to issue preliminary injunctive relief for an employer to be free from the intrusive and overreaching mandate, finding that plaintiffs established the potential for irreparable harm exists, and with the showing Plaintiffs have made thus far of being able to convincingly prove their case, it is proper to issue an injunction until a final decision on the merits can be reached based upon the facts of the instant case. (R-39: Page ID #825-44); *see also Legatus*, slip op. at *18.

Congress enacted the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb et seq. (hereinafter "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*.

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). *See also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (holding that RFRA applies to the federal government).

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 also 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 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 in violation

of Wisconsin law. *Yoder* at 207. Each parent was fined $5 per child for failing to comply with 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 Court held that the impact of 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 also 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; the same constitutionally forbidden compulsion is before the Court in this case.

In accordance with the Supreme Court rulings in *Sherbert* and *Yoder*, and in light of the plain language of RFRA expressly enacted by Congress to protect religious freedom, the HHS Mandate substantially burdens the Plaintiffs' sincere exercise of religion. Furthermore, the federal government cannot "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).

A. Plaintiffs are protected under RFRA

Plaintiffs do not lose all of their rights protected by Congress under RFRA 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. As with the twenty six injunctions issued against the HHS Mandate, multiple other courts have recognized that business owners can bring religious exercise claims, because they are impacted by government burdens on their businesses without a moral distinction between themselves and their companies.

1. The government contends that Plaintiffs forfeit their rights to religious liberty by earning a living by running a corporation, but the corporate form cannot be a reason to declare an entity incapable of exercising religion, consistent with Supreme Court precedent. Likewise, RFRA applies to "persons," 42 U.S.C. § 2000bb(b), and persons as defined by 1 U.S.C. § 1 includes corporations. The United States Code requires the conclusions that corporations can exercise religion. Concluding otherwise would mean that churches, religious hospitals, and religious non-profits cannot bring claims either under RFRA or under the Free Exercise Clause.

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).

2. Defendants assert an odd proposition: individuals do have rights under RFRA, but not individuals who own corporations. Then Defendants also incongruously argue that corporations do hold religious exercise right under RFRA—but only if those corporations are non-profit corporations. These categorical exclusions from RFRA are illogical and unsupported by RFRA itself. *See Beckwith v. Sebelius*, 13-cv-648, Slip op. at *16-26 (M.D. Fla. June 25, 2013) (holding that a corporation and a business owner both have rights under RFRA and providing a complete and thorough analysis). This Court should not let the Defendants take it "down a rabbit hole where religious rights are determined by the tax code, with non-profit corporations able to express religious sentiments while for-profit corporations and their owners are told that business is business and faith

is irrelevant." *Conestoga Specialties Corp. v. Sebelius*, No. 13-1144, Slip op. at *32 (3rd Cir. July 26, 2013) (Jordan, J.) (dissenting).

A for-profit corporation, just like its non-profit counterpart for which the Defendants granted an exemption, can only take corporate action as the result of direction and the expressed intention of its owner, in this case the sole owner and sole director Thomas Monaghan. *See Robertson v. Cheney*, 876 F.2d 152, 159 (D.C. Cir. 1989) ("A corporation cannot act except through the human beings who may act for it."). The government is attempting to draw a line in the sand by arguing that one cannot exercise religion while engaging in business.

Unless the plain language of statute excludes a corporation under the definition of "person," the inclusion of corporations runs consistent with the statutory scheme that laws covering persons are construed to cover corporations. *See Bennett v. MIS Corp.*, 607 F. 3d 1076, 1085 (6th Cir. 2010) (applying 1 U.S.C. § 1). Reading the definition of person to cover corporations is consistent with the statutory scheme because corporations already benefit from other civil rights 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 free exercise clause has often involved the commercial sphere. In *Sherbert*, an employee's religious beliefs were burdened by not receiving unemployment benefits. 374 U.S. at 399. The same occurred in *Thomas*, 450 U.S. at 709. In *United States v. Lee*, the Court held that an employer's beliefs were burdened by paying taxes for workers. 455 U.S. at 252, 257 (1982) (losing on a separate element of the claim, but finding "substantial burden"). 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.

The District Court, therefore, correctly held that "a closely held corporation may assert its owner's free exercise and RFRA rights where the corporate entity is merely the instrument through and by which the owners express their religious beliefs." (R-39: Page ID #829). There the Court granted a preliminary injunction against application of the mandate stating that it "sees no reason why a corporation cannot support a particular religious view point by using corporate funds to support that view point." *Id.* at Page ID #830.

3. Previously, in a Ninth Circuit case, the Court held that the owners of a for-profit business had standing to assert the free exercise rights of its owners despite its operation as a secular for-profit company. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1116-20 (9th Cir. 2009). Similarly, the Court in *EEOC v. Townley Engineering Manufacturing Company*, found that a corporation owned primarily by a husband and wife who were members of the Catholic faith were permitted to exercise their free exercise rights as owners of the corporation in a Title VII case. *Townley*, 859 F.2d 610, 619-20 n.15 (9th Circuit 1988). The courts in these cases found that for profit corporations are capable of asserting the Free Exercise rights of their owners.[6]

[6] In *Hobby Lobby*, the Tenth Circuit *en banc* held that corporations, such as Domino's Farms, that bring religious objections to the mandate are "persons exercising religion for purposes of RFRA," stating to "end the matter here since the plain language of the text [of RFRA] encompasses 'corporations'" such as Domino's Farms. *Hobby Lobby v. Sebelius*, 2013 WL 3216103 at *9 (10th Cir.

Stormans and *Townley* support the view that an imposition on a corporation, Domino's Farms, is no less an imposition on the sole owner and sole director, Thomas Monaghan.

Furthermore, the burden imposed by the mandate is not alleviated by the corporate form when the mandate is being *directly* imposed on Domino's Farms and forcing action by Thomas Monaghan. Indeed, forcing a plaintiff to pay for and provide a health plan that includes contraception is tantamount to forcing a plaintiff to provide employees with vouchers for contraception paid for entirely by the plaintiff himself. This is exactly the type of claim RFRA was enacted to prevent.

The mandate imposes the harm on Domino's Farms as it does on its sole shareholder, sole owner, and sole director. The mandate requires Thomas Monaghan to manage his company in a way that violates his religious faith. All penalties assessed against Domino's Farms have a direct financial and practical impact on Thomas Monaghan. The mandate on Domino's Farms applies unquestionably substantial pressure on Thomas Monaghan to violate his beliefs.

July 18, 2013). "[A]s a matter of statutory interpretation [] Congress did not exclude for-profit corporations from RFRA's protections." *Id.* Narrower religious employer exemptions found in other statutes, such as Title VII, "rather than providing contextual support for excluding for-profit corporations from RFRA . . . show that Congress knows how to craft a corporate religious exemption, but chose not to do so in RFRA." *Id.* at 10. There is no reason here to justify a holding contrary to the plain language of RFRA.

As in the many injunctions issued against the mandate at this point, multiple other courts, namely the Tenth, Seventh, Eight, and D.C. Circuits as well as several district courts, have recognized that an owner of a company can succeed on this claim to defend their religious exercise, because he/she is impacted by government burden on his/her business without a moral distinction between themselves and their companies. "It would truly be form over substance to say there is a meaningful distinction between [Domino's Farms] and [Thomas Monaghan]." *Beckwith*, slip op. at *22; *Tyndale House Publishers, Inc. v. Sebelius, et al.*, No. 12-1635, slip op. at 5-9 (D.D.C. Nov. 16, 2012).[7]

4. Defendants want us to believe that individuals necessarily must forfeit their religious conscience and liberties to use the corporate forum. To suggest that someone can assume that their religious exercise is conditioned on not availing themselves of a government benefit while others who have no religious objections can take advantage of it is simply unequal treatment under the law. Thus, just the

[7] The *Beckwith* Court also noted, "Clearly, an individual employed by a secular corporation has the right to exercise religion concomitantly with her employment. *See Sherbert*, 374 U.S. 404 (holding that an employee did not have to work a six-day week—in contravention of her religious beliefs—in order to qualify for state unemployment benefits). But following the government's logic that same individual would lose the right to exercise religion merely by changing hats and becoming the *employer* instead of the *employee*. Hypothetically, that same individual (acting now as employer) would not be able to challenge—on religious freedom grounds—a federal law that compelled (by threat of substantial fines) all "secular", for-profit businesses to remain open seven days a week. The Court sees no reason to distinguish religious freedom rights based upon the manner and form that one chooses to make a living." *Id.* at 25 (emphasis in original).

mere act of having to give up your corporate identity in order to protect your religious conscience in itself constitutes a substantial burden.

Defendants similarly missed the point when they argue that it would be inconsistent to allow Domino's Farms to enjoy the corporate identity for their business and yet allow them to pierce the corporate veil to exercise their religious conscience. Exercising your religious conscience is not a matter of piercing the corporate veil, which is a term normally held for finding owners of closely held businesses liable for their grossly negligent and willful acts. Never has it been suggested that the exercise of any religious freedom is connected with piercing the corporate veil. It is supported by *McClure v. Sports and Health Club, Inc.*, where the distinction is made that the corporate veil was pierced to make the owners of the corporation liable for their illegal actions. *McClure*, 370 N.W.2d 844 (1985). Domino's Farms and Thomas Monaghan have never suggested that illegal activity or ignoring other federal or state laws that do not burden their religious conscience was advocated in any manner.

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 (U.S. 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 its legislative purpose of RFRA—which is quite obviously to protect religious freedom and not to strip wholesale categories of individuals and corporations from religious freedom. The "tenets of corporate principles" argued by Defendants does *not*, or has it ever, created a Chinese wall—stranding employers and companies outside of its protection to either go bankrupt or go without religion. And this "tenet" has especially *never* done so under RFRA analysis.

5. Congress has rejected the government's 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 Apr. 22, 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 government's now-stated view that religious exercise cannot occur in the world of commerce. If facilities and health plans have conscience protections under federal law, so too should the Plaintiff family business.

6. The government's central argument seems to be that laws such as the Civil Rights Act prevent Plaintiffs from exercising religion under RFRA or the First Amendment. Many of the government's case citations interpret terms such as "religious employer" in Title VII—not "free exercise." This contention is a non sequitur. Congress cannot change the First Amendment by statute. 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 or the Free Exercise Clause.

The government states the 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, the 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. "Under accepted canons of statutory interpretation, we must . . . giv[e] effect to each word and mak[e] every effort not to interpret a provision in a manner that renders other provisions . . . meaningless." *Lake Cumberland Trust, Inc. v. United States EPA*, 954 F.2d 1218, 1222 (6th Cir. 1992). 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.

Furthermore the government tries to inflate its position by claiming that a "special solicitude" for only religious non-profits is reflected in "Acts of Congress." But it cites only one "Act of Congress," Title VII, which addresses only one issue, employment discrimination, among myriad ways businesses could exercise religion. Notably, RFRA is also an "Act" of Congress, giving "solicitude" to "any" exercise of religion in any context. Title VII has not been canonized into the Bill of Rights.

The government also misconstrues the holding in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), when it contends that only "religious organizations" can exercise religion. No Supreme Court case, including *Hosanna-Tabor*, makes that assertion. In *Hosanna-Tabor* the Court made clear that religious corporations are protected by special Establishment Clause concerns relating to their selection of ministers, but the Court in no way limited religious exercise in its decision or concluded that no company has protection unless it is a religious nonprofit.

In trying to define religion as wholly separate from business, the government asserts a view best characterized as essentially theological and not supported 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. Religion is not an isolated category of human activity. Under the law, a person is not required to

attend weekly mass, uphold the sacraments, and tithe before being able to hold religious beliefs as the government suggests. Therefore, such practices cannot then be required of a corporation. Religion is, among other things, a viewpoint from which people engage in any kind of activity or purpose, not excluding business. *See Good 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). Religion is also not purely "personal" as the government argues. Many religions require exercise in groups, and guide believers in all their daily activities. American law protects religious exercise, not religious subjectivism. No precedent exists which dictates that the confluence of two realities—corporate status and profit motive—make religious exercise impossible. 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.

B. Plaintiffs are directly burdened by the HHS Mandate which forces Plaintiffs to provide insurance contrary to Plaintiffs' religious beliefs

Defendants inexplicably and remarkably conclude—contrary to Plaintiffs' knowledge and explanation of their own faith—that Plaintiffs' faith is not substantially burdened.[8] 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 Catholic Church, the directives of Catholic leaders, and the sworn affidavits of Plaintiffs submitted to the lower court. These Defendants' assertions are neither based in fact nor law.

The HHS Mandate is an archetypal substantial burden, because it "make[s] unlawful the religious practice itself." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). The Plaintiffs exercise their religious beliefs in this case by refraining from covering abortifacient items, contraception, and related counseling in their employee health insurance plan. To outlaw that religious exercise and "compel a

[8] RFRA's definition of "any exercise of religion is broad, expansive, and amorphous. The practice of religion is not "purely personal" as Defendants have asserted: "the fact the [Plaintiff's] activities exceed its worship services make them no less a part of Plaintiff's religious exercise." *Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp. 2d 691, 701 (E.D. Mich. 2004).

violation of conscience," as here is a quintessential substantial burden. *Thomas v. Review Bd.*, 450 U.S. at 717.[9]

The government argues that because the HHS Mandate applies to Plaintiff Domino's Farms, its sole owner, sole director, and sole shareholder, Plaintiff Thomas Monaghan is isolated from its effect. *U.S. v. Lee*, *Stormans*, *Townley*, *Legatus*, the other cases cited above, and the twenty six injunctions against the HHS Mandate instead recognize the commonsense view that an imposition on a family-business corporation is no less an imposition on the owner. This can be seen in the present case. Plaintiff Domino's Farms is a closely held "s" corporation, subject to pass through taxation as if its income belongs to its owner as an individual. The HHS Mandate can only be implemented by Plaintiff Thomas Monaghan, the sole owner, sole director, and sole shareholder of Domino's Farms. The corporate papers cannot implement the HHS Mandate, nor can its brick-and-mortar buildings.

[9] Furthermore, the government is incorrect in asserting, in conclusory fashion, that the substantial burden placed on Plaintiffs' free exercise is "too attenuated" because employees use the contraceptives. 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." *Tyndale*, slip op. at 13 (citing *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)).

Although a group health plan might be a separate legal entity, as Defendants state, such a plan does not will itself into existence. It can only be created through a business that arranges for the plan with its carrier. And a business, also a distinct legal entity, 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.[10] A business is operated according to the ethics, morals, and values of its owners or management. A business is necessarily operated according to the religious values of its owners or management. A corporation can only act through its human agency in accordance to their conscience (including with respect to the mandated services here) which is established through policies created by the corporation's owner according to his/her own moral, ethical, and religious beliefs.

The government's argument that since a corporation has limited liability it cannot exercise religion does not negate the right to free exercise of religion. Limited liability is only one characteristic of a corporation, and not morally relevant here. The duty imposed by the mandate falls directly onto Plaintiff

[10] ". . . 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).

Thomas Monaghan. The corporate form does not isolate Plaintiff Thomas Monaghan—it is actually the mechanism the HHS Mandate uses to impose its burden. *See* (R-39: Page ID #834) ("The Court sees no reason why [the corporate Defendant] cannot be secular and profit-seeking, and maintain rights, obligations, powers, and privileges distinct from those of Monaghan [its owner], while at the same time being an instrument through which Monaghan may assert a claim under RFRA.").

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. This is as it should be because any effort to make the 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"). Here, the Plaintiffs seek to live out their religious faith, in part, in the way they conduct the business Plaintiff Thomas

Monaghan owns and operates. To force Plaintiffs to violate their conscience or face ruinous fines for doing so substantially burdens the Plaintiffs' free exercise of religion under RFRA and the First Amendment.

Pursuant to the teachings of the Catholic Church, Plaintiffs' sincerely held religious beliefs prohibit them from providing or purchasing health insurance coverage for contraception, abortion, abortifacients, or related education and counseling. Plaintiffs' compliance with these beliefs is a religious exercise. The HHS Mandate creates government-imposed coercive pressure on Plaintiffs to purchase insurance and provide contraception, abortion, 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 the Plaintiffs' religious beliefs, the HHS Mandate not only exposes Plaintiff Domino's Farms and Plaintiff Thomas Monaghan to substantial per employee fines for their religious exercise—roughly $2,000 annually per employee, a fine 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 the Plaintiffs to purchase and provide coverage for medications and devices that can bring about early abortions and contraception. Not only is the religious belief of the Plaintiffs clear—that they cannot in good conscience facilitate such coverage—the substantial burden is also clear—penalties of at minimum $2,000 per year per employee. Such penalties are an intense burden on the sustainability of Plaintiff Domino's Farms, as well as Plaintiff Thomas Monaghan's livelihood, property, employment, and family history. The HHS Mandate imposes a substantial burden on Plaintiffs' religious exercise by forcing Plaintiffs to violate their deeply held religious beliefs and the teachings of the Catholic Church to which they belong.[11]

Cases cited by Defendants, such as *Living Water Church of God v. Charter Township of Meridian*, 258 Fed. Appx. 729 (6th Cir. 2007), actually support that

[11] 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 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.

the mandate substantially burdens Plaintiffs' free exercise of religion. In *Living Water*, the court in its analysis explained a substantial burden as follows:

> In short, while the Supreme Court generally has found that a government's action constituted a substantial burden on an individual's free exercise of religion when that action forced an individual to choose between "following the precepts of her religion and forfeiting benefits" or when the action in question placed "substantial pressure on an adherent to modify his behavior and to violate his beliefs," *Sherbert, 374 U.S. at 404*; *Thomas, 450 U.S. at 717-18* . . . "[C]ourts have been far more reluctant to find a violation where compliance with the challenged regulation makes the practice of one's religion more difficult or expensive, but the regulation is not inherently inconsistent with the litigant's beliefs."

Id. at 734-35. Here, the mandate applies "substantial pressure" on Plaintiffs "to modify [their] behavior" by supplying contraceptive insurance coverage that Plaintiffs have never before covered and which directly "violate[s] [their Catholic] beliefs."

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

i. The HHS Mandate fails to use the least restrictive means and fails to justify a compelling interest

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

It is the Defendants, not the 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 the Plaintiffs' religious liberties is justified, the Defendants would need to pass strict scrutiny—"the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The Defendants are charged 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). The government bears the burden of proof and "ambiguous proof will not suffice." *Id.* at 2739.

Forcing the Plaintiffs to provide and fund health insurance which makes 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 contraceptives and abortifacients. There is "no actual problem in need of solving," and forcing the 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."

(http://www.hhs.gov/news/press/2012pres/01/20120120a.html, last visited Sept. 9, 2013). Physicians and pharmacies have traditionally also provided contraceptive and abortifacient services. There is no compelling reason for the HHS Mandate to take the matter one step further by forcing employers, such as the Plaintiffs, objecting upon sincere religious grounds to subsidize these services through the insurance plans they sponsor. If the Defendants were truly concerned with the lack of access to contraceptives and abortifacients in this country, the Defendants could provide those "preventive services" itself without burdening the Plaintiffs' religious beliefs.

Furthermore, the HHS 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*. The HHS Mandate imminently threatens violation of the Plaintiffs' rights secured to them by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq.

In *Church of the Lukumi*, *supra*, the City of Hialeah enacted an ordinance prohibiting the public sacrifice of animals. *Id.* at 527. The ordinance also contained exemptions for the slaughtering of animals raised for food purposes and

for sale in accordance with state law. *Id.* at 528. The ordinance had the stated purpose of promoting "public health, safety, welfare, and the morals of the community" and carried a maximum fine of $500. *Id.* at 528. The ordinance, however, prevented members of the church of Santeria from engaging in a principle aspect of their religious worship, which was the public, sacrificial killing of animals. *Id.* at 524-25. This practice was known to the Defendant prior to the enactment of the ordinance. *Id.* at 526-27.

Similarly here, the Defendants knew of Plaintiffs' Catholic beliefs prior to finalizing the mandate into law, but acted to impose a substantial burden on the plaintiffs' religious beliefs. As in both *Lukumi* and also *Gonzalez*, where the Court examined whether the law "infringe[d] upon or restrict[ed] practices because of their religious motivation," or "in a selective manner impose[d] burdens only on conduct motivated by religious belief," this Court should analyze whether a compelling interest exists under the same analysis. *Id.* at 533, 543. *Gonzalez* required 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. *Tyndale*, slip op. at

32-35; *Newland*, slip op. at 14. In *Geneva College v. Sebelius*, the court held "in light of the myriad exemptions to the mandate's requirements already granted and conceding that the requirement does not include small employers similarly situated to SHLC, the requirement is 'woefully under inclusive' and therefore does not serve a compelling government interest." *Geneva College v. Sebelius*, No. 12-00207 (W.D. Pa. April 19, 2013) (order granting preliminary injunction and findings of fact and conclusions of law).

By design, the Defendants imposed the mandate on some religious companies or religious individuals but not on others, resulting in discrimination among religions. The Defendants have created a number of categorical exemptions and individualized exemptions, none of which alleviate the chill imposed on the Plaintiffs' free exercise of religion. The Affordable Care Act and the HHS Mandate include 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 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 as a "religious employer" but self-certify as holding a religious objection to the mandate. 78 Fed. Reg. 39870.

- Corporations who have been granted a waiver by Defendants. 45 C.F.R. § 147.126(d)(3).

This scheme of exemptions flies in the face of the legal precedent that "a law 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 the 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 Sept. 8, 2013). Yet, Congress considered some of the Affordable Care Act's requirements (but not the HHS 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 actually 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 the Plaintiffs. Congress deemed certain interests in the Affordable Care Act to be "of the highest order" for all health plans, but not the HHS Mandate.

Defendants try to minimize the glaring grandfather exception by stating that this is not a permanent exception, but merely a transitional one. The government, however, cannot claim 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 and 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 Sept. 8, 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; Cong. Research Serv., RL 7-5700, Private Health Insurance Provisions in PPACA (May 4, 2012) (describing plan as indefinite); *see also* 42 U.S.C. § 18011 ("Preservation of right to maintain existing coverage"); 45 C.F.R. § 147.140.

The HHS Mandate is not uniform, and RFRA is impatient with its insistence 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.

The government argues that the instant case is similar to *U.S. v. Lee* where the Court upheld a universal tax. The HHS Mandate as shown is far from universal with its varied scheme of exemption. *Lee* was decided on the premise that a government cannot function without taxes. 455 U.S. at 260. First off, the U.S. government has functioned for in excess of two hundred years without a federal mandate demanding the employers provide free abortifacients and contraceptives to their employees. Secondly, this mandate is not a tax and not a "government program." Here, Plaintiffs do not fund the government but directly give specific services to private citizens. The government has decided not to pursue its goals with a governmental program, but instead to conscript religiously objecting citizens.

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

It is the Defendants, not the 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. *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.[12] 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.[13] The studies cited at 2011 IOM pp. 109 referred to

[12] Inst. Of Med., *Clinical Preventive Services for Women: Closing the Gaps* (2011), *available at* (http://www.nap.edu/catalog.php?record_id=13181, last visited Sept. 8, 2013).

[13] *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 Sept. 8, 2013); R. Jones et al, Contraceptive Use Among U.S. Women Having Abortions, 34 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 294 (2002) (a Guttmacher Institute publication); Prepregnancy Contraceptive Use Among Teens with Unintended Pregnancies Resulting in Live

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 make any correlation 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. There is no evidence that any preventive services cost gap exists at Domino's Farms with their comprehensive insurance coverage.

The government 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 cause by or merely

---

Births—Pregnancy Risk Assessment Monitoring System (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+mm6102a1_e, last visited Sept. 8, 2013).

associated with unwanted pregnancy." Institute of Medicine, *The Best Intentions* (1995)("IOM"), (http://books.nap.edu/openbook.php?record_id=4903&page=64, last visited Sept. 8, 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 Sept. 8, 2013).

No evidence shows that the HHS Mandate could not use a less restrictive method to provide contraception and abortifacients. Such evidence would not be possible as the effect of contraception does not differ based upon who has purchased it.

If Defendants' supposedly vital health and equality interests in providing the mandated item were really grave and paramount, as they must be under strict

scrutiny, *Thomas v. Collins*, 323 U.S. 516, 530 (1945), Defendants could not be content to impose this mandate in such a massively inapplicable or haphazard way. This mandate is simply not a concern that the Defendants treat as compelling, except for when religious people object.

vi. The HHS 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.[14] *See also*, *S. Ridge Baptist Church v. Indus. Comm'n*, 911 F.2d 1203, 1206 (6th Cir. 1990).

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

[14] 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 punishing 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.*

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.[15] The government is already formulating its website and infrastructure to operate its exchanges until the Affordable Care Act. The government could likely organize a different manner in which it could achieve its stated goals under the mandate, using the tools it is currently formulating. 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").

[15] *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).

The government argues that Plaintiffs are asking the government to "subsidize private religious practices." This could not be further from the truth. Plaintiff 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 our free exercise of religion. The Plaintiffs are not asking the government to subsidize them or any religious practice. They are not even asking the government to buy contraceptives and abortifacients. The Plaintiffs simply assert that if the government wants to give private citizens contraceptives and abortifacients free of charge, it can do so itself instead of forcing the Plaintiffs to do it. Such an alternative renders the mandate a violation of RFRA.

The government arguing that it is interested in women's health and equality is an exceptionally positive and innocuous goal. But then, the government claims that women's health and equality can only be achieved through free contraception. And then the government claims that women's health and equality are harmed depending on who gives them the free contraception—and this is what Defendants are arguing. 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 difference 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.

Defendants argue, using language from *Eisenstadt v. Baird*, that "if the right of privacy means anything, and is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). Defendants misunderstand the interest and intent of Domino's Farms and Thomas Monaghan. They do not want to intrude on the privacy of their employees or attempt to dictate what they can or cannot do. Plaintiffs merely want to avoid involvement with the objectionable coverage. Why should the Plaintiffs be forced by the Government to provide something that should be free from unwarranted governmental intrusion?

That same rule of privacy should extend to Plaintiffs as well, freeing them from unwarranted governmental intrusion into a type of health insurance coverage that violates their religious conscience. Defendants go on to argue that these services are necessary for women's health and gender equality rights *while trampling on Plaintiffs' religious freedom*. There is no question that women are able to obtain the medical services including contraceptives and other medical treatment of their choosing. But should they do so at the cost of trampling on someone else's religious freedom as well as requiring an employer to pay for it by

government coercion? Defendants have many other ways of promoting and encouraging women's health through tax credits, tax deductions, and enhancing private and federally sponsored programs already in place for women's health.

Defendants fail to substantiate RFRA's least restrictive means prong. Defendants have not even attempted to demonstrate, for example, how providing a tax credit or deduction for the preventive services at issue, or liberalizing the eligibility requirement of already existing federal programs that provide free contraception, or incorporating this into the exchanges, instead of conscripting religious employers like Plaintiffs into paying and providing for them, would require the government to establish new programs with attendant costs and burdens on others. "When a plausible, less restrictive alternative is offered . . . it is the *Government's obligation to prove* that the alternative will be ineffective to achieve its goals." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000) (emphasis supplied). Defendants have failed in this obligation.

D. *Autocam* is Factually Dissimilar

Defendants' continual reliance upon *Autocam* is misplaced as the two cases, as expressly held by the District Court, are factually different beyond cavil. *See, e.g.*, (R-39: Page ID #836); *see also id.* at Page ID #832 (discussing how Plaintiff Thomas Monaghan's beliefs are indistinguishable from Plaintiff Domino's Farms beliefs and how Plaintiffs' beliefs are incorporated into the daily operations of

Plaintiff Domino's Farms); *id.* at Page ID #833 ("The Court points to the fact that [Plaintiffs] provide[] a Catholic chapel and numerous mass services for its tenants, a Catholic bookstore on-site, and Catholic food options."). The District Court held that the opinion in *Autocam* "is not persuasive and is inapplicable here, given that this case is factually distinguishable from *Autocam*. *Id.* at Page ID #836.

In *Autocam v. Sebelius*, the W.D. of Michigan focused on the fact that those Plaintiffs "have not claimed that any such payment obligation [*the taxes and fines attached to noncompliance of the mandate*] would be ruinous." *Autocam v. Sebelius, et al.*, No. 12-1096, slip op. at 3 (W.D. Mich. Dec. 24, 2012). Here, Plaintiffs claim such payment obligation *would* be ruinous. *See* (R-20: Page ID #478-86, Decl. of Thomas Monaghan at ¶ 54) ("crippling"). Plaintiffs do not supply a health savings account that was determinative to the district court in *Autocam*. *See* (R-39: Page ID #836). The Court in *Autocam* stated that those Plaintiffs were not compelled by the mandate "to do anything." *Autocam* at * 7. However as the sole owner, sole director, sole implementer of the mandate of Plaintiff Domino's Farms, which is a closely held "s" corporation, Plaintiff Thomas Monaghan is compelled by the mandate to provide abortifacients and contraception that he morally objects to and will be individually responsible for penalties of noncompliance. Furthermore the Court in *Autocam* focused on the mandate's monetary sanctions and failed to focus on the true challenge at hand: the

constitutional violation which tramples upon the free exercise of religion. The court employs an individualized factual inquiry when determining if a plaintiff's religious freedom is substantially burdened. *Living Water Church of God v. Charter Twp. Meridian*, 258 Fed. Appx. 729, 734 (6th Cir. 2007). Here, as the District Court properly analyzed the factual distinctions between the instant case and *Autocam*, the two cases are "factually distinguishable." (R-39: Page ID #836).

E. Plaintiffs meet the other preliminary injunction qualifications

The District Court did not commit clear error in its analysis of the facts related to the unique Plaintiffs before the court, nor abuse its discretion in its grant of injunctive relief for Plaintiffs Thomas Monaghan and Domino's Farms. This case involves religious exercise and it is well-established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). For this reason, and the others articulated in the District Court's opinion at (R-39: Page ID #843-44), there has been no error committed by the District Court and the injunction should remain untouched.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court uphold the District Court's grant of preliminary injunctive relief.

Respectfully submitted,

THOMAS MORE LAW CENTER

By: /s/ Erin Mersino
Erin Mersino, Esq.

Attorneys for Plaintiffs-Appellees

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 15,135 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

Respectfully submitted,

THOMAS MORE LAW CENTER

/s/ Erin Mersino
Erin Mersino (P70886)

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 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.

THOMAS MORE LAW CENTER

/s/ Erin Mersino
Erin Mersino (P70886)

ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record No.	Page ID# Range	Description
R-1	1-40	Complaint
R-8	82-236	Plaintiffs' Motion for TRO
R-12	241-340	Defendants' Resp. to Plaintiffs' Motion for TRO
R-17	414-26	Opinion on TRO
R-18	427-28	Order on TRO
R-20	432-89	Plaintiffs' Motion for Preliminary Injun Injunction
R-22	491-621	Defendants' Resp. to Plaintiffs' Motion for Preliminary Injunction
R-39	825-44	Opinion and Order on Preliminary Injunction
R-41	848-50	Defendants' Notice of Appeal