[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRANCIS A. GILARDI, JR., et al.,
Plaintiffs-Appellants,

v. Appeal No. 13-5069

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.,
Defendants-Appellees.
_____/

PLAINTIFFS-APPELLANTS' REPLY BRIEF IN SUPPORT OF THEIR EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL BEFORE APRIL 1, 2013, AND TO EXPEDITE APPEAL

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On April 1, 2013, Plaintiffs will experience irreparable harm to their religious exercise unless this Court grants them an injunction pending appeal.[1]/ Defendants oppose preserving the status quo in this case and allowing Plaintiffs to continue to act pursuant to their religious beliefs, as they have done for the past decade with regard to their employee health plan, even though Defendants *already allow* wholesale categories of employers nationwide *not* to comply with the same federal regulations challenged here. There is simply no equitable reason to allow those employers to avoid compliance with the Mandate *indefinitely* (*e.g.*, those employers with grandfathered health plans) or *temporarily* (*e.g.*, those employers who fall within the temporary safe harbor) while preventing Plaintiffs from doing so pursuant to their religious beliefs. Plaintiffs only ask for the same *temporary* injunctive relief afforded for-profit plaintiffs in twelve other cases, including in *Tyndale House Publishers* that is pending in this Court.[2]/

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[1]/ The district court's proceedings have been stayed pending the outcome of this appeal. (DCT Minute Order, dated March 11, 2013.)

[2]/ *Annex Med., Inc. v. Sebelius*, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013) (granting injunction pending appeal); *Grote v. Sebelius*, 2013 U.S. App. LEXIS 2112 (7th Cir. Jan. 30, 2013) (same); *Korte v. U.S. Dep't of Health & Human Servs.*, 2012 U.S. App. LEXIS 26734 (7th Cir. Dec. 28, 2012) (same); *O'Brien v. U.S. Dep't of Health & Human Servs.*, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012) (same); *Triune Health Grp., Inc. v. U.S. Dep't of Health & Human Servs.*, No. 1:12-cv-06756 (N.D. Ill. Jan. 3, 2013) (ECF Doc. 50, order granting plaintiffs' motion for preliminary injunction); *Am. Pulverizer Co. v. U.S.*

(Text of footnote continues on the following page.)

I. There Is No Business Exception Under RFRA, And Plaintiffs Fall Within Its Protections.

Defendants argue that because the Plaintiff companies are secular, for-profit entities, as opposed to a religious, non-profit organization, they cannot be a person exercising religion under RFRA. (Defs.' Resp. at 10-14.) Notably, Defendants ignore much of the language of RFRA itself, pointing elsewhere to support their position, *e.g.*, Title VII and the National Labor Relations Act, and case law interpreting those statutes. (*Id.*) Defendants evade this point because the text of RFRA defeats their position. RFRA provides: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability. . . ." 42 U.S.C. § 2000bb-1(a). Neither here, nor anywhere else in RFRA, are its terms limited to individuals and religious or non-profit organizations. A corporation is a "person" under RFRA, *see* 1 U.S.C. § 1, and

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Dep't of Health & Human Servs., 2012 U.S. Dist. LEXIS 182307 (W.D. Mo. Dec. 20, 2012) (same); *Tyndale House Publ'rs v. Sebelius*, 2012 U.S. Dist. LEXIS 163965 (D.D.C. Nov. 16, 2012) (same); *Legatus v. Sebelius*, 2012 U.S. Dist. LEXIS 156144 (E.D. Mich. Oct. 31, 2012) (same); *Newland v. Sebelius*, 2012 U.S. Dist. LEXIS 104835 (D. Colo. July 27, 2012) (same); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 2012 U.S. Dist. LEXIS 182942 (E.D. Mo. Dec. 31, 2012) (granting temporary restraining order); *Monaghan v. Sebelius*, 2012 U.S. Dist. LEXIS 182857 (E.D. Mich. Dec. 30, 2012) (same); *Sioux Chief Mfg. Co., Inc. v. Sebelius*, No. 4:13-cv-036 (W.D. Mo. Feb. 28, 2013) (ECF Doc. 9, order granting plaintiffs' *unopposed* motion for preliminary injunction); *see also Lindsay v. U.S. Dep't Health & Human Servs.*, No. 1:13-cv-01210 (N.D. Ill. Mar. 5, 2013) (ECF Doc. 14, Defendants' notice of *non-opposition* to plaintiffs' motion for preliminary injunction; awaiting ruling on preliminary injunction motion).

"religious exercise" under RFRA "includes *any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A), incorporated by 42 U.S.C. § 2000bb-2(4) (emphasis added). Defendants ask this Court to rewrite RFRA to apply only to the exercise of a *religious person*, as opposed to what RFRA clearly provides: *any religious exercise* of a *person*, whether a natural person or a corporate person. Contrary to Defendants' view, whether RFRA applies to a situation is not dependent on how religious the claimant is; rather, it is dependent on the degree of pressure the government is applying to cause the violation of a person's religious beliefs. *See* 42 U.S.C. § 2000bb-1; *Tyndale House Publ'rs*, 2012 U.S. Dist. LEXIS 163965, at *38 ("[T]he contraceptive coverage mandate affirmatively compels the plaintiffs to violate their religious beliefs in order to comply with the law and avoid the sanctions that would be imposed for their noncompliance. Indeed, the pressure on the plaintiffs to violate their religious beliefs is 'unmistakable.'").[3]/

Congress was well aware of Title VII's exemption for religious organizations when it enacted RFRA in 1993. Congress's choice not to include similar language in RFRA, limiting its scope to religious or non-profit entities only, defeats

[3]/ Defendants' reliance on *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), is misplaced. That case considered only the meaning of the "substantially religious character" exception to the National Labor Relations Act, and this Court exercised constitutional avoidance in order to avoid intrusive inquiry concerning a claimant's religiosity. *Id.* at 1340-42.

Defendants' position that RFRA should be read through the prism of Title VII and other statutes. (Defs.' Resp. at 13); *see Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186 (1988) (courts "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."). In fact, RFRA itself provides that it "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3. Thus, Title VII and other federal laws must be interpreted and applied in light of RFRA, not the other way around.

In short, the First Amendment and RFRA do not *only* protect religious organizations. Just as a for-profit corporation need not be organized, operated, and maintained for the primary purpose of engaging in free speech activity to invoke First Amendment free speech protections, see *First National Bank v. Bellotti*, 435 U.S. 765 (1978), a for-profit corporation need not be organized, operated, and maintained for the primary purpose of religious activity to invoke First Amendment religious protections. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120, n.9 (9th Cir. 2009) ("[A]n organization that asserts the free exercise rights of its owners need not be primarily religious."). Nowhere has the Supreme Court suggested, including in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012), cited by Defendants, that First Amendment protection extends to corporations, *except* for the Free Exercise Clause. *See*

Citizens United v. FEC, 130 S. Ct. 876, 899 (2010); *see also Conestoga Wood Specialties Corp.,* 2013 U.S. App. LEXIS 2706, at *40-42 (Jordan, J., dissenting) (concluding that the government's distinction between for-profit and non-profit corporations for purposes of RFRA is untenable and listing cases rejecting that argument).[4]/

Defendants also incorrectly try to foreclose any claim by Plaintiffs under RFRA by drawing a hard and fast line between the business and the management that arranges for the group health plan. (Defs.' Br. at 14-16.) Defendants take this distinction too far. A business does not make any decision, including deciding what type of group health plan it will have, except through human agency, *i.e.*, through its managers, officers, and owners pursuant to the policies of the business established by these same individuals. Here, the Gilardis are the sole owners of the

[4]/ Defendants fail in their attempt to limit the teachings of *Sherbert v. Verner*, 374 U.S. 398 (1963), *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Thomas v. Review Board*, 450 U.S. 707 (1981). (Defs.' Resp. at 16-17.) RFRA specifically restored the compelling interest test set forth in *Sherbert* and *Yoder*, 42 U.S.C. § 2000bb-(b)(1), and based on those cases, RFRA protects all persons whose religious exercise rights are substantially burdened by, among other things, being compelled to choose between (1) doing something their faith forbids or discourages (or not doing something their faith requires or encourages), and (2) incurring financial penalties, the loss of a government benefit, criminal prosecution, or other substantial harm. Defendants' attempt to distinguish *Stormans* and *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988), also fails. (Defs.' Br. at 17.) Both cases hold that a business has standing to assert the free exercise rights of its owners. There can be no standing without injury, and these cases contradict Defendants' position that the Mandate imposes no injury on Plaintiffs.

Plaintiff companies and they make the policies for the companies, which they run pursuant to their Catholic faith. (Emerg. Mot. Exs. A & B.) The Gilardis operate their businesses in keeping with the laws of their State, as explained in the amicus brief filed by the State of Ohio: "Under Ohio law … [f]amily-owned companies … surely can be operated according to agreed guiding religious principles of their owners regardless of whether they are organized under the general or the non-profit sections [of the Ohio Revised Code]."). (DCT Doc. 27 at 23-24.)[5]/

It is uncontested by Defendants that the imposition of millions of dollars of penalties *upon the companies* for non-compliance with the Mandate would significantly harm *both the companies and the Gilardis.* Indeed, the specter of this significant harm *substantially pressures the Gilardis* to take actions that violate their religious beliefs and those of their companies (by complying with the Mandate). *See, e.g., Thomas*, 450 U.S. at 717-18.

Lastly, Defendants contend that the use of the goods and services required by the Mandate depends on the independent decisions of third parties. (Defs.' Br. at 18-19.) Thus, they claim that Plaintiffs should have no moral problem with (and

[5]/ Defendants cite *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), (Defs.' Br. at 11-12), wherein Justice Brennan's concurrence recognizes "that some for-profit activities could have a religious character." *Id.* at 345 n.6 (Brennan, J., concurring in the judgment). The Plaintiff companies often engage in various religious activities, such as donating to religious causes and publicly expressing religious views regarding the sanctity of human life, which are done at the direction of the Gilardis. (Emerg. Mot. at 5-6, Exs. A & B.)

therefore experience no substantial burden to their religious beliefs by) arranging for and paying for insurance that complies with the Mandate, despite the fact that the tenets of their Catholic faith prohibit them from directly and indirectly doing so. (Emerg. Mot. Exs. A-B.) Defendants' reasoning here is undermined by the fact that the federal government—itself—knows that when *it* funds a program *it facilitates the activities that it funds.* Indeed, the government routinely excludes particular activities or entities from neutral funding programs because the government does not want to *facilitate*, directly or indirectly, certain activities, *e.g.*, abortion or obscenity. (DCT Doc. 30 at 15-17) (listing examples and citations).[6]/

In addition, as the Seventh Circuit stated in rejecting this, and other arguments advanced by Defendants,

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[6]/ Among the references listed at DCT Doc. 30 at 15-17 are *Harris v. McRae*, 448 U.S. 297, 325 (1980), in which the Court upheld the Hyde Amendment's exclusion of funding for most abortions and noted that, by subsidizing medical expenses of childbirth while not subsidizing medical expenses of most abortions, "Congress has established incentives that make childbirth a more attractive alternative than abortion," and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), in which the Court upheld provisions that prohibited the National Endowment for the Arts from providing funding for obscene projects, productions, or programs.

Moreover, Defendants' reliance on *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and *Board of Regents v. Southworth*, 529 U.S. 217 (2000), is misplaced as is the reliance on those two cases by the dissent in *Grote*, 2013 U.S. App. LEXIS 2112. (Defs.' Br. at 19.) Such cases, which recognize that *the government* has broad authority to spend public funds as it sees fit without violating the First Amendment, bear little relevance to the question of whether requiring *private individuals and entities* to take direct action that is prohibited by their religious beliefs substantially burdens their religious exercise under RFRA.

> the government's primary argument is that because K & L Contractors is a secular, for-profit enterprise, no rights under RFRA are implicated at all. This ignores that Cyril and Jane Korte are also plaintiffs. Together they own nearly 88% of K & L Contractors. It is a family-run business, and they manage the company in accordance with their religious beliefs. This includes the health plan that the company sponsors and funds for the benefit of its nonunion workforce. That the Kortes operate their business in the corporate form is not dispositive of their claim. The contraception mandate applies to K & L Contractors as an employer of more than 50 employees, and the Kortes would have to violate their religious beliefs to operate their company in compliance with it. . . . The religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services.

Korte, 2012 U.S. App. LEXIS 26734, at *8-9 (citations omitted); *see also Tyndale House Publ'rs*, 2012 U.S. Dist. LEXIS 163965, at *44 (explaining that it is the required Mandate coverage that substantially burdens plaintiffs' religious exercise, and "it is irrelevant that the use of the contraceptives depends on the independent decisions of third parties.").[7]/

II. The Mandate Fails Strict Scrutiny As Applied To Plaintiffs.

Defendants pay scant attention to demonstrating that the Mandate satisfies strict

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[7]/ Defendants' reliance on *United States v. Lee*, 455 U.S. 252 (1982), further undercuts their argument. (Defs.' Br. at 16.) Although the Court noted in the context of applying strict scrutiny that religious adherents who enter the commercial marketplace do not have an *absolute* right to receive a religious exemption from *all* legal requirements that conflict with their faith, *id.* at 261, the fact that the Court concluded that there was a substantial burden *in the first place* and then proceeded to apply strict scrutiny illustrates that the government does not have *carte blanche* to substantially burden the religious exercise of business owners, as Defendants suggest on appeal.

scrutiny, which is their burden, for an obvious reason: they cannot articulate a compelling governmental interest in *requiring Plaintiffs* to comply with the Mandate while, for example, employers with grandfathered plans, in which tens of millions of individuals are enrolled, do not have to do so. *See Gonzales v. O Centro Espirita Beneficente*, 546 U.S. 418, 430-38 (2006). Defendants try to minimize the glaring grandfather exception by stating that this is not a permanent exception, but merely a transitional one. (Defs.' Resp. at 20.) As explained in the emergency motion, however, grandfathered plans may continue *indefinitely* and the government has defined this indefinite status as a *right*. (Emerg. Mot. at 4 & n.6.)

The government's alleged interests are further undermined by the fact that although grandfathered plans *need not comply* with the Mandate, the government has decided that those plans *must comply* with other provisions of the Affordable Care Act.[8]/ The government's imposition of certain requirements on grandfathered plans, but not the Mandate, indicates that the *government itself* does not think the Mandate is an interest of the "highest order." *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993).

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[8]/ For a summary of the applicability of Affordable Care Act provisions to grandfathered health plans, *see* Application of the New Health Reform Provisions of Part A of Title XXVII of the PHS Act to Grandfathered Plans, http://www.dol.gov/ebsa/pdf/grandfatherregtable.pdf (last visited Mar. 12, 2013). The Mandate also does not apply to employers of fewer than fifty employees if they choose not to provide employee health insurance. 26 U.S.C. § 4980H(c)(2)(A).

Defendants give even less attention to meeting their burden of proof under RFRA's least restrictive means prong. (Defs.' Br. at 20.) Defendants do not even attempt to demonstrate, for example, how providing a tax credit or deduction for the preventive services at issue, or liberalizing the eligibility requirements of already existing federal programs that provide free contraception, instead of conscripting objecting employers like Plaintiffs into paying for them, would not be a less restrictive means of achieving its stated interests. "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); *Grote*, 2013 U.S. App. LEXIS 2112 at *11 ("And as in *Korte*, the government has not, at this juncture, made an effort to satisfy strict scrutiny.").

III. Plaintiffs Satisfy All Factors For An Injunction Pending Appeal.

Defendants do not address Plaintiffs' arguments that they satisfy the remaining factors warranting injunctive relief and that an injunction pending appeal would preserve the status quo while this Court resolves the important legal issues raised in this appeal, and they concede those points. (Emerg. Mot. at 19-20.)

CONCLUSION

Accordingly, this Court should grant Plaintiffs' emergency motion in full, issue an injunction pending appeal before April 1, 2013, and expedite this appeal.

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March 12, 2013

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2013, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the counsel of record for Plaintiffs and Defendants who are registered users of the CM/ECF system. Counsel of record may obtain a copy of the foregoing through the CM/ECF system.

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