NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals
for the District of Columbia Circuit

No. 13-5069

FRANCIS A. GILARDI; PHILIP M. GILARDI; FRESH UNLIMITED INCORPORATED, doing business as FRESHWAY FOODS; and FRESHWAY LOGISTICS INCORPORATED,

Plaintiffs – Appellants,

vs.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as Secretary of United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF LABOR; and SETH D. HARRIS, in his official capacity as Acting Secretary of United States Department of Labor,

Defendants – Appellees.

On Appeal from the United States District Court for the District of Columbia in Case No.1:13-CV-00104-EGS (Hon. Emmet G. Sullivan, Judge)

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June 21, 2013

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GLOSSARY OF ABBREVIATIONS

Affordable Care Act: Patient Protection and Affordable Care Act, 111 Pub. L. No. 148, 124 Stat. 119, 111th Cong., 2d Sess., Mar. 23, 2010.

App.: Appendix.

Defs.' Br.: Defendants' responsive brief on appeal.

Freshway Foods: Plaintiff Fresh Unlimited, Inc., d/b/a Freshway Foods.

Freshway Logistics: Plaintiff Freshway Logistics, Inc.

Gilardis: Plaintiffs Francis and Phil Gilardi.

Mandate: Federal regulations enacted pursuant to the Affordable Care Act, requiring non-exempt group health plans to provide coverage without cost-sharing for all FDA approved contraceptive methods—including abortion-inducing drugs—sterilization procedures, and patient education and counseling for women with reproductive capacity.

Pls.' Br.: Plaintiffs' opening brief on appeal.

RFRA: Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq*.

INTRODUCTION

In *Braunfeld v. Brown*, 366 U.S. 599 (1961), Justice Stewart wrote:

> Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand. For me this is not something that can be swept under the rug and forgotten in the interest of Sunday togetherness. I think the impact of this law upon these appellants grossly violates their constitutional right to the free exercise of religion.

Id. at 616 (Stewart, J., dissenting).

Who were the appellants in *Braunfeld*? A group of Orthodox Jewish merchants engaged in the *obviously* for-profit business of selling clothes and furniture. And while a majority of the Court in this pre-*Sherbert* and *Yoder* case rejected, on other grounds, the merchants' free exercise challenge to Pennsylvania's Sunday closing law, no member of the Court so much as questioned the right of those for-profit business owners to bring a free exercise challenge to a law that — quite indirectly — had an adverse economic impact on their businesses.

Old Order Amish farmer Lee was also engaged in a for-profit business. *United States v. Lee*, 455 U.S. 252 (1982). And while the Court ultimately

held that his free exercise claim had to yield to a compelling state interest in a uniform Social Security tax system, no member of the Court expressed any doubt about the right of this for-profit business owner to bring a free exercise claim.

The fundamental error in both the district court's decision and Defendants' argument in support of that decision is the focus on the formal identity of the person bringing the free exercise claim. The Supreme Court rejected this approach in *Bellotti* and this Court should do the same here. *First Nat'l Bank v. Bellotti,* 435 U.S. 765, 780 (1978) ("The proper question therefore is not whether corporations 'have' *First Amendment* rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the *First Amendment* was meant to protect.") (emphasis added).

Here, the proper question, the correct focus, should not be on whether the Gilardis as individual business owners enjoy free exercise rights – of course they do. Nor should the focus be on whether Freshway Foods or Freshway Logistics, corporate entities like the First National Bank, the New

York Times, the Church of the Lukumi, the O Centra Espirita church, and Citizens United, may bring a First Amendment claim – of course they can. The real focus, rather, should be on whether or not – in the face of uncontested evidence that the Gilardis have a specific religious objection to paying for the mandated coverage – the government can carry its burden of demonstrating that "an interest of the highest order" would somehow be undermined by extending to Plaintiffs the same exemption currently afforded to thousands of other employers.

Tortured interpretations of the plain language of RFRA will not do. Mistaken characterizations of Plaintiffs' positions will not do. Parades of horribles will just not do. The Gilardis are faced with the same kind of "cruel choice" decried by Justice Stewart in *Braunfeld*: they must choose between their religious beliefs (the sincerity of which the government does not question) or economic survival ($14.4 million in annual penalties). By focusing on the formal identity of the parties, the government hopes to divert the Court's attention from the glaring fact that the Mandate — purporting to advance a governmental interest of the highest order, while

exempting (according to the government's own estimates) one-third of the Nation from its coverage — cannot possibly withstand strict scrutiny.

SUMMARY OF ARGUMENT

RFRA allows business owners and their companies – both considered "persons" under RFRA – to assert claims against the government when the government – as here – substantially burdens their religious exercise. Because RFRA protects Plaintiffs' rights, Defendants direct this Court's focus to the irrelevant; hence the government's focus on such other laws as Title VII that do not provide for the broad protection of RFRA. Although Title VII differentiates between certain religious non-profit entities and other employers, RFRA does not. RFRA protects the religious exercise of *all persons*, which includes the Gilardis and the Plaintiff companies.

The Gilardis are the 100% owners and operators of the Plaintiff companies. The Gilardis manage their companies pursuant to their Catholic faith, and the companies reflect the Catholic faith of the Gilardis. In short, the companies do nothing without the Gilardis' approval. Although Defendants attempt to obfuscate the reality of the matter, the

Mandate has given the Gilardis a stark choice: either violate their faith and comply with the Mandate or violate the Mandate and comply with their faith (and have their companies pay $14.4 million in annual fines). This choice places a substantial burden on Plaintiffs' religious exercise – plain and simple. Defendants understand that, which explains their mischaracterization of Plaintiffs' arguments, for example, Defendants' claim that Plaintiffs contend that religious objectors can ignore anti-discrimination laws, something Plaintiffs have not argued.

Lastly, not only have Defendants not refuted Plaintiffs' arguments that the Mandate substantially burdens Plaintiffs' religious exercise, Defendants have also failed to satisfy strict scrutiny, which is Defendants' burden. Defendants have failed to show that the Mandate advances an interest of the highest order such that it must be imposed on Plaintiffs – despite the substantial burden to their religious exercise — because the government has exempted millions of Americans from the same Mandate. And, the government has failed to show that, other than the Mandate, there are no less restrictive means available for the government to use to avoid the

conflict the Mandate creates with the religious liberty interests of many Americans, including Plaintiffs.

ARGUMENT

I. Defendants' Novel Reading Of RFRA Is Unfounded.

The government's responsive brief presents an incomplete picture of the background of RFRA. Defs.' Br. at 16–24. It is simply not true that pre-*Smith* (and, thus, pre-RFRA) courts did not entertain free exercise challenges brought by for-profit, secular businesses. In both *Braunfeld* and *Lee*, the Supreme Court itself adjudicated free exercise claims brought by such businesses. The holdings in both cases turned, not on the formal identity of the plaintiffs – certainly not on their for-profit or "secular" status – but on the Court's application of the pre-*Smith*, and now RFRA, compelling interest/least restrictive means analysis.

Nor is there anything in the language of RFRA to support the government's narrow reading. RFRA does not categorically exclude for-profit corporations from its coverage (or any other category of persons). It says it covers *persons*. Not any particular kind of persons. Not "natural

persons" as opposed to "corporate persons." Just persons. "As in all statutory construction cases, we 'assume that the ordinary meaning of the statutory language accurately expresses the legislative purpose.'" *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1172 (2013) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242 (2010)). And because the Supreme Court has uniformly defined "person" to include corporations from the late 1800s through the present day, and because Congress itself has done likewise, the ordinary meaning of the term "person" as it appears in RFRA can only be construed to include corporations. *See Santa Clara County v. So. Pacific*, 118 U.S. 394 (1886); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 687 (1978); *Citizens United v. FEC*, 558 U.S. 310, 342 (2010); 1 U.S.C. § 1.

To avoid the plain meaning of RFRA, Defendants embark upon an extended interpretive foray into Title VII and other statutes that is completely irrelevant. It is true, of course, that Title VII expressly differentiates between certain religious non-profit entities and other employers. *But RFRA does not*. Congress, well aware of Title VII, declined to include language in RFRA limiting its coverage to religious or non-profit

entities alone. Defendants' attempt to import language into RFRA from other statutory schemes runs counter to the maxim that a legislature's exclusion of language in a statute or statutory section is presumed to be intentional. *See, e.g., 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").

RFRA 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; *see United States v. Ali*, 682 F.3d 705, 709 (8th Cir. 2012) (RFRA "amended all federal laws to include a statutory exemption" where RFRA's two-part test is satisfied). The Americans with Disabilities Act and the National Labor Relations Act are similarly irrelevant to this case. In short, Title VII (and other statutes) must be read through the prism of RFRA, not the other way around.

RFRA and the Free Exercise Clause protect the religious exercise of persons — not (solely) the exercise of religious persons. That the Free

Exercise Clause "gives special solicitude to the rights of religious organizations," *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 706 (2012), does not mean that for-profit corporations are excluded from the Free Exercise Clause's protection, just as the fact that the Fourteenth Amendment was adopted "with special solicitude" for the rights of African-Americans, *Nixon v. Condon*, 286 U.S. 73, 89 (1932), does not mean that that Amendment protects *only* the rights of African-Americans. Applying Defendants' interpretation of RFRA to the Fourteenth Amendment would require just such an absurd result.

The Gilardi brothers own 100% of Freshway Foods and Freshway Logistics. The corporations are legal persons under RFRA. Yet, like every other corporate person, the corporations act only at the direction of the human agents who own and control them and set corporate policy. According to the uncontested evidence in the record here, the corporate plaintiffs are operated in a way that reflects the teachings of the Gilardi brothers' Catholic faith. App. 38-43, 50-55. The Gilardis have set a policy for the corporate plaintiffs that they will not pay for health coverage for

contraceptives, sterilization, and abortifacients. *Id.* Since the Mandate requires them to do just that, it obviously imposes a burden on the free exercise rights of the corporate plaintiffs (as well as the individual plaintiffs). That triggers RFRA in this case.

There is nothing radical or novel about the concept of corporations exercising First Amendment rights in a manner that reflects their human owners' opinions and beliefs. Just as the New York Times Company ultimately expresses the views of the Sulzberger-Ochses, and the Washington Post Company the views of the Grahams, and yet no one doubts that the respective corporate entities enjoy free speech rights, *see, e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964) , it is hardly a stretch to say that Freshway Foods and Freshway Logistics, which reflect the religious views of the Gilardis, enjoy free exercise rights and have the right to seek to enforce those rights under RFRA.

As one scholar has put it: "Like the Free Exercise Clause itself, RFRA is universal in its scope. RFRA singles out no claims for special advantage or disadvantage." *See* Douglas Laycock, *The Religious Freedom Restoration Act*,

1993 B.Y.U. L. Rev. 221, 235 (1993). This Court should reject the government's attempt to distort the plain meaning of RFRA.

II. The Supreme Court Has Rejected Attempts To Restrict The First Amendment Rights Of Persons Based On Corporate Or For-Profit Status.

Defendants' theory is analogous to the argument concerning corporate free speech rights that the Supreme Court rejected in *Bellotti*. As noted previously, the Court stated that the "proper question" in such cases is not the formal identity of the one bringing the First Amendment challenge but, rather, "whether [the statute] abridges expression that the First Amendment was meant to protect." 435 U.S. at 780.

The Court dismissed as a "novel and restrictive gloss on the First Amendment" the idea (urged by Defendants here) that First Amendment freedoms are limited to those one might immediately associate with those freedoms. According to the Court, "the press does not have a monopoly on either the First Amendment or the ability to enlighten. . . ." *Id*. at 777, 782. Even so, neither churches, nor synagogues, nor nonprofits have a

monopoly on religion or acts undertaken, or refrained from, based on religious beliefs.

The *Bellotti* Court also clearly rejected the argument that underlies much of the view of the district court and the government that First Amendment rights may be cabined or parceled out based on the general character of an entity alone:

> If a legislature may direct business corporations to "stick to business," it also may limit other corporations -- religious, charitable, or civic -- to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment.

Id. at 785. Just as the First Amendment's Freedom of Speech Clause is not the exclusive property of those in the "speech business," the First Amendment's Freedom of Religion Clause is not the exclusive property of those in the "religion business."

Even more recently, in *Citizens United*, the Court expressly rejected the kind of nonprofit vs. for-profit distinction being urged by Defendants here in the First Amendment context:

> We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the

> speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit *or* for-profit corporations.

130 S. Ct. at 50 (emphasis added).

The Court was also unimpressed with the corporate structure arguments that figure so largely in the government's argument in this case. Despite the obvious significance of certain features of the corporate form in other contexts, the Court specifically found that the fact that "[s]tate law grants corporations special advantages--such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets," is of very little significance in the context of laws burdening First Amendment freedoms: "[T]his does not suffice, however, to allow laws prohibiting speech. 'It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of *First Amendment* rights.'" *Id.* at 69 (quoting *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, (1990) (Scalia, J., dissenting)) (emphasis added).

In short, Defendants ignore the teachings of both *Bellotti* and *Citizens United* on the First Amendment rights of corporate persons.

III. Defendants Mischaracterize Plaintiffs' Arguments.

The government's brief mischaracterizes Plaintiffs' arguments in at least three important ways.

First, the Gilardis and the Plaintiff companies do not contend that religious objectors have *carte blanche* to ignore anti-discrimination laws, OSHA regulations and the like. Defs.' Br. at 31. At most, what Plaintiffs allege is that a person whose exercise of religion is substantially burdened by a government enactment may bring a claim under RFRA. But, as Judge Walton noted in *Tyndale House Publishers v. Sebelius*, 2012 U.S. Dist. LEXIS 163965, at * 31-32, n. 13 (D.D.C. Nov. 16, 2012), "just because a corporation is allowed to assert a RFRA claim does not mean that it will succeed on the claim." And, however "demanding" the strict scrutiny test is deemed to be, *see City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), it has proven perfectly capable of turning away free exercise claims brought against measures that — unlike the Mandate — were *truly* related to governmental interests of the highest order being pursued by narrow means. *See, e.g., Lee*, 455 U.S. 252; *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

The government's mischaracterization of Plaintiffs' position is obviously intended to invoke a parade of horribles. Yet, as Judge Walton also pointed out in *Tyndale*, recognition of a closely-held corporation's right to assert the free exercise rights of its owners when the corporation's beliefs are an extension of the owner's beliefs has been the law in the United States Court of Appeals for the Ninth Circuit for the past quarter of a century, and yet the horribles have not paraded. *Tyndale*, 2012 U.S. Dist. LEXIS 163965, at *25, n. 11 ("[N]othing has been presented to show that courts in that Circuit have been flooded with free exercise and RFRA claims by for-profit corporations.").[1]/

Second, the Gilardis do not contend that they are permitted to disregard the corporate status of Freshway Foods or Freshway Logistics "when it is advantageous to do so." Defs.' Br. at 13. What they do contend is simply that the corporate form cannot be invoked by the government as an

[1]/ The procedural history of *Tyndale* itself undercuts the government's assertion of the perils that would befall recognition of a for-profit right to bring a RFRA case. The district court granted Tyndale — a for-profit company — a preliminary injunction. The government appealed that order, but subsequently dismissed its own appeal, 2013 U.S. App. LEXIS 9208 (D.C. Cir. May 3, 2013).

absolute defense in the First Amendment context when the real-world effect of government action clearly infringes the First Amendment freedoms of individuals who own corporations. This was recognized implicitly by the *Bellotti* Court, and explicitly by the *Citizens United* Court: "It is rudimentary that the State cannot exact as the price of those special advantages [use of corporate status] the forfeiture of First Amendment rights." *Citizens United*, 558 U.S. at 69.

Third, Plaintiffs do not contend, even implicitly, that "any corporate shareholders," let alone "a minority shareholder," could bring a RFRA claim based on some regulation that he or she found "immoral." Defs.' Br. at 13-14. Plaintiffs simply contend that those who own, control, and have *ultimate* decision-making authority for a corporation may, in circumstances analogous to the present case, assert a claim. Thus, the Gilardis, who own 100% of the Plaintiff companies and who manage and operate those companies in a way that reflects the teachings, mission, and values of their Catholic faith, App. 38-39, 50-51, may assert a RFRA claim.

As 100% owners of these Subchapter S corporations, it is the Gilardis who set up the businesses' self-insured health plan and who write the checks that pay for the services covered. Plaintiffs' argument in no way opens the door for claims by those who have less than ultimate control or decision-making authority in the corporate structure.

IV. Defendants' Exalting Of Form Over Substance Ignores Reality.

The government waves off the Gilardis' claim that the Mandate substantially burdens their religious faith by contending that the Mandate requires the Gilardis to do nothing. Defs.' Br. at 13, 24. Apparently, the government thinks that if the Gilardi brothers decide to literally "do nothing," the "corporate structure" of Freshway Foods and Freshway Logistics will somehow take on flesh and blood and begin writing checks, procuring health coverage, and setting company policies. But the reality, especially in a small, family-owned and operated business, is quite different. Until Frank and Phil Gilardi show up in the morning, the lights don't even get turned on. And unless the Gilardi brothers — who come complete with their (perhaps, counter-cultural) Catholic principles — make

decisions about what sort of health plan is to be provided to the employees of the Plaintiff companies, no plan is provided. (That the companies' plan bears the imprint of the Gilardis' religious beliefs is evident from the plan document's consistent exclusion of contraceptive coverage. *See* App. 45-49.)

That said, to argue as the government does that the Mandate does not require the Gilardis to do anything is the type of form over substance approach that has no place in a First Amendment case. *Bellotti*, *supra.*; *Citizens United*, *supra.* In fact, the government's attempted analogy with corporate shareholder cases, Defs.' Br. at 24-27, runs up against the facts of this case, and others like it, where the owner(s), board members, and managers are family members. The Gilardis are not mere shareholders. Their involvement in the business does not entail some derivative financial injury to their shares in a corporation they own. In these situations, limited legal liability does not provide limited moral liability. This is the common sense conclusion of the Ninth Circuit as well as the highest courts of both Minnesota and Illinois. *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th

Cir. 1988); *McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985); *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474 (2008).

Nor is there any merit to the government's contention that the Gilardis should be mollified by the fact that an employee's decision to use particular services included in a health plan cannot be attributed to her employer. Defs.' Br. at 14. The Gilardis do not contend that their objection lies with whatever an employee might choose to do. Instead, they contend that they object to *arranging and paying for the coverage at all*, an objection that stands whether or not any employee ever decides to access the objectionable coverage.

The government's professed inability to comprehend that the Mandate imposes a burden on a religious objector is disingenuous in light of the fact that the government itself — in this very regulation — has acknowledged that paying for the objected-to coverage by those religiously opposed to doing so is burdensome. This is, of course, why the government has pledged to "accommodat[e] [the] religious liberty interests" of *some* employers by "protect[ing]" them from "having to contract, arrange, or pay

for contraceptive coverage." 77 Fed. Reg. 16501, 16503 (Mar. 21, 2012); 78 Fed. Reg. 8456, 8458-59 (Feb. 6, 2013) (emphasis added). Obviously, even in the case of the non-profits whose "religious liberty interests" the government has pledged to protect, the mechanics are the same: the employees' decisions cannot be attributed to the non-profit. Yet, in that situation, the government has little difficulty recognizing what, in this situation, it professes to be absurd, *i.e.*, that contracting for, arranging for, and paying for the objected-to coverage imposes a substantial burden on an employer who has religious objections to doing so.

This is consistent with longstanding Congressional recognition of the fact that, for some Americans, corporate or individual, for-profit or non-profit, contracting for, arranging for, and paying for certain kinds of insurance has grave moral implications. The Affordable Care Act itself prohibits health plans in state exchanges from using federal money to pay for most abortions, and also requires plans covering abortions to pay for them from a segregated account. 42 U.S.C. § 18023(b)(2). Coverage for

abortion is excluded from Medicaid,[2]/ the Indian Health Service,[3]/ and all other federally-funded insurance programs.[4]/ The federal government's own employee health plans similarly exclude coverage for abortions.[5]/

It is clear, therefore, that the government itself has long recognized that paying for certain types of health insurance coverage is morally problematic for some employers, and that the problematic nature of this action is not short-circuited by an employee's independent decision-making. Seeking protection from such requirements implicates — as the government itself puts it — a "religious liberty interest."

V. Defendants Fail To Adequately Address Plaintiffs' Strict Scrutiny Arguments.

The Defendants' responsive brief goes to considerable length exploring why the interest the Mandate purports to advance — increased access to contraceptives — is an interest of the highest order. Defs.' Br. at 38-46.

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[2]/ 42 C.F.R. § 441.202.

[3]/ 25 U.S.C. § 1676.

[4]/ *See, e.g.*, 42 C.F.R. § 457.475 (State Children's Health Insurance Program).

[5]/ 32 C.F.R. § 1994(e) (Tricare); *see also* Congressional Research Service, *Laws Affecting the Federal Health Benefits Program* 4 (2013), http://www.fas.org/sgp/crs/misc//R42741.pdf (last visited June 19, 2013).

What Defendants fail to come to grips with, however, is that that interest is supposedly being advanced by a regulation that — on its face — exempts millions of Americans. There is simply no escaping the fact that those in grandfathered plans, those employed by "religious employers," and those working for companies with fewer than fifty employees, are, by the Mandate's own terms, at least potentially subject to plans that are not required to provide the mandated coverage. *See* Pls.' Br. at 6-10. "[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal quotation marks and citations omitted).

Nor does the government even mention what is, perhaps, the single most telling fact undermining its assertion that the Mandate advances a compelling interest — the fact that, while some features of the Affordable Care Act *are* required to be included in grandfathered plans, the

contraceptive Mandate *is not required to be included*.[6]/ It simply cannot be said — based on the exemptions and exceptions the government has written into the Mandate — that it advances an interest of the highest order.

Finally, Defendants make little attempt to address Plaintiffs' illustration of a number of less restrictive means the government could use to avoid the inevitable conflict (a conflict acknowledged by the government) that the Mandate creates with the "religious liberty interest" of many Americans. The government has an *obligation* to prove that the alternatives suggested by Plaintiffs will be ineffective to advance its goals. *United States v Playboy Entm't Grp.*, 529 U.S. 803, 816 (2000). The government has not satisfied that obligation here, nor could it have if it had attempted to do so.

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[6]/ For example, provisions of the Affordable Care Act dealing with excessive waiting periods and extension of dependent coverage must be included in grandfathered plans. 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 June 19, 2013).

CONCLUSION

For the reasons argued in Plaintiffs' opening brief and herein, Plaintiffs request that this Court reverse the decision of the district court denying Plaintiffs' motion for a preliminary injunction and remand this case to the district court with instructions to enter a preliminary injunction as requested by Plaintiffs.

Respectfully submitted on this 21st day of June, 2013,

/s/ Colby M. May

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CERTIFICATE OF COMPLIANCE

In reliance on the word count feature of the word processing system used to prepare this brief, Microsoft Word 2003, the undersigned counsel certifies that the foregoing Reply Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,314 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The undersigned counsel further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Palatino Linotype font.

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CERTIFICATE OF SERVICE

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that: Counsel Press was retained by the AMERICAN CENTER FOR LAW AND JUSTICE, Attorneys for Plaintiffs-Appellants, to print this document. I am an employee of Counsel Press. On **June 21, 2013**, Counsel for Appellants authorized me to electronically file the foregoing **Reply Brief of Appellants** with the Clerk of Court using the CM/ECF System, which will serve, via e-mail notice of such filing, to any of the following counsel registered as CM/ECF users:

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A courtesy copy has also been mailed to the above-listed counsel.

Eight paper copies have been hand-delivered to the Court on the same date.

June 21, 2013

/s/ John Kruesi
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