[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' EMERGENCY PETITION FOR REHEARING EN BANC OF PANEL DECISION DENYING THEIR EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL BEFORE APRIL 1, 2013

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March 25, 2013

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EMERGENCY PETITION FOR REHEARING EN BANC

This petition raises a question of exceptional importance: whether this Court should enter an injunction to permit Francis and Philip Gilardi and their two family-run businesses to continue to exclude from their employee health coverage all contraceptive methods, including abortion-inducing drugs, and sterilization procedures, as they have been doing for the last decade based on their Catholic faith, while their claims are adjudicated on appeal. Without an injunction, Plaintiffs will be forced by the preventive services coverage provision of the Affordable Care Act and related regulations ("the Mandate") to make a stark and inescapable choice before April 1, 2013: either arrange and pay for all contraceptive methods and sterilization procedures, in violation of their Catholic religious beliefs and company standards, or start incurring crippling penalties totaling about $39,500 per day (more than $14.4 million per year) for non-compliance.

On March 21, 2013, a motions panel denied Plaintiffs' emergency motion for an injunction pending appeal with minimal explanation, over Judge Brown's dissent. (Add. 1-2.) That decision conflicts with decisions of the Seventh and Eighth Circuits, which have addressed the same issue and have granted injunctive relief pending appeal to similarly-situated employers who are also challenging the Mandate: *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).

The motions panel decision has also led to inconsistent results within this Circuit. Pending in this Court is another Mandate case, also brought by a for-profit business and its owners, in which the district court granted the plaintiffs preliminary injunctive relief. *Tyndale House Publ'rs v. Sebelius*, 2012 U.S. Dist. LEXIS 163965 (D.D.C. Nov. 16, 2012), *appeal docketed*, No. 13-5018. The motions panel here ordered that the instant appeal and *Tyndale House* be argued on the *same day* in September and before the *same merits panel*. (Add. 2.) Based on the motions panel decision, however, Plaintiffs will face irreparable harm and staggering penalties starting on April 1 (over $7.2 million between April 1 and September 30, alone), whereas the *Tyndale House* plaintiffs are free to adhere to their religious principles while their appeal is litigated. The plaintiffs in these two appeals should be on an equal footing concerning the protection of their religious exercise pending the full adjudication of their claims by the same merits panel. A contrary result is both unjust and inexplicable.

To Plaintiffs' knowledge, for-profit and non-profit employers have filed more than fifty federal lawsuits challenging the Mandate. At present, injunctive relief

protects the religious exercise of for-profit employers in thirteen cases,[1]/ whereas such relief has been denied in five cases, including this one.[2]/ An injunction pending appeal will preserve the status quo, protect Plaintiffs' religious exercise, and not harm the interests of Defendants or the public. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843-44 (D.C. Cir.

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[1]/ *Annex Med., Inc.*, 2013 U.S. App. LEXIS 2497 (granting injunction pending appeal); *Grote*, 2013 U.S. App. LEXIS 2112 (same); *Korte*, 2012 U.S. App. LEXIS 26734 (same); *O'Brien*, 2012 U.S. App. LEXIS 26633 (same); *Monaghan v. Sebelius*, 2013 U.S. Dist. LEXIS 35144 (E.D. Mich. Mar. 14, 2013) (granting preliminary injunction); *Triune Health Grp., Inc. v. U.S. Dep't of Health & Human Servs.*, No. 1:12-cv-06756, ECF Doc. 50 (N.D. Ill. Jan. 3, 2013) (same); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, 2012 U.S. Dist. LEXIS 182307 (W.D. Mo. Dec. 20, 2012) (same); *Tyndale House Publ'rs*, 2012 U.S. Dist. LEXIS 163965 (same); *Legatus v. Sebelius*, 2012 U.S. Dist. LEXIS 156144 (E.D. Mich. Oct. 31, 2012) (same); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (same); *Lindsay v. U.S. Dep't Health & Human Servs.*, No. 1:13-cv-01210, ECF Docs. 20-21 (N.D. Ill. Mar. 20, 2013) (order granting plaintiffs' unopposed motion for preliminary injunction); *Sioux Chief Mfg. Co., Inc. v. Sebelius*, No. 4:13-cv-036, ECF Doc. 9 (W.D. Mo. Feb. 28, 2013) (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 TRO); *see also Geneva Coll. v. Sebelius*, 2013 U.S. Dist. LEXIS 30265 (W.D. Pa. Mar. 6, 2013) (granting in part, denying in part motion to dismiss action brought by businesses and their owners).

[2]/ *Hobby Lobby Stores v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (denying preliminary injunction), *appeal docketed*, 2012 U.S. App. LEXIS 26741 (10th Cir. Dec. 20, 2012) (denying injunction pending appeal), *and* 133 S. Ct. 641 (Dec. 26, 2012) (Sotomayor, J., in chambers) (same); *Autocam Corp. v. Sebelius*, 2012 U.S. Dist. LEXIS 184093 (W.D. Mich. Dec. 24, 2012) (denying preliminary injunction), *appeal docketed*, 2012 U.S. App. LEXIS 26736 (6th Cir. Dec. 28, 2012) (denying injunction pending appeal); *Conestoga Wood Specialties Corp. v. Sebelius*, 2012 U.S. Dist. LEXIS 4449 (E.D. Pa. Jan. 11, 2013) (denying preliminary injunction after granting TRO), *appeal docketed*, 2013 U.S. App. LEXIS 2706 (3d Cir. Feb. 7, 2013) (denying injunction pending appeal); *Briscoe v. Sebelius*, 2013 U.S. Dist. LEXIS 26911 (D. Colo. Feb. 27, 2013) (denying TRO).

1977). If an injunction is not granted, this case would warrant immediate consideration and resolution as early as possible this summer.

FACTUAL BACKGROUND

I. The Mandate, Its Exceptions, and Its Penalties

Under the Mandate, all non-exempt employers, group health plans, and health insurance issuers must provide group or individual health coverage without cost-sharing for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity" as of their first plan renewal date occurring after August 1, 2012.[3]/ Plaintiffs are not exempt from the Mandate, but many other employers are. For example, grandfathered health plans, *i.e.*, plans in existence on March 23, 2010, that have not undergone any of a defined set of changes, are indefinitely exempt from compliance with the Mandate.[4]/ Millions of Americans are enrolled in grandfathered plans and thus not covered by the Mandate.[5]/ *See, e.g., Monaghan*, 2013 U.S. Dist. LEXIS 35144, at *30.

Non-exempt employers that provide non-compliant insurance plans are subject

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[3]/ Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines/; 42 U.S.C. § 300gg-13.

[4]/ *See* 45 C.F.R. § 147.140; 75 Fed. Reg. 41726, 41731; *see also* 42 U.S.C. § 18011; 76 Fed. Reg. 46621, 46623.

[5]/ The government considers the ability to indefinitely maintain grandfathered coverage to be a "right." 42 U.S.C. § 18011; 75 Fed. Reg. 34538; Cong. Research Serv., RL 7-5700, Private Health Insurance Provisions in PPACA (May 4, 2012).

to a penalty of $100 per day for each full-time employee and potential enforcement suits, see 26 U.S.C. § 4980D(b); 29 U.S.C. §§ 1132, 1185d(a)(1), and they face annual fines of roughly $2,000 per full-time employee (not counting the first thirty employees) if they provide no health insurance. *See* 26 U.S.C. §§ 4980H(a), (c)(1).

II. The Plaintiffs

Plaintiffs Francis and Philip Gilardi are the sole owners of Plaintiffs Freshway Foods and Freshway Logistics. The Gilardis set the policies governing the conduct of all phases of the two closely-held, family-owned companies. Freshway Foods is a fresh produce processor and packer with approximately 340 full-time employees. Freshway Logistics is a for-hire carrier of mainly refrigerated products with approximately fifty-five full-time employees. (Emerg. Mot. Exs. A & B at ¶¶ 1-4.)

The Gilardis are Catholic and sincerely believe that actions intended to terminate an innocent human life by abortion at any point after conception are gravely sinful. They also sincerely hold to the Catholic Church's teaching regarding the immorality of contraception and sterilization. They manage and operate their companies to reflect the teachings, mission, and values of their Catholic faith, and they desire to continue to do so. Examples of how Plaintiffs further their religious beliefs and moral values include the following: (1) For approximately the last ten years, the Gilardis have directed that a sign be affixed to the back of Freshway Foods trucks stating, "It's not a choice, it's a child," to

publically promote their religious beliefs concerning the sanctity of human life; (2) Freshway Foods makes annual monetary and/or in-kind donations to many community non-profit charitable organizations; and (3) Freshway Logistics donates a trailer to the local Catholic parish to use for the annual parish picnic and delivers the food donated by Freshway Foods. (*Id.* Exs. A & B at ¶¶ 5-7; Ex. A-1.)

Moreover, Plaintiffs provide their full-time employees with a self-insured health plan that provides health insurance and prescription drug insurance. The plan renews on April 1. For approximately the last ten years, Plaintiffs have specifically excluded coverage of all contraceptives, abortion, and sterilization from their plan because paying for such services as part of a health plan would violate their sincerely-held religious beliefs. To comply with the Mandate, however, the Gilardis will have to violate their sincerely-held religious beliefs and *direct* their companies to cover such goods and services. Non-compliance with the Mandate would result in annual penalties of roughly $14.4 million (395 employees x $100 per day x 365 days) that would have a crippling impact on the companies' ability to survive economically and would harm the Gilardis financially. (*Id.* Exs. A & B at ¶¶ 8-13, 15-19; Ex. A-2 at pp. 1-5.)

LEGAL STANDARD

In considering a motion for an injunction pending appeal, this Court uses a sliding scale and balances "(i) the likelihood that the moving party will prevail on

the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public interest." D.C. Cir. R. 8(a)(1); *see also Holiday Tours, Inc.,* 559 F.2d at 843-44; D.C. Cir. *Handbook of Practice and Internal Procedures*, at 33. Without explanation, the motions panel stated that Plaintiffs did not satisfy these factors. (Add. 1.) Respectfully, the motions panel was incorrect.

ARGUMENT

I. The Mandate Substantially Burdens Plaintiffs' Religious Exercise.

Under the Religious Freedom Restoration Act ("RFRA"), the federal government may only substantially burden a person's exercise of religion if "it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). A substantial burden is present when the government puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981); *see also Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

As the Seventh Circuit correctly explained in granting an injunction pending appeal that prevented enforcement of the Mandate against a for-profit business and its owners: "[t]he 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.

A. The Mandate substantially burdens the Gilardis' religious exercise.

Corporations do not run themselves or comply with legal mandates except through human agency. The Gilardis will be the ones to make the difficult decision before April 1, absent relief from this Court, to direct their companies to comply with the Mandate, in violation of their beliefs, or start incurring $39,500 in daily penalties that will cripple their companies. (Emerg. Mot. Exs. A & B at ¶¶ 14-18.)

The Gilardis do not dispute that their companies are distinct legal entities that are directly subject to the Mandate, nor do they suggest that the companies' assets are, in fact, their own assets. Under the substantial burden test, however, courts examine the substantiality of "the coercive impact" on the claimant, *Thomas*, 450 U.S. at 717, *not* how direct or indirect *the source* of that coercive impact is. *Id.* at 718 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."). The annual imposition of millions of dollars of penalties *upon the Plaintiff companies* for non-compliance with the Mandate would significantly harm *both the Gilardis and the companies*.[6]/ Indeed, the mere

[6]/ The Plaintiff companies are Subchapter S corporations and any penalty imposed on them would be passed through to the Gilardis, the sole shareholders,

(Text of footnote continues on following page.)

specter of this harm substantially pressures *the Gilardis* to act contrary to their religious beliefs and those of their companies (by complying with the Mandate). The Gilardis' religious faith does not excuse their participation in, and facilitation of, immoral behavior because of a corporate veil or other legal technicalities. For purposes of substantial burden analysis, the dictates of Plaintiffs' religious beliefs control, not the nuances of corporate law.[7]/ *See Grote*, 2013 U.S. App. LEXIS 2112, at *10-11 (noting that the corporate form is not dispositive of a RFRA claim and holding that the Mandate required the business owners to violate their faith).

To conclude otherwise would be tantamount to concluding that the religious exercise of the parents in *Yoder* would not have been substantially burdened if Wisconsin had penalized *their children*, rather than them, for the children's failure to attend school, because the parents would not themselves be directly burdened by a government sanction. Such a conclusion would be incorrect, however, because the parents were the ultimate decision-makers concerning whether their children attended school, and they would feel substantial pressure to modify their behavior in a manner that violated their beliefs (by sending their children to school). The

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on a pro rata basis and subtracted from the Gilardis' gross income. *See Ardire v. Tax Comm'r*, 77 Ohio St. 3d 409, 674 N.E.2d 1155 n.1 (1997).

[7]/ Plaintiffs *do not* suggest that a burden upon a person's religious exercise is substantial just because a plaintiff declares it to be so. Rather, the substantiality of a burden is measured by the real-world pressure to act contrary to one's faith. *See Thomas*, 450 U.S. at 717-18 (improper coercion may be direct or indirect).

Mandate applies similar pressure on the Gilardis' religious exercise, as it is the Gilardis who direct, manage, and operate all aspects of the Plaintiff companies, including what type of health insurance coverage the companies will provide their employees. (Emerg. Mot. Exs. A & B at ¶¶ 2, 5-15); *see Korte*, 2012 U.S. App. LEXIS 26734, at *8-9 (explaining that the religious liberty violation inheres in the Mandate's coerced provision of coverage, not whether anyone uses that coverage).

B. The Plaintiff companies exercise religion.

RFRA protects the religious exercise of "a person," not just the exercise of a *religious person*. Although RFRA does not define the term "person," it is well-established that the term "person" generally includes both a natural person and a corporation.[8]/ Application of RFRA does not depend on the religiosity of the claimant but on *the degree of pressure* the government applies to the claimant's religious exercise. Corporations, whether for-profit or non-profit, can, and often do, engage in a plethora of quintessentially religious acts, such as donating to charities and committing themselves to act and speak pursuant to the teachings of a religious faith, just as the Plaintiff companies do here. (Emerg. Mot. Exs. A & B at

[8]/ *See, e.g.,* 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise. . . 'person' . . . include[s] corporations . . . as well as individuals."); *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010) (noting that corporations are legal persons that enjoy free speech rights); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 687 (1978) ("[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis.").

¶¶ 6-7; Ex. A-1.) Courts have addressed the merits of religion-based claims brought by a business and/or its owners in numerous cases.[9]/ Where, as here, a company is owned and controlled by a few like-minded individuals who share the same religious values and run the company pursuant to those values, the company itself holds and/or asserts the values of its owners. *See, e.g., Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009); *Tyndale House Publ'rs*, 2012 U.S. Dist. LEXIS 163965, at *23-25.

There is no basis in RFRA or in the First Amendment to suggest that some businesses are religious *enough* to exercise religion while others (such as the Plaintiff companies here) are *not* religious enough to do so. A "religious enough" standard is too vague. It would make no sense to hold, for example, that closely-held Company X engages in religious exercise when it financially supports religious charities or advocates in favor of religious causes, but closely-held Company Y does not engage in religious exercise when it does the same things for the same religious reasons, because Company X is "more religious" than Company Y. Compliance with the Mandate will require the Plaintiff companies (and the

[9]/ *See, e.g., United States v. Lee*, 455 U.S. 252, 258-61 (1982) (addressing free exercise claims of an Amish employer); *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 210-12 (2d Cir. 2012) (addressing free exercise claim of a kosher deli and butcher shop and its owners); *see also EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620-21 & n.15 (9th Cir. 1988) (addressing free exercise defense raised by manufacturing company and its owners).

Gilardis) to act contrary to their religious belief system. That is enough to establish a substantial burden under RFRA. *See Thomas*, 450 U.S. at 717-18.

II. Defendants Cannot Satisfy Strict Scrutiny.

Because the Mandate substantially burdens Plaintiffs' religious exercise, Defendants must satisfy strict scrutiny regarding application of the Mandate to Plaintiffs. *See* 42 U.S.C. § 2000bb-1(b); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006). Defendants have proffered health and gender equality as the compelling governmental interests supporting the Mandate. 77 Fed. Reg. 8725, 8729. Yet, the massive number of employees—tens of millions—whose health and equality interests are completely unaffected by the Mandate because they are covered by grandfathered plans totally undermines the government's claim that the Mandate is needed to address a compelling harm to its asserted interests. *See, e.g., Monaghan*, 2013 U.S. Dist. LEXIS 35144, at *30 (noting that about 190 million Americans are covered by grandfathered plans). The government's alleged interests, therefore, cannot be of the highest order when millions are excluded from the same Mandate the government seeks to apply to Plaintiffs, in violation of their religious exercise rights. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (regarding strict scrutiny, "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited").

Assuming *arguendo* that the interests proffered by Defendants were compelling in this context, the Mandate is not the least restrictive means of furthering those interests. The government could (1) provide these services to citizens itself (*as it already does* for many people);[10]/ (2) provide incentives for pharmaceutical companies that manufacture contraceptives to provide such products free of charge; (3) offer tax deductions or credits for the purchase of contraceptive services, or (4) allow citizens who pay to use contraceptives to submit receipts to the government for reimbursement. Each option would further Defendants' proffered compelling interests in a direct way that would not impose a substantial burden on persons such as Plaintiffs. *See 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").

III. Plaintiffs Satisfy The Remaining Injunction Factors.

Absent an injunction, Plaintiffs will experience irreparable harm due to the violation of their religious freedom beginning on April 1. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). An injunction preventing Defendants' enforcement of the

[10]/ In 2010, public expenditures for family planning services totaled $2.37 billion, with Title X of the Public Health Service Act, devoted specifically to supporting family planning services, contributing $228 million. *Facts on Publicly Funded Contraceptive Services in the U.S.,* May 2012, http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited Mar. 22, 2013).

Mandate against Plaintiffs will not harm Defendants' interests, especially because Defendants have already excluded millions of employees from the Mandate. The public, moreover, has a strong interest in the preservation of Plaintiffs' religious freedom. *See Simms v. Dist. of Columbia*, 872 F. Supp. 2d 90, 105 (D.D.C. 2012). Lastly, an injunction would preserve the status quo by allowing Plaintiffs to continue to provide their employees with a health plan that is consistent with their Catholic faith, as they have done for the past decade, while this case is pending.[11]/

IV. Absent An Injunction, This Case Should Be Decided This Summer.

Plaintiffs, with Defendants' consent, had proposed a briefing and oral argument schedule that would have allowed this case to have been heard before the summer recess: "Plaintiffs' opening brief due April 8, 2013; Defendants' responsive brief due April 22, 2013; Plaintiffs' reply brief due April 29, 2013; and oral argument on May 16, 2013, which counsel understands is the last oral argument date before the summer recess."[12]/ (Emerg. Mot. at 2-3, 20.) The motions panel expedited the case,

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[11]/ Plaintiffs' employees will not be harmed by an injunction. They would be similarly situated with the millions of employees covered by grandfathered or otherwise exempted plans, and they have been covered by health insurance that has specifically excluded contraceptives, abortion, and sterilization for a decade. (Emerg. Mot. Exs. A & B at ¶ 9; Ex. A-2 at pp. 1-5.)

[12]/ Subsequent to the filing of the emergency motion, counsel for Defendants informed this Court by letter that she would no longer be available for oral argument on May 16 because an oral argument had been scheduled that same day before another court. She noted that she had no other oral arguments currently scheduled for May.

but did not adopt the proposed schedule, instead setting oral argument sometime in September. If this Court does not grant an injunction, then Plaintiffs again ask this Court to adopt their proposed schedule (or modify the current schedule) to allow this case to be heard and resolved as early as possible this summer. According to this Court's *Handbook of Practice and Internal Procedures*, panels "are available throughout the summer to hear appeals in which there is an urgent need for immediate consideration." *Id.* at 46. This appeal, absent injunctive relief, warrants such immediate consideration and should be heard and resolved before September, as currently scheduled, to prevent Plaintiffs from experiencing irreparable harm by having to choose between violating their faith or incurring daily penalties, which would amount to over $7.2 million between April 1 and September 30 alone.

CONCLUSION

Plaintiffs seek an injunction pending appeal before April 1, 2013, so they may continue to provide their employees with the health coverage they have provided for the past decade, in keeping with their religious beliefs. Absent that, Plaintiffs will have to either violate their beliefs or incur ruinous penalties before their claims are adjudicated on appeal. That result would destroy the status quo. This Court should grant this petition and enter an injunction pending appeal as requested in the emergency motion, or otherwise resolve this case as early as possible this summer.

Respectfully submitted on this 25th day of March, 2013,

/s/ Colby M. May

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2013, I caused the foregoing petition and attached addendum 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 and exhibits through the CM/ECF system. Also, on the same date, I caused nineteen true and correct paper copies of the foregoing petition and the attached addendum to be delivered by hand to the Clerk of Court, United States Court of Appeals for the District of Columbia Circuit, 333 Constitution Avenue, N.W., Washington, D.C. 20001.

/s/ Colby M. May
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ADDENDUM

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5069 **September Term, 2012**

1:13-cv-00104-EGS

Filed On: March 21, 2013

Francis A. Gilardi, et al.,

Appellants

v.

United States Department of Health and Human Services, et al.,

Appellees

BEFORE: Rogers, Tatel, and Brown*, Circuit Judges

O R D E R

Upon consideration of the emergency motion for injunction and expedited appeal schedule, the response thereto, the reply, and the 28(j) letters, it is

ORDERED that the motion for injunction be denied. Appellants have not satisfied the stringent requirements for an injunction pending appeal. See Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2011). It is

FURTHER ORDERED that the following briefing schedule will apply:

Appellants' Brief	April 30, 2013
Appendix	April 30, 2013
Appellees' Brief	May 30, 2013
Reply Brief	June 13, 2013

* Judge Brown would grant the emergency motion for an injunction pending appeal.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5069 **September Term, 2012**

The Clerk is directed to calendar this case for oral argument on an appropriate date in September 2013. It is

FURTHER ORDERED, on the court's own motion, that the case be scheduled for oral argument on the same day and before the same panel as Tyndale House Publishers, Inc. v. Sebelius, No. 13-5018.

Parties are strongly encouraged to hand deliver the paper copies of their briefs to the Clerk's office on the date due. Filing by mail may delay the processing of the brief. Additionally, counsel are reminded that if filing by mail, they must use a class of mail that is at least as expeditious as first-class mail. See Fed. R. App. P. 25(a). All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Plaintiffs-Appellants submit the following certificate pursuant to Circuit Rule 28(a):

1. Parties, amici, and intervenors

The following list includes all parties and amicus curiae who appeared in the district court. The listed Plaintiffs-Appellants and Defendants-Appellants are parties to this appeal.

Plaintiffs-Appellants:

Francis A. Gilardi, Jr.

Philip M. Gilardi

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

Freshway Logistics, Inc.

Defendants-Appellees:

United States Department of Health and Human Services

Kathleen Sebelius, in her official capacity as the Secretary of the 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

Seth D. Harris, in his official capacity as the Acting Secretary of the United States Department of Labor

Amicus curiae:

State of Ohio, supporting Plaintiffs/Appellants

2. Rulings Under Review

Plaintiffs-Appellants are appealing from the order and supporting memorandum opinion of District Judge Emmet G. Sullivan entered on March 3, 2013, denying Plaintiffs-Appellants' motion for a preliminary injunction. The order and supporting memorandum opinion appear on the district court's docket at entries 33 and 34 respectively. The memorandum opinion appears on Lexis with the following citation: *Gilardi v. Sebelius,* 2013 U.S. Dist. LEXIS 28719 (D.D.C. Mar. 3, 2013).

3. Related Cases

The instant case was never previously before this Court or any other court, other than the district court from which this case has been appealed. Plaintiffs-Appellants are not aware of any cases pending in this Court that involve the same parties. Plaintiffs-Appellants note that other cases pending with this Court involve substantially the same issues:

Tyndale House Publishers v. Sebelius, No. 13-5018 (D.C. Cir.)

Wheaton College v. Sebelius, No. 12-5273 (D.C. Cir.)

Belmont Abbey College v. Sebelius, No. 12-5291 (D.C. Cir.)

Plaintiffs-Appellants provide the following list of cases, of which they are aware, that involve substantially the same issues involved in the instant appeal and that are currently pending in other United States Courts of Appeals:

Conestoga Wood Specialties Corp. v. Sebelius, No. 13-1144 (3d Cir.)

Zubik v. Sebelius, No. 13-1228 (3d Cir.)

Autocam Corp. v. Sebelius, No. 12-2673 (6th Cir.)

Legatus v. Sebelius, Nos. 13-1092, 13-1093 (6th Cir.)

Korte v. Sebelius, No. 12-3841 (7th Cir.)

Grote Indus. LLC v. Sebelius, No. 13-1077 (7th Cir.)

University of Notre Dame v. Sebelius, No. 13-1479 (7th Cir.)

O'Brien v. U.S. Dep't of Health & Human Servs., No. 12-3357 (8th Cir.)

Annex Med., Inc. v. Sebelius, No. 13-1118 (8th Cir.)

American Pulverizer v. U.S. Dep't of Health & Human Servs, No. 13-1395 (8th Cir.)

Newland v. Sebelius, No. 12-1380 (10th Cir.)

Hobby Lobby Stores, Inc. v. Sebelius, No. 12-6294 (10th Cir.)

/s/ Colby M. May

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, the undersigned certifies the following: Plaintiffs Fresh Unlimited, Inc., d/b/a Freshway Foods, and Freshway Logistics, Inc. have no parent companies, subsidiaries, or affiliates that have any outstanding securities in the hands of the public. Plaintiffs Fresh Unlimited, Inc., d/b/a Freshway Foods, and Freshway Logistics, Inc. are closely-held, family owned Subchapter S corporations and they issue no stock to the public. Plaintiff Fresh Unlimited, Inc., d/b/a Freshway Foods, is a fresh produce processor and packer, and Plaintiff Freshway Logistics is a for-hire carrier of mainly refrigerated products.

/s/ Colby M. May
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