IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANCIS A. GILARDI, JR.; PHILIP M. GILARDI; FRESH UNLIMITED, INC., d/b/a Freshway Foods; and FRESHWAY LOGISTICS, INC.,
Plaintiffs,

v. Civil Action No. 1:13-cv-104-RBW

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; NEAL WOLIN, in his official capacity as Acting 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 the United States Department of Labor,
Defendants.[1]/
_____/

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION.
ORAL ARGUMENT AND HEARING REQUESTED WITHIN 21 DAYS.
STATEMENT OF POINTS OF LAW AND AUTHORITY.

Plaintiffs move this Court for the entry of an order granting them a preliminary injunction pursuant to Fed. R. Civ. P. 65 and LCvRs 7, 65.1, and 65.1.1. Because *Plaintiffs face irreparable harm on April 1, 2013*, when they renew their self-insured employee health benefits plan, they respectfully request oral argument and a hearing on this motion within twenty-one days of its filing, pursuant to LCvRs 7(f) and 65.1(d), and respectfully request a ruling on this motion by

[1]/ The successors in office for the former Secretary of the Treasury, Timothy F. Geithner, and the former Secretary of Labor, Hilda L. Solis, have been listed in the caption. Successors in office are automatically substituted as parties when they replace a public officer sued in his or her official capacity. *See* Fed. R. Civ. P. 25(d).

March 15, 2013.[2]/ The facts set forth in this motion and in the attached statement of points of law and authority establish that expedition of this motion is essential to prevent irreparable harm to Plaintiffs.

1. Federal regulations will require Plaintiffs on April 1, 2013, contrary to their religious beliefs and under pain of penalty, to obtain and pay for employee group health coverage for contraceptives, including abortion-inducing drugs, sterilization procedures, and related education and counseling, which Plaintiffs have been specifically excluding from their employee health benefits plan for about the past ten years pursuant to their religious beliefs.

2. Plaintiffs' motion for a preliminary injunction is based on Count I (Religious Freedom Restoration Act) of their complaint. (Doc. 1.) Plaintiffs preserve for further proceedings before this Court all other issues and claims raised in their complaint including those that comprise Counts II, III, and IV and a determination of attorneys' fees and costs.

3. Plaintiffs move this Court for a preliminary injunction prohibiting Defendants, their officers, agents, servants, successors in office, employees, attorneys, and those acting in concert or participation with them, and including any insurance carriers or third party insurance plan administrators with whom Plaintiffs may contract for group health benefits, from applying and enforcing against Plaintiffs any statutes, rules, laws, or regulations that require Plaintiffs to include in their employee health benefit plan any coverage of all Food and Drug Administration

[2]/ Pending is the resolution of the related cases issue as raised in this Court's order at docket entry 11. Even though that issue is pending, Plaintiffs face irreparable harm on April 1, 2013, absent an injunction. Plaintiffs are filing this motion and supporting papers at this time since, as of the afternoon of February 7, 2013, they have received proof that each Defendant, plus the Attorney General and the United States Attorney, has been served with a summons and with a copy of the complaint. (Docs. 7-10, 13-15, 20.) There was an apparent delay in the Postal Service's delivery of the complaint and summons by certified mail to Defendant Department of the Treasury.

("FDA")-approved contraceptives methods, sterilization procedures, and related patient education and counseling, including the substantive requirement imposed in 42 U.S.C. § 300gg-13(a)(4), ("the Mandate"), as well as any penalties, fines, assessments, or enforcement actions for non-compliance, including those found in 26 U.S.C. §§ 4980D, 4980H, and 29 U.S.C. §§ 1132, 1185d, and also prohibiting Defendants, their officers, agents, servants, employees, successors in office, attorneys and those acting in active concert or participation with them from applying and enforcing the Mandate against any insurance carriers or third party plan administrators with whom Plaintiffs may seek to contract with respect to the provision or administration of an employee health plan for Plaintiffs' employees.

4. Plaintiffs rely on the more detailed reasons for granting this motion that are set forth in the attached statement of points of law and authority and exhibits, which show (1) that Plaintiffs are likely to succeed on the merits of their RFRA claim; (2) that Plaintiffs are likely to suffer irreparable harm in the absence of preliminary injunctive relief; (3) that the balance of equities tips in Plaintiffs favor because the harm Plaintiffs would suffer without an injunction outweighs any harm Defendants would suffer if the injunction were granted; and (4) that it is in the public's interest for an injunction to be entered in favor of Plaintiffs.

5. A bond should not be imposed on Plaintiffs since there is no demonstrable harm, monetary or otherwise, to Defendants if the wrongful acts complained of herein are enjoined. The imposition of a bond, moreover, would further harm Plaintiffs' rights by causing them to have to pay to assert and defend those rights.

6. On February 7, 2013, Plaintiffs' counsel, Edward White, conferred with Defendants' counsel, Benjamin Berwick, by telephone regarding this motion. The motion will be opposed by Defendants.

7. Each Defendant, along with the United States Attorney for the District of Columbia and the United States Attorney General, has been served with a summons and with a copy of the complaint. (Docs. 7-10, 13-15, 20.) Each of them will be served with a copy of this motion and supporting papers as noted in the certificate of service. Plaintiffs' counsel, per an agreement with Defendants' counsel, Benjamin Berwick, will serve him with a copy of this motion and supporting papers by electronic mail as noted in the certificate of service.

8. A proposed order accompanies this motion.

Accordingly, for the above-stated reasons and those set forth in the supporting statement of points of law and authority and exhibits, Plaintiffs request that this Court grant this motion and enter a preliminary injunction in Plaintiffs' favor prohibiting Defendants, their officers, agents, servants, successors in office, employees, attorneys, and those acting in concert or participation with them, and including any insurance carriers or third party insurance plan administrators with whom Plaintiffs may contract for group health benefits, from applying and enforcing against Plaintiffs any statutes, rules, laws, or regulations that require Plaintiffs to include in their employee health benefit plan any coverage of all Food and Drug Administration ("FDA")-approved contraceptives methods, sterilization procedures, and related patient education and counseling, including the substantive requirement imposed in 42 U.S.C. § 300gg-13(a)(4), ("the Mandate"), as well as any penalties, fines, assessments, or enforcement actions for non-compliance, including those found in 26 U.S.C. §§ 4980D, 4980H, and 29 U.S.C. §§ 1132, 1185d, and also prohibiting Defendants, their officers, agents, servants, employees, successors in office, attorneys and those acting in active concert or participation with them from applying and enforcing the Mandate against any insurance carriers or third party plan administrators with

whom Plaintiffs may seek to contract with respect to the provision or administration of an employee health plan for Plaintiffs' employees.

Respectfully submitted on this 8th day of February, 2013,

/s/ Edward L. White III
Edward L. White III (adm. phv)
American Center for Law & Justice
5068 Plymouth Road
Ann Arbor, Michigan 48105
Tel. 734-662-2984; Fax. 734-302-1758
ewhite@aclj.org

Francis J. Manion (adm. phv)
Geoffrey R. Surtees (adm. phv)
American Center for Law & Justice
6375 New Hope Road
New Hope, Kentucky 40052
Tel. 502-549-7020; Fax. 502-549-5252
fmanion@aclj.org
gsurtees@aclj.org

/s/ Colby M. May
Colby M. May
D.C. Bar No. 394340
American Center for Law & Justice
201 Maryland Avenue, N.E.
Washington, D.C. 20002
Tel. 202-546-8890; Fax. 202-546-9309
cmmay@aclj-dc.org

Erik M. Zimmerman (adm. phv)
American Center for Law & Justice
1000 Regent University Drive
Virginia Beach, Virginia 23464
Tel. 757-226-2489; Fax. 757-226-2836
ezimmerman@aclj.org

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Defendants.
_____/

PLAINTIFFS' STATEMENT OF POINTS OF LAW AND AUTHORITY
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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* indicates the cases and authorities on which counsel chiefly relies. LCvR 7(a).

INTRODUCTION

Defendants have promulgated regulations that require certain employers to include coverage in their employee health benefit plans for contraceptives, including abortion-inducing drugs, sterilization, and related patient counseling and education ("the Mandate"). Not complying with the Mandate subjects an employer to significant annual fines and penalties.

Plaintiffs—two Catholic individuals and two corporations that they own—seek a preliminary injunction that would prevent enforcement of the Mandate against them so they can *continue* to run their businesses consistent with their Catholic values and beliefs, which deem the use or subsidization of contraceptives, abortion, and sterilization gravely immoral. Pursuant to their religious beliefs and moral values, for about the last ten years Plaintiffs have specifically *excluded* from their employee health benefit plan any coverage for contraceptives, abortion, and sterilization, but the Mandate will require Plaintiffs to start providing coverage for these services, contrary to their religious beliefs and moral values, as of April 1, 2013, the renewal date of their employee health plan.

Absent injunctive relief, Plaintiffs will face a stark choice that substantially burdens their religious exercise: abandon their beliefs to stay in business, or abandon their business to stay true to their beliefs. That is a choice no government actor bound by the Religious Freedom Restoration Act ("RFRA") may lawfully impose upon them. This is especially true because Defendants have decided *not* to impose this same choice upon thousands of other employers (regardless of whether they share Plaintiffs' religious beliefs), leaving millions of employees and their families not covered by the requirements of the Mandate. This intentional, massive under-inclusiveness illustrates that Defendants cannot meet their burden of proving that applying the Mandate to Plaintiffs is the least restrictive means of achieving a compelling interest.

There are currently more than forty federal lawsuits, including the instant action, challenging the Mandate that have been brought by both for-profit and non-profit employers. *See* HHS Mandate Information Central, http://www.becketfund.org/hhsinformationcentral/ (last visited Feb. 8, 2013). At present, for-profit plaintiffs are protected by injunctions preventing application of the Mandate to them in eleven cases, including in *Tyndale House Publ'rs v. Sebelius*, 2012 U.S. Dist. LEXIS 163965 (D.D.C. Nov. 16, 2012), *appeal docketed*, No. 13-5018 (D.C. Cir. Jan. 18, 2013), while injunctive relief has been denied in three cases.

For-profit plaintiffs have received injunctive relief in the following eleven cases: *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. v. U.S. Dep't of Health & Human Servs.*, No. 1:12-cv-06756, slip op. (N.D. Ill. Jan. 3, 2013) (granting preliminary injunction) (Ex. C); *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 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), *appeal docketed*, No. 12-1380 (10th Cir. Sept. 26, 2012); *see also 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).

For-profit plaintiffs have been denied injunctive relief in the following three cases: *Hobby Lobby Stores v. Sebelius*, 2012 U.S. Dist. LEXIS 164843 (W.D. Okla. Nov. 19, 2012) (denying preliminary injunction), *appeal docketed*, 2012 U.S. App. LEXIS 26741 (10th Cir. Dec. 20, 2012) (denying injunction pending appeal), *and* 2012 U.S. LEXIS 9594 (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 Specialities Corp. v. Sebelius*, 2012 U.S. Dist. LEXIS 4449 (E.D. Pa. Jan. 11, 2013) (denying preliminary injunction after granting temporary restraining order), *appeal docketed*, 2013 U.S. App. LEXIS 2706 (3d Cir. Feb. 7, 2013) (denying injunction pending appeal).

Without injunctive relief, Plaintiffs will be forced to decide whether to act contrary to the teachings of their faith by directly subsidizing products and services they believe are immoral or start incurring annual penalties in excess of $14 million. Plaintiffs, therefore, request the grant of a preliminary injunction for the same reasons that for-profit employers have received injunctions against the Mandate's enforcement in eleven cases, including *Tyndale House Publishers*.

FACTUAL BACKGROUND

I. The Mandate, Its Exceptions, and Its Penalties

The Patient Protection and Affordable Care Act ("Affordable Care Act") requires non-exempt group health plans to provide coverage for preventative care and screening for women without cost-sharing in accordance with guidelines created by the Health Resources and Services Administration. 42 U.S.C. § 300gg-13(a)(4). These guidelines include, among other things, "[a]ll Food and Drug Administration ["FDA"] approved contraceptive methods, sterilization

procedures, and patient education and counseling for women with reproductive capacity.[1]/ FDA-approved contraceptive methods include emergency contraception (such as "Plan B" and "Ella"), diaphragms, oral contraceptive pills, and intrauterine devices.[2]/ In February 2012, Defendants finalized an interim rule requiring all group health plans to provide coverage for all FDA-approved contraceptive methods and sterilization procedures as well as patient education and counseling about those services. 45 C.F.R. § 147.130; 77 Fed. Reg. 8725, 8729; 76 Fed. Reg. 46621, 46623. The Mandate applies to all non-exempt employers once their group health plans are renewed on or after August 1, 2012; as discussed herein, non-compliance will lead to significant annual penalties. 45 C.F.R. § 147.130(a)(1)(iv); 77 Fed. Reg. 8725.

Although the Mandate applies to Plaintiffs and their approximately 395 employees (about 340 work for Freshway Foods and about fifty-five work for Freshway Logistics), Defendants have exempted many employers from the Mandate. For example, grandfathered health plans, that is, plans in existence on March 23, 2010, that have not undergone any of a defined set of changes, are exempt from compliance with the Mandate. *See* 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140. The government describes the rules for grandfathered health plans as preserving a "right to maintain existing coverage." 42 U.S.C. § 18011; 45 C.F.R. § 147.140; 75 Fed. Reg. 34538, 34562, 34566.[3]/

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[1]/ Health Res. & Servs. Admin., Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines/ (last visited Feb. 8, 2013).

[2]/ Food and Drug Administration, Office of Women's Health, Birth Control Guide, http://www.fda.gov/downloads/forconsumers/byaudience/forwomen/freepublications/ucm282014.pdf (last visited Feb. 8, 2013).

[3]/ According to the Congressional Research Service, "[e]xisting plans may continue to offer coverage as grandfathered plans in the individual and group markets. . . . Enrollees could continue and renew enrollment in a grandfathered plan *indefinitely*." Cong. Research Serv., RL 7-5700, Private Health Insurance Provisions in PPACA (May 4, 2012) (emphasis added).

Defendant HHS estimates that "98 million individuals will be enrolled in grandfathered group health plans in 2013." 75 Fed. Reg. 41726, 41732. On the other hand, many provisions of the Affordable Care Act do apply to grandfathered plans.[4]/ "Religious employers" are also exempt from the Mandate. 45 C.F.R. § 147.130(a)(1)(iv)(B); 78 Fed. Reg. 8456, 8461-62. And, a temporary enforcement safe harbor is currently in place for non-profit entities that satisfy certain criteria. 77 Fed. Reg. 16501, 16503; 78 Fed. Reg. at 8459-59; *see* Dep't of Health & Human Servs., Guidance on the Temporary Enforcement Safe Harbor, http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf (last visited Feb. 8, 2013).

In addition, employers with fewer than fifty full-time employees have no obligation to provide employee health insurance under the Affordable Care Act and can bypass the Mandate by not providing any group health plan. 26 U.S.C. § 4980H(c)(2)(A).

A non-exempt employer that provides health insurance that does not comply with the Mandate faces penalties of $100 per day for each employee not properly covered, 26 U.S.C. § 4980D, as well as potential enforcement lawsuits, 26 U.S.C. §§ 1132, 1185d. Moreover, non-exempt employers with fifty or more full-time employees that fail to provide any employee health insurance plan are subject to annual penalties of $2,000 for each full-time employee, not counting thirty of them. 26 U.S.C. § 4980H.

II. The Plaintiffs

Plaintiffs Francis A. Gilardi, Jr. and Philip M. Gilardi are the sole owners of Plaintiffs Fresh Unlimited, Inc., d/b/a Freshway Foods ("Freshway Foods"), and Freshway Logistics, Inc. ("Freshway Logistics"). They each hold a 50% ownership stake in Freshway Foods and

[4]/ 75 Fed. Reg. 34538, 34542; 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 Feb. 8, 2013).

Freshway Logistics and, therefore, together own the full and controlling interest in both corporations. (Ex. A, F. Gilardi Decl. at ¶ 1; Ex. B, P. Gilardi Decl. at ¶ 1.) Francis Gilardi is the Chief Executive Officer and Treasurer of Freshway Foods and Freshway Logistics and Philip Gilardi is the President and Secretary. They are the only Directors of the two corporations, and together they set the policies governing the conduct of all phases of the two corporations. (Ex. A, F. Gilardi Decl. at ¶ 2; Ex. B, P. Gilardi Decl. at ¶ 2.)

Freshway Foods is a closely-held and family owned fresh produce processor and packer serving twenty-three states for over twenty-four years. It has approximately 340 full-time employees. Freshway Logistics is a closely-held and family owned for-hire carrier of mainly refrigerated products serving twenty-three states since 2003. It has approximately fifty-five full-time employees. They are both Subchapter S corporations and are incorporated, and based, in the State of Ohio. (Ex. A, F. Gilardi Decl. at ¶¶ 3-4; Ex. B, P. Gilardi Decl. at ¶¶ 3-4.)

Francis and Philip Gilardi hold to the teachings of the Catholic Church regarding the sanctity of human life from conception to natural death. They sincerely believe that actions intended to terminate an innocent human life by abortion are gravely sinful. They also sincerely hold to the Catholic Church's teaching regarding the immorality of artificial means of contraception and sterilization. They manage and operate Freshway Foods and Freshway Logistics in a way that reflects the teachings, mission, and values of their Catholic faith, and they desire to continue to do so. (Ex. A, F. Gilardi Decl. at ¶¶ 5-6; Ex. B, P. Gilardi Decl. at ¶¶ 5-6.)

Examples of how Plaintiffs further their religious beliefs and moral values include the following:

- For approximately the last ten years, Francis and Philip Gilardi have directed that a sign be affixed to the back of the trucks they own, through a separate company, but which

bear the name of Freshway Foods, stating "It's not a choice, it's a child," as a way to promote their pro-life views to the public. (Ex. A, F. Gilardi Decl. at ¶ 7; Ex. A-1; Ex. B, P. Gilardi Decl. at ¶ 7);

- Francis and Philip Gilardi strongly support their Catholic parish, schools, and seminary financially and otherwise. (Ex. A, F. Gilardi Decl. at ¶ 7; Ex. B, P. Gilardi Decl. at ¶ 7);
- In or about 2004, Francis and Philip Gilardi drafted a statement listing values by which all their companies would be run. They listed "Ethics" first since that is their primary business value: "Ethics: Honest, Trustworthy and Responsible to: - Each Other; - Our Customers; - Our Vendors. Non-negotiable - Supersedes everything." (*Id.*);
- At the direction of Francis and Philip Gilardi, Freshway Foods makes annual monetary and/or in-kind donations, primarily food, to many community non-profit charitable organizations, including Agape, Compassionate Care, the YMCA, Holy Angel's Soup Kitchen, United Way, Habitat for Humanity, American Legion, Bill McMillian's Needy Children, Elizabeth's New Life Center, and local schools. (*Id.*);
- At the direction of Francis and Philip Gilardi, Freshway Logistics donates a trailer for use by the local Catholic parish for the annual parish picnic and uses its trucks to deliver the food donated by Freshway Foods to food banks outside the Sidney, Ohio, area. (*Id.*);
- At the direction of Francis and Philip Gilardi, during Plaintiffs' Monthly Associate Appreciation Lunches, Plaintiffs provide their employees with alternative foods to accommodate their religious dietary requirements. (*Id.*); and
- At the direction of Francis and Philip Gilardi, Freshway Foods and Freshway Logistics provide their Muslim employees with space to pray during breaks and lunches, and Plaintiffs adjust break periods during Ramadan to allow their Muslim employees,

pursuant to their religion, to eat after sundown. (*Id.*)

Moreover, Freshway Foods and Freshway Logistics provide their full-time employees with a self-insured health plan that provides health insurance and prescription drug insurance through a third-party administrator and stop loss provider. Employees of the two corporations may choose a basic option or a premier option from the plan. The plan is renewed on April 1. For approximately the last ten years, at the direction of Francis and Philip Gilardi, Plaintiffs' have specifically excluded coverage of all contraceptives, abortion, and sterilization in their employee health plan, because paying for such services as a part of a health plan would violate their sincerely-held religious beliefs and moral values. (Ex. A, F. Gilardi Decl. at ¶¶ 8-9; Ex. A-2 at pp. 1-5; Ex. B, P. Gilardi Decl. at ¶¶ 8-9.)

Francis and Philip Gilardi consider the provision of employee health insurance to be an integral component of furthering the mission and values of their corporations and of their religious beliefs and moral values. Their sincerely-held religious beliefs and moral values do not allow them to direct, or allow, Freshway Foods and Freshway Logistics to arrange for, pay for, provide, or otherwise facilitate employee health plan coverage for contraceptives, including abortion-inducing drugs, sterilization, abortion, or related education and counseling. (Ex. A, F. Gilardi Decl. at ¶¶ 10-11; Ex. B, P. Gilardi Decl. at ¶¶ 10-11.)

Freshway Foods and Freshway Logistics are not exempted from the Mandate. They each employ more than fifty full-time employees. They are not "religious employers," as that term is defined by the Mandate. They do not fall within any "temporary enforcement safe harbor" provided by Defendants to certain non-profit entities, and their employee health plan is not "grandfathered." (Ex. A, F. Gilardi Decl. at ¶¶ 12-13; Ex. B, P. Gilardi Decl. at ¶¶ 12-13.)

To operate and manage Freshway Foods and Freshway Logistics consistent with their

Catholic faith and values, Francis and Philip Gilardi want to continue to be able to provide high quality health insurance for their full-time employees that excludes coverage for things they believe are morally wrong for them and their corporations to arrange for, pay for, provide, facilitate, or otherwise support. (Ex. A, F. Gilardi Decl. at ¶ 14; Ex. B, P. Gilardi Decl. at ¶ 14.)

Absent injunctive relief, however, by April 1, 2013, which is the renewal date for the employee health benefit plan, the Mandate will require Francis and Philip Gilardi to direct Freshway Foods and Freshway Logistics contrary to their religious beliefs and moral values, to arrange for, pay for, provide, facilitate, or otherwise support a health plan that includes contraceptives, including abortion-inducing drugs, sterilization, and related patient education and counseling. (Ex. A, F. Gilardi Decl. at ¶¶ 15, 18-19; Ex. B, P. Gilardi Decl. at ¶¶ 15, 18-19.)

If Freshway Foods and Freshway Logistics fail to comply with the Mandate, or drop employee group health coverage entirely, then they would likely incur significant annual penalties payable to the federal government that would have a crippling impact on their ability to survive economically and, by extension, would greatly harm Francis and Philip Gilardi financially. Also, dropping the employee health plan altogether would have a severe impact on Plaintiffs' ability to compete with other companies that offer health coverage and would also harm their employees who would have to find expensive individual policies in the private marketplace. (Ex. A, F. Gilardi Decl. at ¶¶ 16-17; Ex. B, P. Gilardi Decl. at ¶¶ 16-17.)

The Mandate requires Plaintiffs to choose between (a) complying with the Mandate and violating their religious beliefs and moral values and (b) not complying with the Mandate and paying annual penalties in order to conduct business consistent with their religious beliefs and moral values. The Mandate prevents Francis and Philip Gilardi from following the dictates of their Catholic faith in the operation and management of Freshway Foods and Freshway

Logistics, and the Mandate violates the religious-based principles by which Freshway Foods and Freshway Logistics are run. Plaintiffs, therefore, request injunctive relief from this Court before April 1, 2013. (Ex. A, F. Gilardi Decl. at ¶¶ 18-19; Ex. B, P. Gilardi Decl. at ¶¶ 18-19.)

ARGUMENT

The Mandate substantially burdens Plaintiffs' religious exercise because, absent injunctive relief, the Mandate will require Plaintiffs to take actions that they believe are immoral—paying for and providing coverage of morally objectionable goods and services—on a continuing basis beginning on April 1, 2013; otherwise, they will incur substantial annual penalties for adhering to their religious and moral principles. Defendants cannot meet their burden of proving that the Mandate is the least restrictive means of achieving a compelling government interest and, as such, applying the Mandate to Plaintiffs violates their rights under RFRA.

I. Plaintiffs Satisfy the Standard for Obtaining Preliminary Injunctive Relief.

A plaintiff seeking a preliminary injunction under Fed. R. Civ. P. 65 "'must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *In re Navy Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012) (quoting *Winter v. Natural Resources Def. Council*, 555 U.S. 7, 20 (2008)); *accord Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011). As demonstrated herein, Plaintiffs make a strong showing on each of the four factors, and this Court should grant their motion for a preliminary injunction.[5]/

[5]/ Historically, the D.C. Circuit has applied a "sliding scale" approach in evaluating the four preliminary injunction factors: "if the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009). Recently, some D.C. Circuit judges have suggested, but have not decided, that the "sliding scale" approach should no longer be applied. *See Sherley*, 644 F.3d at 392-93. Whether or not this Court applies the "sliding

(Text of footnote continues on following page.)

A. Plaintiffs are likely to succeed on the merits of their RFRA claim.

Under RFRA, the "[g]overnment 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). RFRA defines religious exercise broadly to "include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4), as amended by 42 U.S.C. § 2000cc-5(7)(A). The only time the federal government may substantially burden a person's exercise of religion is 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) (emphasis added). By broadly protecting *any religious exercise* of "a person," not just the exercise of a *religious person*, RFRA protects the free exercise of all individuals, churches, non-profit organizations, companies, and other organizations that are considered "persons" under the law.[6]/

1. The Mandate substantially burdens Plaintiffs' exercise of religion.

Under RFRA, Plaintiffs must show that a federal regulation or action substantially burdens their sincerely held religious beliefs. *See, e.g., Kaemmerling v. Lappin*, 553 F.3d 669, 677 (D.C. Cir. 2008). A law substantially burdens religious exercise when a person, whether an individual

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scale," Plaintiffs are entitled to a grant of a preliminary injunction because they make a sufficiently strong showing on each of the four factors.

[6]/ RFRA does not define the term "person." Under accepted law, the term "person" includes a natural person and a corporation. *See* Dictionary Act, 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."); *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1707 (2012) (noting that the term "person" often includes organizations); *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."). Moreover, corporations may assert their own free exercise rights and/or the free exercise rights of their owners or employees. *E.g.*, *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988); *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474 (2008).

or corporation, must 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 significant harm. 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); *accord Kaemmerling*, 553 F.3d at 678.

For example, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court held that a state's denial of unemployment benefits to a Seventh-Day Adventist employee, whose religious beliefs prohibited her from working on Saturdays, substantially burdened her exercise of religion. The regulation "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. Also, in *Thomas*, the Court held that a state's denial of unemployment benefits to a Jehovah's Witness employee, whose religious beliefs prohibited him from participating in the production of armaments, substantially burdened his religious beliefs. "[T]he employee was put to a choice between fidelity to religious belief or cessation of work," 450 U.S. at 717, and the Court noted that, "[w]hile the compulsion [of the denial of benefits] may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.* at 718. In addition, in *Wisconsin v. Yoder*, 406 U.S. 205, 208, 219 (1972), the Court held that a state compulsory school-attendance law substantially burdened the religious exercise of Amish parents who were fined five dollars after refusing to send their children to high school. The Court found the burden "not only severe, but inescapable," requiring the parents "to perform acts undeniably at odds with fundamental tenets of their religious belief." *Id.* at 218.

Plaintiffs face a similar inescapable choice. Under the Mandate, they must facilitate, subsidize, and encourage the use of goods and services that they sincerely believe are immoral or suffer severe penalties. It is this forced subsidization, and not the manner in which employees may spend their own money or conduct their personal lives, to which Plaintiffs object. In recently granting an injunction preventing enforcement of the Mandate on appeal, the United States Court of Appeals for the Seventh Circuit correctly stated in *Korte*:

> The government also argues that any burden on religious exercise is minimal and attenuated, relying on a recent decision by the Tenth Circuit in *Hobby Lobby Stores, Inc. v. Sebelius,* No. 12-6294 [2012 U.S. App. LEXIS 26741] (10th Cir. Dec. 20, 2012). . . . [T]he Tenth Circuit denied an injunction pending appeal, noting that "the particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [the corporate] plan, subsidize *someone else's* participation in an activity condemned by plaintiff[s'] religion." *Id.* at 7. With respect, we think this misunderstands the substance of the claim. 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.

2012 U.S. App. LEXIS 26734, at *8-9 (citation omitted) (emphasis in original). Similarly, in *Tyndale House Publishers*, this Court wrote that "[b]ecause 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." 2012 U.S. Dist. LEXIS 163965, at *44 (quoting *Thomas*, 450 U.S. at 718); *see also id.* 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.'").

The substantial burden that the Mandate imposes on Freshway Foods and Freshway Logistics is the same as the substantial burden imposed on Francis and Philip Gilardi. Freshway Foods and Freshway Logistics are closely-held, family-owned corporations governed by Francis and Philip Gilardi, and the beliefs of the Gilardis extend to, and are reflected in, the actions of the two corporations.[7]/ The Gilardis wish to continue to run their family businesses based on the tenets of their sincerely-held Catholic faith. A corporation does not think, act, and establish business values and practices except through human agency. It is the human agency of the corporation that defines the purposes of the corporation, gives it its character, and gives shape to its ethos—in addition to shaping and fulfilling the business's commercial mission.

For purposes of substantial burden analysis, requiring the two corporations to provide group health coverage that the Gilardis consider immoral is the same as requiring the Gilardis themselves to provide such immoral coverage. Ultimately, it is Francis and Philip Gilardi who face, and have to make, the difficult decision, absent relief from this Court: either direct their two corporations to comply with the Mandate, in violation of their religious beliefs, or incur more than $14 million in annual penalties that will cripple their two corporations.[8]/ *See Stormans*, 586 F.3d at 1120 (explaining that a family-owned corporation's beliefs were an extension of the family's beliefs such that the corporation did not "present any free exercise rights of its own different from or greater than its owners' rights"); *Korte v. U.S. Dep't of Health & Human*

[7]/ Freshway Foods and Freshway Logistics are Subchapter S corporations, incorporated under Ohio law. "The taxable income of an S corporation is computed essentially as if the corporation were an individual. Items of income, loss, deduction, and credit are then passed through to the shareholders on a pro rata basis and are added to or subtracted from each shareholder's gross income." *Ardire v. Tax Comm'r*, 77 Ohio St. 3d 409, 674 N.E.2d 1155 n.1 (1997) (citing 26 U.S.C. §§ 1363, 1366); *accord Tetlak v. Vill. of Bratenahl*, 92 Ohio St. 3d 46, 49, 748 N.E.2d 51, 54 (2001).

[8]/ The two corporations have a total of about 395 employees. A daily penalty of $100 per employee amounts to $39,500 per day and over $14 million per year.

Servs., 2012 U.S. Dist. LEXIS 177101, at *17 (S.D. Ill. Dec. 14, 2012) (explaining that "[b]ecause K&L is a family-owned S corporation, the religious and financial interests of the Kortes are virtually indistinguishable"); *Monaghan*, 2012 U.S. Dist. LEXIS 182857, at *9 (noting that a corporation cannot "act (or sin) on its own" and that a court should not dispute an owner's assertion that the Mandate's requirement that he direct his company to provide the required immoral coverage will cause him to commit a "grave sin").

Of course, the protections afforded by RFRA do not give a business, run consistent with its owner's religious principles, the unbounded right to ignore anti-discrimination laws, or, for that matter, refuse to pay payroll taxes, violate OSHA requirements, etc. Any such claims—assuming that a substantial burden was present—should be resolved based on whether the law or regulation at issue satisfies strict scrutiny as applied to the claimant, *not* on the grounds that the employer could *never* have its religious exercise substantially burdened. Under RFRA, a business operated with religious values may challenge a law that substantially burdens its religious exercise: a kosher deli may have a claim against a mandate that it sell pork, and a medical practice operated by pro-life doctors may have a claim against a mandate that it perform abortions. *See United States v. Lee*, 455 U.S. 252, 257 (1982) (holding that participation in the social security system substantially burdened the for-profit employer's religious exercise *before* holding that the burden was justified in that case); *Tyndale House Publ'rs*, 2012 U.S. Dist. LEXIS 163965, at *31-33 n.13 (rejecting the government's argument that allowing a for-profit corporation to assert a RFRA claim would undermine the enforcement of anti-discrimination laws, such as Title VII).[9]/

[9]/ This Court's decision in *Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C.), *aff'd sub nom. Seven Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), is inapplicable, as this Court explained in *Tyndale House Publ'rs.*, 2012 U.S. Dist. LEXIS 163965, at *45-48. Plaintiffs here, unlike the plaintiffs in *Mead*, have no alternative but to violate the Mandate and be subjected to severe

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Plaintiffs' objection to the requirements of the Mandate is not novel; federal law recognizes that many Americans have religious and moral objections to providing or paying for certain goods and services, such as contraceptives and abortion. For example, there are many federal laws that provide exemptions, in various contexts, for providers of health care, insurance, and prescription drug coverage as well as for other individuals and entities who do not want to provide, pay for, or cover by insurance certain goods and services to which they object on religious and moral grounds. *See*, *e.g.*, Consolidated Appropriations Act: 2012, Pub. L. 112-74, § 808, 125 Stat. 786, Dec. 23, 2011 (requiring any D.C. regulation concerning the provision of contraceptive coverage to "include a 'conscience clause' which provides exceptions for religious beliefs and moral convictions"); *id* § 727 (exempting carriers of prescription drug coverage plans that object to the provision of contraceptive coverage "on the basis of religious beliefs" from a ban on the use of appropriated funds to provide prescription drug coverage that excludes contraceptives); 42 U.S.C. § 18023 (stating that health plans offered through an Exchange may not discriminate against health care providers or facilities due to their "unwillingness to provide, pay for, provide coverage of, or refer for abortions").[10]/

With regard to the Mandate, Defendants have expressly acknowledged the burden it imposes upon the religious exercise of many. Recognizing that paying for, providing, or subsidizing contraceptive and sterilization services would conflict with "the religious beliefs of certain

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financial penalties "and, therefore, the pressure to violate their religious beliefs remains undiminished." *Id.* at *47.

[10]/ *See also* 42 U.S.C. § 300a-7(b) (stating that the government may not mandate that individuals or entities perform, assist in the performance of, or make their facilities available for the performance of, any abortion or sterilization procedure solely due to their receipt of federal funds if doing so would violate their religious or moral convictions); 42 U.S.C. § 1395w-22(j)(3) (providing an exemption for organizations offering a Medicare + Choice plan that object on moral or religious grounds to providing, reimbursing for, or providing coverage for a counseling or referral service).

religious employers," 77 Fed. Reg. 8725, 8726, Defendants have granted a wholesale exemption for a class of employers, including churches and their auxiliaries, from complying with the Mandate. 76 Fed. Reg. 46621, 46623; 78 Fed. Reg. 8456, 8462-64. In addition, the government has provided a temporary enforcement safe harbor for any employer, group health plan, or group health insurance issuer that fails to cover some or all recommended contraceptive services and that is sponsored by a non-profit organization that meets certain criteria. 77 Fed. Reg. 16501, 16503; 78 Fed. Reg. at 8458-59. This temporary safe harbor period runs until the first plan year beginning on or after August 1, 2013. *Id.*

Defendants have also recently proposed rules that will attempt to accommodate "eligible" non-profit religious organizations that oppose providing coverage for some or all of the contraceptive services required by the Mandate on account of their religious objections. 78 Fed. Reg. at 8461-62.

In sum, Plaintiffs have established that the Mandate substantially burdens their religious exercise. The burden now shifts to Defendants to satisfy the high demands of strict scrutiny, something Defendants are unable to do as will be explained in the next section of this brief.

2. RFRA imposes strict scrutiny on Defendants.

RFRA requires application of the "strict scrutiny test." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006). This test, which requires "the most rigorous of scrutiny," *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993), "is the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). As noted above, the strict scrutiny test imposed by RFRA must be conducted "through application of the challenged law '*to the person*'—the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430-

31 (emphasis added). Indeed, in both *Sherbert* and *Yoder*, the Court "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *Id*. at 431. It is therefore not enough for Defendants to describe a compelling interest in an abstract or categorical fashion; they must demonstrate that the interest "would be adversely affected by granting an exemption" *to the religious claimant*. *Id.* In this case, Defendants must demonstrate *that exempting Plaintiffs* and their approximately 395 full-time employees from the Mandate would jeopardize Defendants' asserted interests even though Defendants have already willingly exempted thousands of other employers (who employ tens of millions of employees) from the Mandate.

a. Defendants cannot demonstrate that applying the Mandate to Plaintiffs furthers a compelling governmental interest.

Just two years ago, the Supreme Court described a compelling state interest as a "high degree of necessity," *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011), noting that "[t]he State must specifically identify an 'actual problem' in need of solving, and the curtailment of [the asserted right] must be actually necessary to the solution." *See id.* at 2738 (citations omitted). The "[m]ere speculation of harm does not constitute a compelling state interest." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 543 (1980).

Here, Defendants have proffered two compelling governmental interests for the Mandate: health and gender equality. 77 Fed. Reg. 8725, 8279. Defendants' invocation of the promotion of health and gender equality as compelling interests, without more, is insufficient to meet the demands of strict scrutiny. While recognizing "the general interest in promoting public health and safety," the Supreme Court has held that "invocation of such general interests, standing alone, is not enough." *O Centro*, 546 U.S. at 438. Defendants must demonstrate "some

substantial threat to public safety, peace, or order," or an equally compelling interest, that would be posed by exempting the claimant. *See Yoder*, 406 U.S. at 230. Also, "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (internal quotation marks omitted).

What radically undermines Defendants' claim that the Mandate is needed to address a compelling harm to its asserted interests is the massive number of employees, tens of millions in fact, whose employers are not subject to the Mandate and whose health and equality interests are completely unaffected by it. For example, Defendants cannot explain how these interests can be of the highest order when the Mandate does not apply to plans grandfathered under the Affordable Care Act. The court in *Newland v. Sebelius* found, based on government estimates, that "*191 million* Americans belong to plans which may be grandfathered under the [Affordable Care Act]," 2012 U.S. Dist. LEXIS 104835, at *4 (emphasis added), and the government has estimated that "*98 million* individuals will be enrolled in grandfathered group health plans in 2013." 75 Fed. Reg. 41726, 41732 (emphasis added).

This broad exemption leaves appreciable damage to the government's asserted interests untouched and indicates the lack of any compelling need to apply the Mandate to Plaintiffs in violation of their consciences. *See Newland*, 2012 U.S. Dist. LEXIS 104835, at *23 ("[T]his massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs."); *Tyndale House Publ'rs*, 2012 U.S. Dist. LEXIS 163965, at *61 ("[C]onsidering the myriad of exemptions . . . the defendants have not shown a compelling interest in requiring the plaintiffs to provide the specific contraceptives to which they object."); *Am. Pulverizer*, 2012 U.S. Dist. LEXIS 182307, at *14 (explaining that the significant

exemptions to the Mandate "undermine any compelling interest in applying the preventative coverage mandate to Plaintiffs").

Indeed, Defendants' alleged interests are further undermined by the fact that though grandfathered plans have a right to indefinitely ignore the Mandate, they must comply with other provisions of the Affordable Care Act. For example, *Defendants' decision* to impose the Affordable Care Act's prohibition on excessive waiting periods on grandfathered plans, but not the Mandate, indicates that *the government itself* does not believe that the Mandate is necessary to protect an interest of the highest order. *See Lukumi*, 508 U.S. at 547. Defendants, moreover, cannot explain how their asserted interests can be compelling when employers with fewer than fifty employees have no obligation to provide health insurance for their employees (and thus no obligation to directly subsidize contraception). Defendants cannot explain how there is a compelling need to coerce Plaintiffs into violating their religious beliefs and moral values when businesses with fewer than fifty employees can avoid the Mandate entirely by not providing a group health plan. *See O Centro*, 546 U.S. at 432-37 (granting relief under RFRA to a church to allow its approximately 130 members to use a Schedule I drug in their religious ceremonies because the government allowed hundreds of thousands of Native Americans to use a different Schedule I drug in their religious ceremonies).

Thus, Defendants cannot demonstrate a compelling need to require Plaintiffs to comply with the Mandate for their approximately 395 full-time employees when that same Mandate does not apply to the employers of tens of millions of employees nationwide. In short, Defendants cannot show a "substantial threat" to their asserted interests should Plaintiffs be exempted from the Mandate, *Yoder*, 406 U.S. at 230, and Defendants cannot satisfy their strict scrutiny burden.

b. The Mandate is not the least restrictive means of achieving a compelling governmental interest.

The existence of a compelling interest in the abstract does not give Defendants *carte blanche* to promote that interest through any regulation of their choosing particularly where, as here, a fundamental right is substantially burdened. *See, e.g., United States v. Robel*, 389 U.S. 258, 263 (1967) (noting that compelling interests "cannot be invoked as a talismanic incantation to support any [law]"). 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." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983).

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. Defendants could directly further their interest in providing free access to contraceptive services in a myriad of ways without violating Plaintiffs' consciences. For example, the government could (1) offer tax deductions or credits for the purchase of contraceptive services; (2) provide these services to citizens itself; (3) allow citizens who pay to use contraceptives to submit receipts to the government for reimbursement; or (4) provide incentives for pharmaceutical companies that manufacture contraceptives to provide such products to pharmacies, doctor's offices, and health clinics free of charge. *See Newland*, 2012 U.S. Dist. LEXIS 104835, at *26-27 ("'[T]he government already provides free contraception to women.'. . . Defendants have failed to adduce facts establishing that government provision of contraception services will necessarily entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women."). Even if the government claims these options would not be as effective as the Mandate, "a court should not assume a plausible, less restrictive alternative would be ineffective." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 824

(2000). In fact, if a less restrictive alternative would serve the government's purposes, "the legislature must use that alternative." *Id.* at 813.

Accordingly, for the above-stated reasons, Plaintiffs are likely to succeed on the merits of their RFRA claim, *see In re Navy Chaplaincy*, 697 F.3d at 1178, because they have established that the Mandate places substantial pressure on them to modify their behavior and violate their religious beliefs, and Defendants cannot demonstrate that application of the Mandate to Plaintiffs is the least restrictive means to further a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1(b); *Thomas*, 450 U.S. at 718.

B. Plaintiffs will Suffer Irreparable Harm Absent an Injunction.

It is well settled that even the momentary loss of First Amendment freedoms constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The same is true regarding a violation of RFRA because it protects the same type of religious exercise as the First Amendment. *See Tyndale House Publ'rs*, 2012 U.S. Dist. LEXIS 163965, at *61-62; *see also Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("[A] plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA."); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("Courts have persuasively found that irreparable harm accompanies a substantial burden on an individual's rights to the free exercise of religion under RFRA."); *W. Presbyterian Church v. Bd. of Zoning Adjustment of Dist. of Columbia*, 849 F. Supp. 77, 79 (D.D.C. 1994) (granting a preliminary injunction against a zoning ordinance prohibiting a church's feeding of the homeless based on likely violations of the First Amendment and RFRA). Thus, a preliminary injunction should be issued in favor of Plaintiffs. Absent an injunction, Plaintiffs' rights will be violated on a continuing basis beginning on April 1, 2013, as discussed previously.

C. The Balance of Equities Tips in Plaintiffs' Favor.

A grant of a preliminary injunction would preserve the status quo. The enactment and imminent enforcement of the Mandate against Plaintiffs created the present controversy between the parties. Before this controversy arose, Plaintiffs exercised a freedom to fashion a health plan in accordance with their religious beliefs and principles, which is what Plaintiffs have been doing for about the last ten years. *See, e.g., Consarc Corp. & Consarc Eng'g v. U.S. Treasury Dep't*, 71 F.3d 909, 913 (D.C. Cir. 1997) ("Judicial precedent confirms that the status quo is the last uncontested status which preceded the pending controversy.") (internal quotations marks and citations omitted).

Moreover, a preliminary injunction preventing Defendants' enforcement of the Mandate against Plaintiffs will not harm Defendants' interests. This is especially true because, as discussed previously, Defendants already have exempted thousands of employers of millions of employees from the Mandate. *See Newland*, 2012 U.S. Dist. LEXIS 104835, at *14-15 (noting that the government's asserted interests regarding the Mandate were undermined by the existence of numerous exemptions); *see also Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004) (explaining that there is no legitimate governmental interest to be furthered by violating someone's rights). Accordingly, the balance of the equities tips in Plaintiffs' favor.

D. The Public Interest Favors a Preliminary Injunction.

As this Court explained in *Tyndale House Publishers,*

> Where, as here, the regulations at issue include exemptions and other provisions excluding a large number of people from the scope of the regulations, and the government has failed to show a compelling interest furthered by the enforcement of those regulations as to the plaintiffs in this case, the public has little interest in the 'uniform application' of the regulations. The public interest instead weighs in favor of the plaintiffs.

2012 U.S. Dist. LEXIS 163965, at *66-67. Furthermore, the public has a strong interest in the preservation of religious freedom, as Congress recognized in enacting RFRA. *See Newland*, 2012 U.S. Dist. LEXIS 104835, at *14-15 (stating that the government's asserted interests regarding the Mandate were "countered, and indeed outweighed, by the public interest in the free exercise of religion"); *Legatus*, 2012 U.S. Dist. LEXIS 156144, at *44 ("The harm in delaying the implementation of a statute that may later be deemed constitutional must yield to the risk presented here of substantially infringing the sincere exercise of religious beliefs."). Consequently, the public interest favors the grant of a preliminary injunction in favor of Plaintiffs. *See Simms v. Dist. of Columbia*, 2012 U.S. Dist. LEXIS 93052, at *43 (D.D.C. July 6, 2012) ("It is always in the public interest to prevent the violation of a party's constitutional rights.") (internal quotation marks and citations omitted).[11]/

II. No Bond Should be Imposed on Plaintiffs.

A bond requirement would further harm Plaintiffs by causing them to have to pay to assert and defend their rights. Also, enjoining the enforcement of the Mandate against Plaintiffs will impose no monetary requirements on Defendants. *See* Fed. R. Civ. P. 65(c); LCvR 65.1.1. Therefore, Plaintiffs request that this Court exercise its discretion and not impose a bond. *See CAIR v. Gaubatz*, 667 F. Supp. 2d 67, 81 (D.D.C. 2009) (exercising discretion under Rule 65(c) and imposing no bond).

[11]/ Granting Plaintiffs a preliminary injunction will not harm their employees. For about the last ten years, their employees have been covered by health insurance that has specifically excluded contraceptives, abortion, and sterilization. (Ex. A, F. Gilardi Decl. at ¶ 9; Ex. A-2 at pp. 1-5; Ex. B, P. Gilardi Decl. at ¶ 9.) In addition, allowing Plaintiffs to continue offering such insurance would place their employees in the same position as the millions of employees and their families covered by grandfathered plans or by plans otherwise exempt from the Mandate.

CONCLUSION

Federal courts have granted injunctive relief to for-profit employers in eleven cases, preventing application of the Mandate to them. Plaintiffs seek the same relief. Plaintiffs have made a sufficiently strong showing on each of the four preliminary injunction factors to obtain that relief. Accordingly, for the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for a preliminary injunction and allow them to continue to follow their religious beliefs and moral values when they renew their employee health plan on April 1, 2013.

Respectfully submitted on this 8th day of February, 2013,

/s/ Edward L. White III
Edward L. White III (adm. phv)
American Center for Law & Justice
5068 Plymouth Road
Ann Arbor, Michigan 48105
Tel. 734-662-2984; Fax. 734-302-1758
ewhite@aclj.org

Francis J. Manion (adm. phv)
Geoffrey R. Surtees (adm. phv)
American Center for Law & Justice
6375 New Hope Road
New Hope, Kentucky 40052
Tel. 502-549-7020; Fax. 502-549-5252
fmanion@aclj.org
gsurtees@aclj.org

/s/ Colby M. May
Colby M. May
D.C. Bar No. 394340
American Center for Law & Justice
201 Maryland Avenue, N.E.
Washington, D.C. 20002
Tel. 202-546-8890; Fax. 202-546-9309
cmmay@aclj-dc.org

Erik M. Zimmerman (adm. phv)
American Center for Law & Justice
1000 Regent University Drive
Virginia Beach, Virginia 23464
Tel. 757-226-2489; Fax. 757-226-2836
ezimmerman@aclj.org

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2013, I caused the foregoing motion, statement of points of law and authority, exhibits, and proposed order 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 I also caused to be sent by United States Mail, first-class postage prepaid, true and correct copies of the above-referenced documents to each of the following non-CM/ECF participants:

U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201
Defendant

U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
Defendant

Kathleen Sebelius, Secretary
U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201
Defendant

Seth D. Harris, Acting Secretary
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210
Defendant

U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220
Defendant

Eric Holder, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Neal Wolin, Acting Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220
Defendant

Civil-process clerk
c/o Ronald C. Machen Jr.
U.S. Attorney, District of Columbia
555 4th Street, N.W.
Washington, D.C. 20530

Moreover, I certify that on February 8, 2013, I caused true and correct copies of the above-referenced documents to be sent to Defendants' counsel, Benjamin Berwick, by electronic mail to the following address: Benjamin.L.Berwick@usdoj.gov.

/s/ Edward L. White III
Edward L. White III (adm. phv)
American Center for Law & Justice