EN BANC ARGUMENT SCHEDULED MAY 23, 2013

No. 12-6294

In the United States Court of Appeals for the Tenth Circuit

HOBBY LOBBY STORES, INC., MARDEL, INC., DAVID GREEN, BARBARA GREEN, STEVE GREEN, MART GREEN, AND DARSEE LETT,

Appellants,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, HILDA SOLIS, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY,

Appellees.

On Appeal from the United States District Court
for the Western District of Oklahoma, No. 5:12-cv-01000
Judge Joe Heaton, Presiding

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INTRODUCTION

The Court has asked the parties to file supplemental briefs addressing the standing of the Green family, Hobby Lobby Stores, Inc., and Mardel, Inc. to challenge the Mandate under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, and the Free Exercise Clause. 4/1/2013 Order at 2. The Court has also asked the parties to address the applicability of the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421(a). *Id.*

FACTUAL BACKGROUND

The Green family owns and operates Hobby Lobby, an arts-and-crafts chain, and Mardel, a chain of Christian bookstores. Appellants' Br. ("Br.") 2-3.[1] The Greens alone set business policy, including which services are covered in Hobby Lobby's self-insured health plan. Br. 3-5. They each sign trust commitments obliging them to run Hobby Lobby according to their faith and to use all assets to "create, support, and leverage the efforts of Christian ministries." JA 21a.[2] Consequently, the Greens have adopted religious statements of purpose for Hobby Lobby, JA 21-25a, and consistently direct Hobby Lobby to engage in religious practices, such as closing on Sundays and buying newspaper ads at Christmas and

[1] Unless otherwise specified, references to "Hobby Lobby" include Mardel.

[2] The Greens hold their ownership interest in Hobby Lobby through trusts they have created, of which they are sole trustees. JA 13a. As trustees, the Greens have the power "generally to do any lawful act in relation to the trust property which any individual owning the same absolutely might do." 60 Okla. Stat. Ann. § 171.

Easter inviting readers to "know Jesus as Lord and Savior." JA 23-26a; Br. 3-4. Relevant here, the Greens direct Hobby Lobby's health plan to exclude emergency contraceptives—such as Plan B and Ella—because, according to their religious beliefs, they cannot provide or pay for drugs that risk harming newly conceived human life. JA 24-27a, 33a; Br. 4-5.

The federal regulation at issue ("the Mandate") would compel the Greens to cover those emergency contraceptives. The Mandate is a regulation promulgated by HHS pursuant to its authority under the Affordable Care Act, which amends and reorganizes the Public Health Services Act. *See* 42 U.S.C. § 300gg-13(a)(4); 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011); Br. Add. 44-45, 62. Failure to comply will expose Hobby Lobby to fines, regulatory action, and private lawsuits. Br. 6-7; Br. Add. 20-26, 34-44.

The Greens and Hobby Lobby sued for declaratory and injunctive relief against the Mandate. JA 51a. They also sought a preliminary injunction, which the district court denied. JA 202a. An injunction pending appeal was denied by a motions panel of this Court and by Justice Sotomayor. Br. 9-11. The Court subsequently granted Hobby Lobby's motions for en banc review and expedited argument.

The Mandate takes effect against Hobby Lobby on July 1, 2013. Br. 11.

SUMMARY OF ARGUMENT

The Mandate presents the Greens with a stark choice: they must direct Hobby Lobby's health plan to cover drugs in violation of their religious beliefs or risk substantial penalties against their family-owned businesses. The Court asks whether the Greens and Hobby Lobby have standing to challenge the Mandate, and whether the Court may entertain their lawsuit notwithstanding the AIA. The answer to both questions is yes.

To establish standing, the Greens and Hobby Lobby must show that they suffer an injury traceable to the Mandate and redressable by a favorable decision from this Court. All parties meet this standard. The Greens have standing because the Mandate compels them to operate Hobby Lobby's health plan in a manner their religious beliefs forbid. Hobby Lobby and Mardel independently have standing because they are subject to the Mandate, which is sufficient no matter how this Court decides the religious liberty claims they raise. Finally, if the Greens themselves are somehow prevented from asserting their own claims, Hobby Lobby and Mardel could still sue on the Greens' behalf because of the close relationship between a family business and its owners.

The AIA bars suits brought "for the purpose of restraining the assessment and collection of any tax," 26 U.S.C. § 7421(a), in order to protect IRS assessment and collection activities from federal-court interference. The government has correctly

admitted in a parallel case that the AIA does not apply to Mandate challenges. The Mandate is a regulation promulgated by HHS, not the IRS; it is part of the Public Health Services Act, not the Internal Revenue Code; and it is enforceable not merely by the IRS, but by two other federal agencies, private citizens, and the fifty States. Consequently, this lawsuit does not seek to restrain any tax, but instead seeks to preserve religious liberty by enjoining a public health regulation not even located in the Tax Code. The AIA does not apply.

ARGUMENT

I. THE GREENS HAVE STANDING.

The Court's briefing order first asks whether the Greens have standing to challenge the Mandate under RFRA and the Free Exercise Clause. They do.

Standing concerns whether "[a] litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). When evaluating standing at this stage, the Court "'must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003) (quoting *Warth*, 422 U.S. at 501). The Greens' allegations easily demonstrate their standing to challenge the Mandate under RFRA and the Free Exercise Clause.

A. The Greens have Article III standing.

To have Article III standing, "plaintiffs must allege (and ultimately prove) that they have suffered an 'injury in fact,' . . . fairly traceable to the challenged action

of the Defendants, and . . . redressable by a favorable decision." *Initiative & Ref. Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). "At bottom, the gist of the question of standing is whether [the plaintiffs] have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Awad v. Ziriax*, 670 F.3d 1111, 1120 (10th Cir. 2012) (quotations omitted).

The Greens have Article III standing. The Mandate requires a non-exempt "group health plan" to cover all FDA-approved contraceptives, including emergency contraceptives. Br. 6; Br. Add. 44, 62. The Greens allege that (1) they fund, control, and operate a group health plan for their employees, JA 17-18a, 20-21a, 26a; (2) the plan is not exempt from the Mandate, JA 18a, 27a; (3) they have a sincere religious objection to covering the mandated emergency contraceptives, JA 26-27a ; and (4) the Mandate threatens them with penalties if they do not comply, JA 39-41a. The Greens have thus alleged that the Mandate coerces them to act contrary to their religious beliefs. *See, e.g., Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012) (explaining that "the religious-liberty violation at issue here inheres in the *coerced coverage* of . . . abortifacients").

These undisputed allegations establish Article III standing. "In the First Amendment context, . . . a plaintiff generally has standing if he or she alleges an

intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder." *Ward*, 321 F.3d at 1267 (citations and quotations omitted). If the Greens persist in their religious exercise of excluding the mandated drugs, a "credible threat" of enforcement plainly exists. *See, e.g.*, *Walker*, 450 F.3d at 1095-96 ("prosecution" includes "civil liability [and] regulatory requirements"). While the government has exempted numerous religious organizations from the Mandate and delayed enforcement as to others, it has repeatedly refused relief to for-profit business owners like the Greens. *See* Br. 42-43, 50-51. "In this case . . . , the threat of enforcement is not just credible, but certain." *Walker*, 450 F.3d at 1090.

The Mandate's coercion of the Greens' faith, and its impending threat to their property, far exceed the requirements for constitutional standing. Where "the plaintiff is himself an object of the action . . . , there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-62. Consequently, "[i]t is clear that [the Greens] have far more than an abstract interest in whether [the Mandate] is constitutionally valid; they are precisely the type of party most affected by [it]." *Walker*, 450 F.3d at 1091. Furthermore, the Greens' claims involve their personal free exercise rights, making their standing here "axiomatic." *See Day v. Bond*, 500

F.3d 1127, 1137 (10th Cir. 2007) ("[I]t is axiomatic that a plaintiff has standing to assert that his or her First Amendment rights have been violated.")

For similar reasons, the Greens also have standing under RFRA. "It is long settled in the law that '[t]he actual or threatened injury required by Art[icle] III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing[.]'" *Day*, 500 F.3d at 1136 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982)); *see also Warth*, 422 U.S. at 500 (explaining that "the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief"). Here, the Greens allege the Mandate substantially burdens their religious exercise, and RFRA affords them the right to "assert that violation as a claim or defense in a judicial proceeding." 42 U.S.C. § 2000bb-1(c).

The jurisdictional question of the Greens' standing under RFRA is distinct from the merits question of whether the Mandate's burden is "substantial." *See* Br. 20-22 (explaining why Mandate's burden is substantial under RFRA). Unless Congress "clearly states" that "a statutory limitation on coverage [is] jurisdictional, courts should treat the restriction as non-jurisdictional." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006); *see also, e.g., Pub. Serv. Co. of New Mexico v. NLRB*, 692 F.3d 1968, 1076 (10th Cir. 2012) (noting Supreme Court's warning "against

confusing 'claim-processing rules or elements of a cause of action' with true 'jurisdictional limitations'" (quoting *Reed Elsevier, Inc. v. Muchnick*, 599 U.S. 154, __, 130 S.Ct. 1237, 1243-44 (2010)). Far from "clearly stating" that RFRA's elements are jurisdictional, Congress stated the opposite, providing that "[s]tanding to assert a claim or defense under [RFRA] shall be governed by the general rules of standing under article III of the Constitution." 42 U.S.C. § 2000bb-1(c); *cf., e.g.*, 28 U.S.C. § 1332(a) (providing that "[t]he district courts *shall have original jurisdiction* of all civil actions where," *inter alia*, "the matter in controversy exceeds the sum or value of $75,000") (emphasis added). Thus, whether the Greens satisfy RFRA's elements goes to the merits, not standing.[3]

It is immaterial to standing that the Mandate applies to the health plan and not to the Greens personally. The Mandate governs "a group health plan," 42 U.S.C. § 300gg-13, but the Greens alone control that plan. JA 13a, 17-18a; *see, e.g.*, *Robinson v. Cheney*, 876 F.2d 152, 159 (D.C. Cir. 1989) ("[A] corporation cannot act except through the human beings who may act for it."). Coercing the plan thus coerces the Greens to operate the plan in a particular way that violates their free exercise rights. *See, e.g., EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620

[3] *See, e.g., Smith v. Rail Link, Inc.*, 697 F.3d 1304, 1313-14 (10th Cir. 2012) (court had subject matter jurisdiction because "statute does not speak to these elements in jurisdictional terms"); *Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 726 n.4 (10th Cir. 2006) (concluding that "failure to qualify as an 'eligible employee'" went to merits, not jurisdiction).

n.15 (9th Cir.1988) (a family corporation bringing a free exercise challenge "present[ed] no rights of its own different from or greater than its owners' rights"); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1121 (9th Cir. 2009) (concluding "we will consider the rights of the owners as the basis for the Free Exercise claim").

More broadly, characterizing the Mandate's impact as "indirect" cannot defeat the Greens' standing: "[t]he fact that the harm . . . may have resulted indirectly does not in itself preclude standing." *Warth*, 422 U.S. at 504-05. If a regulation "imposed on one party causes specific harm to a third party, . . . the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights." *Id*. (citation omitted). In *Stormans*, for example, although the rule required the *pharmacy* to deliver medications, the pharmacy would "generally depend upon their pharmacists" to comply. 586 F.3d at 1121. Thus, pharmacists with a religious objection to delivering those medications could challenge the rule. *Id*. at 1121-22 ("It is difficult to imagine a more appropriate group of plaintiffs to challenge new rules governing the conduct of pharmacies and pharmacists than a pharmacy and two pharmacists."). Just so here: the Greens can challenge a regulation of their business that would make them violate their faith.

Finally, independent of the Mandate's religious coercion, the Greens also have constitutional standing as beneficial shareholders of Hobby Lobby. It is settled that shareholders have Article III standing to challenge action that threatens their

property interests in their companies. *See, e.g.*, *Franchise Tax Bd. of Cal. v. Alcan Alum. Ltd.*, 493 U.S. 331, 336 (1990) ("quite right" that owners "have Article III standing to challenge the taxes that their [businesses] are required to pay"). The Greens, of course, are more than shareholders: they alone own and operate Hobby Lobby and are alone trustees of its assets. JA 13a, 17-18a. Thus, their property interests alone afford them standing to challenge the Mandate. *See, e.g.*, *Grubbs v. Bailes*, 445 F.3d 1275, 1280 (10th Cir. 2006) (shareholders have Article III standing when corporation "incurs significant harm, reducing the return on their investment and lowering the value of their stockholdings").

B. Prudential considerations do not bar the Greens' standing.

Prudential standing requires that a plaintiff "generally must assert his own legal rights and interest, and cannot rest his claim to relief on the legal rights or interest of third parties." *Grubbs*, 445 F.3d at 1280 (quoting *Franchise Tax Bd. of Cal.*, 493 U.S. at 336). For numerous reasons, no prudential considerations affect the Greens' standing.

First, prudential standing was not raised below and has been waived. *Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007) (noting prudential standing is "not jurisdictional" and waived when "not raised in the court below"); *see also Wilderness Soc'y v. Kane Cnty., Utah*, 632 F.3d 1162, 1168 (10th Cir. 2011) (same).

Second, even if not waived, prudential standing does not apply to a RFRA claim. RFRA provides that standing "shall be governed by the general rules of standing under article III of the Constitution." 42 U.S.C. § 2000bb-1(c). Where "Congress intended standing . . . to extend to the full limits of Art[icle] III," courts "lack the authority to create prudential barriers to standing." *Havens Realty Corp.*, 455 U.S. at 372.

Third, even if prudential standing applied, it is satisfied. The Greens' personal religious beliefs forbid them from providing or paying for the mandated emergency contraceptives in Hobby Lobby's plan. Consequently, the Greens assert claims in defense of *their own* rights, not a third party's. *See, e.g.*, *Grubbs*, 445 F.3d at 1280 (prudential standing bar generally triggered where plaintiff "rest[s] his claim to relief on the legal rights or interest of third parties"). Moreover, prudential standing is relaxed when First Amendment rights are at stake. *See, e.g.*, *Ward*, 321 F.3d at 1266 (noting that "[b]ecause of the significance of First Amendment rights, the Supreme Court has enunciated other concerns that justify a lessening of prudential limitations on standing") (internal quotations and citations omitted).

Finally, the prudential bar to shareholder standing does not apply to the Greens. *See, e.g.*, *Grubbs*, 445 F.3d at 1280 (prudential rule "generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons

other than good-faith business judgment") (quotation omitted). The Greens are not simply beneficial shareholders: they are the sole owners and operators of Hobby Lobby. They sue not merely to vindicate the "rights of the corporation," but *their own* free exercise rights as well. And even if they sued only as shareholders, the prudential rule has a "well-established exception" allowing shareholders with "a *direct, personal interest* in a cause of action to bring suit even if the corporation's rights are also implicated." *Id.* (shareholder had standing to bring trespass claim based on separate possessory interest); *Combs v. PricewaterhouseCoopers LLP*, 382 F.3d 1196, 1200 & n.2 (10th Cir. 2004) (acknowledging shareholder's standing for "injuries to [him] as an employee"). That exception would apply because the Greens' right to free exercise is "a distinct legally recognized interest," and their injury is not "purely derivative" or "solely a function of injury to the corporation's [rights]." *Grubbs*, 445 F.3d at 1280.[4]

[4] *Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1071 (10th Cir. 2002), is not to the contrary. There, the Court held that a sole shareholder's claim of racial discrimination was derivative of her corporation's claim, because the corporation was the "direct victim of the alleged discrimination" and the shareholder's emotional distress "was a product of the economic damages that were suffered by the corporation." *Id*. at 1072. Unlike the single act of discrimination in *Guides*, which the shareholder felt only indirectly, the Mandate makes the Greens themselves take action in violation of their consciences.

II. HOBBY LOBBY AND MARDEL HAVE STANDING.

Additionally, the Court's briefing order asks whether Hobby Lobby and Mardel, as Oklahoma for-profit corporations, have independent standing to challenge the Mandate under RFRA and the Free Exercise Clause. They do.

A. Hobby Lobby and Mardel are subject to the Mandate.

Hobby Lobby and Mardel each have more than fifty full-time employees to whom they provide health insurance through Hobby Lobby's non-grandfathered plan.[5] JA 13a. Accordingly, both are subject to the Mandate and face penalties for failure to comply.

Both companies therefore have standing to challenge the Mandate as unconstitutional and illegal. When plaintiffs are "[themselves] an object of the action" there is "ordinarily little question" that the action "has caused [them] injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-62; *see also Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1235 (10th Cir. 2004) (because plaintiffs were "the subject of the challenged [statutes]," the "obligations and burdens imposed by those statutes speak for themselves, and no additional evidence is necessary to establish standing"); *Walker*, 450 F.3d at 1097 (finding standing where plaintiff

[5] The parties agree that non-grandfathered plans are subject to the Mandate. Hobby Lobby and Mardel relinquished grandfather status before the Mandate was announced. JA 27a.

organizations were "among the direct targets" of the law and there were "no doubts" it would be enforced against them); *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 656 F.3d 580, 585 (7th Cir. 2011) (injury requirement "easily met" for truck drivers challenging regulation directly requiring them to install tracking devices in their trucks).

B. Whether Hobby Lobby and Mardel can state free exercise claims is distinct from whether they have standing.

The government's argument that a "for-profit, secular corporation" cannot exercise religion is irrelevant to Hobby Lobby and Mardel's standing. *See* DOJ Br. 16; *but see* Br. 36-39; Reply Br. 15-21 (explaining that neither the Free Exercise Clause nor RFRA exclude religious exercise by for-profit corporations). This Court's *en banc* opinion in *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006), teaches that, regardless of the Court's ultimate resolution of that issue, Hobby Lobby and Mardel have standing to challenge the Mandate under the Free Exercise Clause and RFRA.

In *Walker*, advocacy groups challenged on free speech grounds a Utah constitutional amendment requiring two-thirds approval of any wildlife management initiative. Arguing that the First Amendment was inapplicable because it does not "guarantee political success," the State claimed the plaintiffs lacked standing. *Id.* at 1092. But the *en banc* Court concluded that the State's "approach . . . confuse[d] standing with the merits." *Id.* The Court explained that

the standing inquiry "cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest. If that were the test, every losing claim would be dismissed for want of standing." *Id.*; *see also, e.g.*, *Peterson v. Martinez*, 707 F.3d 1197, 1209 n.3 (10th Cir. 2013) (whether Second Amendment protects right to carry concealed firearms was irrelevant to plaintiff's standing to contest denial of concealed handgun license to Colorado non-residents).

While recognizing a plaintiff must have some "legally protected interest" to invoke standing, the Court cautioned against "'the common tendency to use standing concepts to address the question whether the plaintiff has stated a claim.'" *Walker*, 450 F.3d at 1093 & n.3 (quoting 13 Wright, Miller, Cooper & Freer, *Federal Practice and Procedure* § 3531.4, at 830 (2d ed. Supp. 2005)). Consequently, the Court held that, as long as a plaintiff "presents a *nonfrivolous* legal challenge, . . . the federal courts may not dismiss for lack of standing on the theory that the underlying interest is not legally protected." *Id*. (emphasis added).

The claim that Hobby Lobby is entitled to Free Exercise protection is far from legally frivolous. The Supreme Court has long recognized that profit-making corporations can exercise constitutional rights, including First Amendment rights.[6]

[6] *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, __, 130 S. Ct. 876, 899-900 (2010) ("The Court has recognized that First Amendment protection extends to corporations.") (collecting cases); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S.

See Br. 36-39; Reply Br. 15-21. Nor is the claim factually frivolous. Both Hobby Lobby and Mardel take numerous actions for express religious reasons. Br. 3-4. Mardel itself is in the business of selling Christian books and materials. Br. 3. These businesses can readily establish that, by excluding certain coverage from their health plan for religious reasons, they engage in "religious exercise." Because their claim is not frivolous, "the federal courts may not dismiss for lack of standing on the theory that the underlying interest is not legally protected." *Walker*, 450 F.3d at 1093.

Finally, as explained above, whether Hobby Lobby and Mardel are "persons" under RFRA is irrelevant to standing. DOJ Br. 17-23; *see supra* part I.A. Courts must treat statutory elements as non-jurisdictional, unless Congress "clearly states" they are jurisdictional. *Arbaugh*, 546 U.S. at 515. Congress did no such thing in RFRA, and instead provided that standing depends only on "the general rules of standing under article III of the Constitution." 42 U.S.C. § 2000bb-1(c). Furthermore, had Congress intended to exclude for-profit corporations, it would not have used the term "person," which includes corporations as a matter of

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765, 780 (1978) ("Freedom of speech *and the other freedoms encompassed by the First Amendment* always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause . . . *and the Court has not identified a separate source for the right when it has been asserted by corporations*."); *id.* at 780 n.15 ("It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment.") (emphasis added) (internal citations omitted).

statutory and constitutional construction. *See* 1 U.S.C. § 1 (providing that, generally, the word "'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals"); *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 687 (1978) (observing that "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis"); *see also* Br. 36.

III. ALTERNATIVELY, HOBBY LOBBY AND MARDEL HAVE STANDING TO ASSERT THE GREENS' RIGHTS.

The Court's briefing order also asks whether Hobby Lobby and Mardel have standing to assert the Greens' rights. The Court need not answer this question because the Greens are already parties with standing to assert their own claims. *See* JA 212a (because "the Greens are parties appearing and asserting their own rights, it is unnecessary to belabor the issue" of whether Hobby Lobby could assert their rights). Moreover, "so long as at least one plaintiff has standing to raise each claim," courts "need not address whether the remaining plaintiffs have standing." *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1243-44 (11th Cir. 2011). If the Court reaches this question, however, the answer is yes: third-party standing principles would allow Hobby Lobby to assert the Greens' rights.

In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1958), the Supreme Court held that the NAACP had standing to assert its members' rights not to have their membership disclosed. Because members' rights could not otherwise

"be effectively vindicated" and because the NAACP had a "nexus . . . sufficient to permit that it act as their representative," the Court granted third-party standing to the organization. *Id*. Relying on *NAACP*, *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303 n.26 (1985), held that a religious organization had standing to bring free exercise claims on behalf of its members. The Ninth Circuit has twice relied upon *Tony and Susan Alamo* to hold that for-profit corporations have third-party standing to represent their owners' free exercise rights. *Townley,* 859 F.2d at 620 n.15 (corporation had standing to challenge Title VII on alleged ground that it violated owner's free exercise); *Stormans*, 586 F.3d at 1121 (corporation had standing to challenge state regulation on ground that it required owners to violate their consciences); *see also Tyndale House Pub., Inc. v. Sebelius*, No. 12-cv-1635, 2012 WL 5817323, at *9 (D.D.C. Nov. 16, 2012) ("Viewing the rights of Tyndale's owners . . . as the basis for its RFRA claim, the Court finds that Tyndale has made a satisfactory showing of Article III standing.").

Regarding third-party standing, this Court has held that plaintiffs may assert another person's rights upon showing (1) that they have "a close relationship with the person who possesses the right" and (2) "that there is a hindrance to the possessor's ability to protect his own interests." *Aid for Women v. Foulston*, 441 F.3d 1101, 1111-12 (10th Cir. 2006) (quotations omitted). Both elements are

satisfied here. First, the Greens have exclusive ownership and control of Hobby Lobby and Mardel, thus ensuring a "close relationship" and "a congruence of interests" such that the companies "will be a motivated, effective advocate for the [Greens'] rights." *Tyndale House Pub.*, 2012 WL 5817323, at *9 (quoting *Powers v. Ohio*, 499 U.S. 400, 414 (1991) (quotation marks omitted)); *see also Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1287 n.13 (10th Cir. 2002) ("A well-established exception to the bar against third-party standing is when the exercise of rights by the third party is intertwined with the litigant's activities.") (citing *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990)).

Second, the government's theory in this and other HHS lawsuits shows how the Greens' ability to protect their own rights could be hindered. The government has argued that "[a for-profit corporation]—though directly injured by the regulation—cannot exercise religion, and [its owners]—though capable of exercising religion—[are] not directly injured by the regulation." *Tyndale House Pub.*, 2012 WL 5817323, at * 9; *see also* DOJ Br. 17, 23. As applied to standing, the government's argument would create a catch-22 where both company and owner are harmed by the Mandate but neither could challenge it. But, following the Supreme Court, this Court has noted that "[w]e have been quite forgiving [in allowing third-party standing] . . . when enforcement of the challenged restriction against the litigant [here, Hobby Lobby] would result indirectly in the violation of third parties' rights

[here, the Greens]." *Foulston*, 441 F.3d at 1112 (citing *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (quotation marks omitted)). Thus, even if the Greens were not already parties, third-party standing on their behalf would be appropriate. The standing rules should not be interpreted to allow the government to impose the Mandate, while stripping federal courts of jurisdiction to determine its constitutionality when asked to do so by directly affected parties.

IV. THE ANTI-INJUNCTION ACT DOES NOT APPLY TO SUITS CHALLENGING NON-TAX REGULATIONS LIKE THE MANDATE.

Finally, the Court's briefing order asks whether the Anti-Injunction Act ("AIA") affects the Court's jurisdiction. The answer is no.

The AIA bars suits "for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). It does not apply to every lawsuit "tangentially related to taxes," *Cohen v. United States*, 650 F.3d 717, 726-27 (D.C. Cir. 2011) (en banc), and it certainly does not apply to this lawsuit, which challenges a non-tax regulatory "guideline" not even promulgated by the IRS.

The AIA "serves twin purposes: It responds to the Government's need to assess and collect taxes as expeditiously as possible" without judicial interference, and it "require[s] that the legal right to the disputed sums be determined in a suit for refund." *Hibbs v. Winn*, 542 U.S. 88, 103 (2004) (internal quotations omitted). The gist of the AIA is to "direct taxpayers to pursue refund suits instead of attempting to restrain collections." *Id*. at 104. The AIA and its purposes are not implicated in

this lawsuit. The Greens and Hobby Lobby do not challenge the IRS's right to assess and collect taxes—rather, they challenge HHS's imposition of insurance coverage requirements that infringe their free exercise rights.

Under the Affordable Care Act ("ACA"), Congress sought to lower health care costs in part by requiring expanded coverage of preventive services. Specifically, the ACA requires all group health plans to cover without cost-sharing (1) certain preventive services recommended by the United States Preventive Services Task Force; (2) certain immunizations; and (3) other "preventive care and screenings" for infants, children, adolescents, and women. 42 U.S.C. § 300gg-13(a)(1)-(4). The law does not define women's "preventive care and screenings," but instead authorizes the Health Resources and Services Administration ("HRSA")—an agency of HHS—to adopt "comprehensive guidelines" for that purpose. *Id*. In response, HRSA included a range of services, such as well-women visits, screenings for gestational diabetes, counseling and screenings for sexually transmitted infections and domestic violence, breastfeeding support, and—most relevant here—"all Food and Drug Administration approved contraceptive methods." *See* Women's Preventive Services: Required Health Plan Coverage Guidelines, *available at* www.hrsa.gov/womensguidelines/ (last visited April 22, 2013).

The Greens and Hobby Lobby challenge only part of the Women's Preventive Services Guidelines ("HRSA Guidelines") concerning contraceptives, and only to the extent they require coverage of drugs like Plan B and Ella that can harm newly conceived human life. Coercing the Greens and Hobby Lobby to pay for and provide this coverage would force them to violate their religious beliefs. *See* Br. 18-22, 36-39. Thus, they seek to enjoin that portion of the Guidelines adopted by HRSA, as applied to them, *for the purpose of protecting their religious freedom*. They are not challenging any IRS action "for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a).[7]

This explains why the government has admitted in parallel litigation that the AIA "does not apply" to lawsuits seeking to enjoin the Mandate. *Autocam Corp. v. Sebelius*, No. 1:12-cv-01096, Suppl. Br. [Dkt. 41] at 3 (W.D. Mich. Dec. 21, 2012); *see Seven-Sky v. Holder*, 661 F.3d 1, 12 (D.C. Cir. 2011) (observing that

[7] To be sure, Hobby Lobby has also named the Treasury Department and the Treasury Secretary in its Complaint. JA 19a. But that is because the Treasury Department (in addition to the Labor Department) has issued regulations incorporating the HRSA Guidelines by reference. *See* 77 Fed. Reg. 8725, 8730 (Feb. 15, 2012) (final Treasury regulations incorporating "preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration"); 29 C.F.R. § 2590.715-2713 (Labor regulations incorporating "preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration"). A change in the HRSA Guidelines would remove the threat posed by the Treasury and Labor regulations as well.

"the Government's determination that the Anti-Injunction Act should not be interpreted to bar appellants' suit is entitled to deference"), *abrogated on other grounds by NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). As the government has explained, the preventive services provision—42 U.S.C. § 300gg-13—"expressly delegates the regulatory decision regarding the preventive care and screening [for] women to an agency other than the Treasury Department." *Autocam* Suppl. Br., *supra*, at 3. Thus, it is HRSA's regulatory authority that is at issue, not the IRS's ability to assess and collect taxes. "[S]ince the [AIA's] obvious purpose is to protect the Government's fisc," *Seven-Sky*, 661 F.3d at 12, it simply does not apply to a suit seeking an injunction to prevent HHS from implementing a narrow part of the HRSA Guidelines.

The Mandate's diverse enforcement mechanisms reinforce the government's conclusion. It may be enforced by the states, 42 U.S.C. § 300gg-22(a)(1), by the Secretary of HHS, 42 U.S.C. § 300gg-22(b), § 201(c); by the Secretary of Labor, 29 U.S.C. § 1132(a)(5), § 1002(13), and by private citizens who are "participant[s], beneficiar[ies], or fiduciar[ies]" of a noncompliant health plan. 29 U.S.C. § 1132(a)(1)(B), (a)(3). The ACA gives the IRS two additional enforcement mechanisms, one imposing an "assessable payment" on any "large employer" that "fails to offer . . . minimum essential coverage," 26 U.S.C. § 4980H, and the other imposing "a tax on any failure of a group health plan to meet the . . . group health

plan requirements[],” 26 U.S.C. § 4980D. But these enforcement provisions are only tangentially impacted by this litigation, if at all. The Greens and Hobby Lobby do not challenge the IRS’s “tax” provision or any of the other enforcement mechanisms as unconstitutional, nor do they challenge the broader preventive care requirements. Rather, they seek only to enjoin the HRSA Guidelines, and only to the extent they require them to pay for and provide drugs and services against their religious beliefs. JA 14a, 31a-34a, 41a-51a. To the extent possible future IRS enforcement is incidentally implicated, that does not trigger the AIA. *See Cohen*, 650 F.3d at 726-27 (the AIA “does not . . . reach all disputes tangentially related to taxes”). The existence of non-IRS enforcement avenues only underscores the fact that the Greens’ lawsuit seeks freedom from the Mandate, not restraint of taxes: if only the IRS were enjoined, the HRSA Guidelines would still apply to Hobby Lobby and it would still face liability under ERISA and other ACA enforcement mechanisms. *See Autocam* Suppl. Br., *supra*, at 3 (government taking the position that the AIA does not bar a pre-enforcement challenge to the Mandate in part because it “is enforced independently outside the Internal Revenue Code”).[8]

Appellants are unaware of any case in which the AIA has been found to bar a suit challenging action by an agency other than the IRS or challenging a law

[8] The government has also suggested that the AIA is not implicated because the Mandate is “subject to immediate challenge by some regulated entities.” *Autocam* Suppl. Br., *supra*, at 3.

outside the Internal Revenue Code.[9] *Cf. United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 8 (1974) (applying AIA to action seeking to enjoin the IRS from collecting taxes by withholding wages, as required under section 3402 of the Internal Revenue Code); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 727 (1974) (applying AIA to action seeking to "enjoin the [IRS] from revoking a ruling letter declaring that petitioner qualifies for tax-exempt status" under section 501(c)(3) of the Internal Revenue Code); *Alexander v. Americans United Inc.*, 416 U.S. 752, 754 (1974) (same); *see also Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 890 (E.D. Mich. 2010) ("Cases in which the [AIA] has been found to bar a suit all involve a challenge to an action of the IRS which resulted in, or was expected to result in, the assessment or collection of any tax."), *aff'd*, 651 F.3d 529 (6th Cir. 2011), *abrogated on other grounds by NFIB*, 132 S. Ct. 2566.

Indeed, courts reviewing non-tax regulations like the HRSA Guidelines have not applied the AIA's bar, even where the challenged regulations are enforceable by a separate tax expressly subject to the AIA. In *National Petrochemical & Refiners Association v. EPA*, for example, the D.C. Circuit considered a procedural

[9] *See, e.g., Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 558 (1976) ("The [AIA] applies to suits brought to restrain assessment of taxes assessable under the Internal Revenue Codes of 1954 and 1939 . . . The license fees in this case are assessed under neither Code but rather under the authority conferred on the President by the Trade Expansion Act of 1962 . . . The fees are therefore not 'taxes' within the scope of the [AIA].").

challenge to the EPA's Highway Diesel Fuel Sulfur Control Requirements ("Diesel Requirements"), which established emission standards for diesel fuel. 287 F.3d 1130, 1134 (D.C. Cir. 2002). By separate statute, the Diesel Requirements are enforceable by IRS penalty. *See* 26 U.S.C. § 6720A (imposing $10,000 penalty for each transfer of fuel not in compliance with the Diesel Requirements). Another statute expressly provides that the penalties are taxes for AIA purposes. 26 U.S.C. § 6671(a); *see also NFIB*, 132 S. Ct. at 2583 (noting that "[p]enalties in subchapter 68B [including fuel penalties] are thus treated as taxes under Title 26, which includes the Anti–Injunction Act"). Yet no federal court has ever held that the AIA barred an action challenging the Diesel Requirements themselves. Similarly, in over thirty-five years of challenges to the EPA's Clean Air Act fuel registration requirements, the D.C. Circuit has never once applied the AIA—even though the Internal Revenue Code relies on these Clean Air Act requirements to determine who must pay certain taxes and penalties. *Compare Lubrizol Corp. v. EPA*, 562 F.2d 807, 809 (D.C. Cir. 1977), *and Ethyl Corp. v. Browner*, 67 F.3d 941, 942 (D.C. Cir. 1995), *with* 26 U.S.C. § 4101; 26 U.S.C. § 4081; 26 U.S.C. § 6719; 26 U.S.C. § 40A (tax and penalty provisions incorporating Clean Air Act definitions and requirements).

Notably, the example of the EPA Diesel Requirements was cited by all parties in the "individual mandate" litigation as a clear example of when the AIA would

not apply. In that case, the plaintiffs sought to enjoin the individual mandate, which is located in the Tax Code (Section 5000A) and administered by the IRS. *See NFIB*, 132 S. Ct. at 2582-83. The parties and the *amicus* appointed to assert the AIA's applicability disagreed sharply over the AIA's impact; before reaching the merits, the Supreme Court concluded the AIA did not apply (largely because Congress called the individual mandate a "penalty" instead of a "tax"). *Id.* at 2583-84. But *all* parties agreed that the AIA would *not* bar a lawsuit challenging the EPA Diesel Regulations that were enforced in part by a tax penalty.[10]

Like a challenge to those EPA regulations, the challenge to the Mandate is not a challenge to a "tax" provision barred by the AIA. The Greens and Hobby Lobby do not separately challenge the constitutionality of the "employer mandate" in section 4980H of the Tax Code, which requires compliance with the ACA generally, nor the constitutionality of the non-compliance penalty in section 4980D of the Tax

[10] *See* AIA Brief of Private Respondents at 13-14, *Dep't of Health & Human Servs. v. Florida*, No. 11-398 (U.S. Feb. 6, 2012) ("[W]hile the AIA therefore bars a pre-enforcement challenge to the IRS' imposition of the 'penalty' on a non-compliant diesel-fuel seller, no one could possibly think that the AIA also bars a pre-enforcement challenge to the validity of the diesel-fuel regulations themselves"); AIA Reply Brief of U.S. Dep't of Health & Human Servs. at 12 n.6, *Dep't of Health & Human Servs. v. Florida*, No. 11-398 (U.S. Feb. 27, 2012) ("A person who violates those regulations is subject not only to the $10,000 assessable penalty under 26 U.S.C. 6720A, but also to civil enforcement by EPA, including fines of up to $25,000 per day. . . . That regulatory requirement is thus freestanding in a way that Section 5000A(a) is not."); AIA *Amicus* Reply Brief at 21-22 n.16, *Dep't of Health & Human Servs. v. Florida*, No. 11-398 (U.S. Mar. 12, 2012) (distinguishing penalties for non-compliance with the EPA regulations).

Code. Rather, they seek only to enjoin the HRSA Guidelines to the extent they impose coverage requirements that violate their religious convictions. JA 14a, 31a-34a, 41-51a, Prayer for Relief. Enjoining those Guidelines will not "restrain" IRS tax assessment and collection any more than a challenge to the EPA's diesel fuel regulations "restrains" the IRS from assessing the regulation-based fuel tax.

Finally, consider the scenario in which a religious objector complied with the Mandate under duress. In that case, no IRS "tax" could ever be assessed. *See* 26 U.S.C. § 4980D (imposing "tax" for "*failure* of a group health plan" to meet plan requirements) (emphasis added)). The objector, however, could still bring a First Amendment challenge to the Mandate. *See May v. Baldwin*, 109 F.3d 557, 563 (9th Cir. 1997) (plaintiff does not forfeit "substantial burden" claim by complying under pressure, because "a 'use it or lose it' approach to religious exercise does not square with the Constitution"); *see also Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1317 (10th Cir. 2010) (recognizing substantial burden imposed by prison's refusal to provide halal diet even though prisoner had been eating non-halal food). In that circumstance, the AIA plainly would not bar the free exercise claim. The same result should follow for the Greens, who have steadfastly refused to comply with the Mandate despite the threatened penalties. Their suit is not brought "for the purpose of restraining the assessment or collection of any tax," 26 U.S.C.

§ 7421(a), but instead seeks to protect their religious freedom by enjoining a regulation that was not promulgated by the IRS and is not located in the Tax Code.

CONCLUSION

The Court should conclude (1) that the Greens, Hobby Lobby Stores, Inc., and Mardel, Inc. each have standing to challenge the Mandate under the Free Exercise Clause and RFRA, and (2) that the Anti-Injunction Act does not apply.

Respectfully submitted,

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Dated: April 22, 2013

CERTIFICATE OF SERVICE

I certify that on April 22, 2013, I caused the foregoing brief to be served electronically via the Court's electronic filing system on the following parties who are registered in the system:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the Court's order of April 1, 2013, which required it to be no longer than 30 pages in a 14-point font.

2. Additionally, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using **Microsoft Office Word 2007** in **Times New Roman 14-point font**.

Pursuant to this Court's guidelines on the use of the CM/ECF system, I hereby certify that:

1. all required privacy redactions have been made;

2. the 12 hard copies that are required to be filed are identical to the brief that is being electronically filed;

3. the ECF submission was scanned for viruses with the most recent version of Symantec Endpoint Protection (last updated April 22, 2013) and, according to the program, is free of viruses.

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