NO. 13-1944

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

MERSINO MANAGEMENT COMPANY, KAREN A. MERSINO, AND RODNEY A. MERSINO,
Plaintiffs-Appellants,

V.

KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SETH D. HARRIS, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF THE DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR; JACK LEW, IN HIS OFFICIAL CAPACITY AS SECRETARY OF TREASURY, UNITED STATES DEPARTMENT OF THE TREASURY,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE PAUL D. BORMAN
Civil Case No. 2:13-cv-11296

MOTION FOR INJUNCTION PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellants Mersino Management Company, Karen A. Mersino, and Rodney A. Mersino (hereinafter "Plaintiffs") state the following:

None of the Plaintiffs are subsidiaries or affiliates of a publicly owned corporation. There are no publicly owned corporations, party to this appeal, that have a financial interest in the outcome.

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INTRODUCTION

Pursuant to Fed. R. App. P. 8, Plaintiffs-Appellants move this court for the entry of an order granting an injunction pending appeal against Defendants-Appellees' enforcement of a portion of the preventive services coverage provision of the Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), and related regulations ("the mandate"). Several Courts have granted this relief.[1] Recently, the Tenth Circuit in *Hobby Lobby Stores v. Sebelius,* No. 12-6294, slip

[1] Out of the twenty six challenges to the mandate seeking preliminary injunctive relief outside of this case, *twenty two* are protected by the preliminary injunctive relief sought by Plaintiffs. *Hobby Lobby Stores v. Sebelius,* No. 12-6294, slip op. (10th Cir. June 27, 2013) (en banc); *Monaghan v. Sebelius*, No. 12-15488, slip op. (E.D. Mich. Dec. 30, 2012 & Mar. 14, 2013); *Legatus v. Sebelius,* No. 12-12061, slip op. (E.D. Mich. Oct. 31, 2012); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, order (8th Cir. Nov. 28, 2012); *Korte v. Sebelius*, No. 12-3841, slip op. (7th Cir. Dec. 28, 2012), *Grote Indus. LLC v. Sebelius*, No. 13-1077, slip op. (7th Cir. Jan. 30, 2013); *Annex Med. Inc. v. Sebelius*, No. 13-1119, slip op. (8th Cir. Feb. 1, 2013), *Am. Pulverizer Co. v. Dep't of Health & Human Servs.*, No. 12-3459, slip op. (W.D. Mo. Dec. 20, 2012); *Newland v. Sebelius*, No. 12-1123, slip op. (D. Colo. July 27, 2012); *Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-648, slip op. (M.D. Fla. June 25, 2013); *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, slip op. (D.D.C. Nov. 16, 2012); *Triune Health Group, Inc. v. U.S. Dep't of Health and Human Servs.*, No. 1:12-cv-06756 (N.D. Ill. Jan. 3, 2013); *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs.*, 12-92, slip op. (E.D. Mo. Dec. 31, 2012); *Sioux Chief Mfg. Co., Inc. v. Sebelius*, No. 13-36, order (W.D. Mo. Feb. 28, 2013); *Seneca Hardwood Lumber v. Sebelius*, No. 12-207, slip op. (W.D. Pa. Apr. 19, 2013); *Lindsay, Rappaport & Postel LLC v. Sebelius*, No. 13-1210, order (Mar. 20, 2013); *Gilardi v. Dep't of Health & Human Servs.*, No. 13-5069 , order (D.C. Cir. Mar. 29, 2013); *Bick Holding, Inc. v. Sebelius*, No. 13-462, order (E.D. Mo. Apr. 1, 2013); *Am. Manufacturing Co. v. Sebelius*, No. 13-295, slip op.(D. Minn. Apr. 2, 2013); *Hart Electric LLC v. Sebelius*, No. 13-2253, order (N.D. Ill. Apr. 18, 2013); *Tonn and Blank Construction v. Sebelius*, No. 12-325, order (N.D. Ill. Apr. 1, 2013); *Johnson Welded Products, Inc. v. Sebelius*, No. 13-cv-609, minute order (D.D.C. May 24, 2013.

op. (10th Cir. June 27, 2013) (en banc) reversed the district court's denial of injunctive relief—applying the same standard for injunctive relief as used here in the Sixth Circuit. *Id.* at *24-25. Without relief, Plaintiffs are being forced to pay for and provide contraceptives, including abortion-inducing drugs, in violation of Catholic religious beliefs and the ethical standards of their company in order to avoid crippling penalties imposed by the federal government. Contrary to the decision of the court below, which denied Plaintiffs' motion for a temporary restraining order and preliminary injunction on July 11, 2013, the Mandate substantially burdens Plaintiffs' religious exercise and violates their rights under the Religious Freedom Restoration Act ("RFRA").[2]

A party must ordinarily move first in the District Court for an injunction pending appeal. Fed. R. App. P. 8(a)(1). Yet, due to the District Court's decisions and because Plaintiffs are now being coerced into violating their religious beliefs to avoid substantial financial penalties, filing first in the District Court would be "impracticable." *Id.* at 8(a)(2)(A)(i). Since this Court's 2-1 decision in *Autocam v. Sebelius*, No. 12-2673, order (6th Cir. Dec. 28, 2012), four other Courts of Appeals

[2] Due to constraints on time and page limitations, Plaintiffs' motion is based on the RFRA claim alone, since full relief can be provided through that statute.

have echoed six times in favor of granting injunctive relief. *Gilardi*; *O'Brien*; *Annex*; *Korte*; *Grote, Hobby Lobby*.[3]

PROCEDURAL BACKGROUND

On March 22, 2013, Plaintiffs brought suit alleging that the mandate violated their rights under RFRA and the First Amendment and violates the Administrative Procedure Act. (R-1: Page ID # 1-45). On May 7, 2013, Plaintiffs filed a motion for a temporary restraining order and preliminary injunction. (R-8: Page ID #156-60; R-10: Page ID #161-91, 193-219). The District Court denied the motion for a temporary restraining order and motion for preliminary injunction on July 11, 2013. (R-29: Page ID #718-50). Plaintiffs filed their Notice of Appeal that same day. (R-30: Page ID #751-52).[4]

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[3] This Court also denied injunctive relief pending appeal in *Eden Foods, Inc. v. Sebelius*, No. 13-1677, order (6th Cir. June 28, 2013); however, that Court relied on the previous denial of injunctive relief pending appeal in Hobby Lobby—a decision that has been reversed.

[4] Plaintiffs filed for a temporary restraining order approximately *one month prior* to the Mandate affecting their plan. The District Court took over two months to render its decision on the temporary restraining order initiated on May 7, 2013. (R-8, Page ID #156-60; R-10, Page ID #161-219). The District Court then accused Plaintiffs of delay in their filings, claiming that Plaintiffs waited over two months between filing their complaint and moving for injunctive relief. Assuming the District Court follows the regular 12-month, Julian calendar, that claim that is clear error. The case law cited by the District Court to claim delay bars injunctive relief is *not* analogous. *See, e.g., Fund for Animals v. Frizzell*, 530 F.2d 982 (D.C. Cir. 1975) (challenge to regulations for sport hunting of migratory birds, but birds already migrated and plaintiffs "made no attempt to show irreparable harm"). The last initial matter, and perhaps the most bizarre, the District Court imputed the knowledge of Plaintiffs' counsel onto the Plaintiffs as a basis to deny injunctive

INJUNCTION PENDING APPEAL STANDARD

In deciding a motion for an injunction pending appeal pursuant to Fed. R. App. 8, this court uses the same sliding scale approach used to decide a motion for a preliminary injunction. *Michigan Coalition v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). "[L]ikelihood of reversal" is required. *Id. But the burden is lessened when the irreparable harm is great. Id.* This case is about religious freedom; irreparable harm is great. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

FACTUAL BACKGROUND

I. The Mandate, Its Exception, and Penalties. Facts surrounding the mandate are set forth in the District Court opinion. (R-29: Page ID # 718-50). In sum, most group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage must provide coverage for certain preventive services without cost-sharing. 42 U.S.C. § 300gg-13. These services have been defined by the Health Resources and Services Administration to include "[a]ll Food and Drug Administration approved contraceptive methods,

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relief. (R-29: Page ID#719, n.1). The District Court claimed that since Plaintiffs' counsel brought a similar claim the year prior with different plaintiffs, under a different insurance plan, with a different plan year—that the instant Plaintiffs should have brought their lawsuit earlier. Notably this would be prior to Plaintiffs seeking legal counsel or knowing that the Mandate applied to their insurance plan. Assuming that an attorney needs to be equipped with precognition to file suits for Plaintiffs prior to those plaintiffs retaining the attorney or prior to Plaintiffs themselves knowing that they should seek legal counsel does not bar injunctive relief- nor should it. Such findings are *illogical.*

sterilization procedures, and patient education counseling for all women with reproductive capacity.[5]

Not all employers are required to comply with the mandate. Grandfathered health plans, i.e. 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.[6] Even though the mandate does not apply to grandfathered health plans, many provisions of the ACA do. 75 Fed. Reg. 34,538, 34,542. Courts estimate that "191 million Americans" are in grandfathered plans to which the mandate does not apply. *See Newland, slip op. at *14*; *Tyndale, slip op.* at *32, 34.[7] Also exempt are "religious employers," defined as organizations whose "purpose" is to inculcate religious values, that "primarily" employ and serve co-religionists, and that qualify as

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[5] HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines/ (last visited May 22, 2013).

[6] *See* 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140; 75 Fed. Reg. 41,726; 41,731; *see also* 42 U.S.C. § 18011; 76 Fed. Reg. 46,621, 46,623 ("The requirements to cover recommended preventive services without any cost-sharing do not apply to grandfathered health plans.").

[7] The government calls the ability to maintain a grandfathered plan a "right." 42 U.S.C. § 18011; 75 Fed. Reg. 34,538, 34,540, 34,562, 34,566. Moreover, "[e]xisting plans may continue to offer coverage as grandfathered plans in the individual and group markets . . . *indefinitely*." Cong. Research Serv., RL 7-5700, Private Health Insurance Provisions in PPACA (May 4, 2012) (emphasis added). The government asserts that "most" plans from employers the size of Mersino Management companies will maintain grandfathered status (and therefore not be subject to the mandate). http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (last visited May 22, 2013).

churches or religious orders under the tax code.[8] In addition, employers with fewer than fifty full-time employees will not be fined by Defendants but only if they opt not to provide any health insurance for their employees, which may allow them to avoid the mandate as employers. 26 U.S.C. § 4980H(c)(2)(A).

Non-exempt employers that fail to comply with the mandate or fail to provide insurance at all face severe penalties. Non-exempt employers that fail to provide an employee health insurance plan will be exposed to annual fines of roughly $2,000 per full-time employee (not counting the first thirty employees).[9] Employers with non-compliant insurance plans are subject to an assessment of $100 per day, per employee, and potential enforcement suits.[10]

II. Plaintiffs. Karen A. Mersino and Rodney A. Mersino own and operate Mersino Management Company ("Mersino Management"). (R-10: Page ID #193-203, 204-13). Mersino Management owns and self-insures an employee benefits health plan for its entities. *Id.*; (R-29: Page ID #722). Karen A. Mersino and Rodney A. Mersino run Mersino Management and its companies in a manner that reflect their sincerely held religious beliefs, and seek to continue doing so.[11] *Id.* Karen A. Mersino and Rodney A. Mersino strive to adhere to business

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[8] 45 C.F.R. § 147.130(a)(iv)(B)(1)-(4).
[9] *See* 26 U.S.C. §§ 4980H(a), (c)(1).
[10] *See* 26 U.S.C. § 4980D(b); 29 U.S.C. §§ 1132, 1185d(a)(1).
[11] Plaintiff Mersino Management also directly funds and supports faith based charities. (R-28: Page ID #715-17).

practices that are in line with the teachings, mission, and values of their faith. *Id.* Mersino Management is a closely held "s" corporation and follows the mission to honor God in all its works. (R-1: Page ID #43-45). Plaintiffs sincerely hold beliefs that guide them to operate Mersino Management with moral business practices. *Id.* Plaintiffs' sincerely held religious beliefs as formed by the moral teachings of the Catholic Church. (R-10: Page ID #193-203, 204-13). Plaintiffs believe that God requires respect for the sanctity of human life as it bears His image and likeness, and in accordance with the teachings of the Catholic Church, that abortion and contraception prevents and ends human life. *Id.* Applying this religious faith and the teachings of the Catholic Church, Plaintiffs conclude that it is sinful and immoral to intentionally participate in, pay for, facilitate, or otherwise support abortifacient drugs or contraception through their self-funded health insurance coverage. *Id.* Therefore, Plaintiffs provide health insurance benefits to their employees that omit coverage of abortifacient drugs and contraception. *Id.* Without relief from the Mandate, Plaintiffs now incur draconian penalties for exercising their faith or must choose to violate their beliefs. *Id.*

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR RFRA CLAIM

A. Mandate imposes a substantial burden on religious exercise.

The purpose of RFRA is "to restore the compelling interested test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)" and "provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b). Under RFRA, the federal government may only substantially burden a person's exercise of religion if "it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b) (emphasis added); *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 430 (2006). To trigger RFRA's strict scrutiny, Plaintiffs must show that a federal policy or action substantially burdens their sincerely held religious beliefs. *Id.* A regulation that substantially burdens religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise effectively impracticable. *Thomas v. Review Bd.,* 450 U.S. 707, 718 (1981). Religious exercise becomes effectively impracticable, when the government exerts "***substantial pressure on an adherent to modify his behavior or violate his beliefs***." *Id.* (emphasis added).

Therefore a law substantially burdens religious exercise where one is required to choose between (1) doing something his faith forbids (or not doing something his faith requires), and (2) incurring financial penalties, legal

enforcement by the government, or even the loss of a government benefit. For example, in *Sherbert*, the Court held that a state's denial of unemployment benefits to a Seventh-Day Adventist, whose religious beliefs prohibited her from working on Saturday 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. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

274 U.S. at 404. Also, in *Yoder* the Court held that a state compulsory school-attendance law substantially burdened the religious exercise of Amish parents who refused to send their children to high school. The parents "were fined the sum of $5 each." 406 U.S. at 208. 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 direct and inescapable burden. Under the mandate, they must either provide coverage believed to be immoral or suffer severe penalties. This is an archetypal burden: to "make unlawful the religious practice itself." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). The mandate explicitly makes unlawful Plaintiff's religious practice of refraining from covering contraceptives. The mandates is a "fine imposed against appellant for" religious practice, *Sherbert*, 374 U.S. at 404, and requires Plaintiffs "to perform acts undeniably at odd with

fundamental tenets of their religious belief." *Yoder*, 406 U.S. at 218. Contrary to the District Court's decision, the mandate bears "direct responsibility" for placing "substantial pressure" on Plaintiffs to provide a health plan that violates their religious and ethical beliefs, rendering their religious exercise—refraining from immoral acts and operating Mersino Management in a manner consistent with deeply held religious beliefs—effectively impracticable.

Defendants expressly acknowledged the burden that the mandate imposes upon religious exercise. Recognizing that providing insurance coverage of contraceptive services conflicts with "the religious beliefs of certain religious employers," Defendants have granted exemptions for a class of employers, e.g. churches and their auxiliaries. 76 Fed. Reg. 46,621, 46,623; 77 Fed. Reg. 8,725. In addition, Defendants have provided a temporary enforcement safe harbor for any employers that fail to cover some or all recommended contraceptive services and that are sponsored by a non-profit organization that meets certain criteria.[12] During this temporary safe harbor, Defendants refrain from enforcing the mandate against qualifying entities, thereby providing such entities with the equivalent of the injunction Plaintiffs seek. Defendants are formulating the accommodation for

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[12] Dep't of Health & Human Servs., Guidance on the Temporary Enforcement Safe Harbor (2012), http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited May 22, 2013); *see also* http://www.ofr.gov/OFRUpload/OFRData/2013-15866_PI.pdf (last visited July 15, 2013) (temporary provisions for non-profits scheduled to become permanent).

"non-exempt, non-profit religious organizations' religious objections to covering contraceptive services [while] assuring that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage without cost sharing." 77 Fed. Reg. 16,501, 16,503. Defendants are also considering whether "for-profit religious employers with [religious] objections should be considered as well," *id.* at 16504, underscoring Defendants' acknowledgement that the mandate even burdens the religious exercise of some for-profit companies.

In denying the preliminary injunction, the District Court wrongly determined that the mandate does not place a substantial burden on the Plaintiffs. (R-29: Page ID # 736-749); *compare with Beckwith Elec. Co. v. Sebelius* (attached as Ex. 1). The District Court determined that any burden on Plaintiffs' religious exercise was too attenuated to be considered substantial. (R-29: Page ID # 746). This exact argument has been rejected time and time in again other courts,

> 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 related services.[13]

The instant action is not based upon objection to employees' life choice, or to employees' use of their own money.[14] Rather, this litigation stems from

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[13] *Korte, slip op. at *5*; *see supra* note 1.

[14] Unlike in *Autocam*, where the court made issue that Plaintiffs offered a flex-spending account, here Plaintiffs do not offer such account. *See Monaghan*, slip

Plaintiffs' objection, based on their faith, to providing insurance coverage for drugs and information, because they believe providing such coverage is immoral. (R-10: Page ID #193-213). This religious faith does not merely object to Plaintiffs' own use of such items, but also prohibits them from self-insuring coverage for such items. *Id.* ***Neither a corporate veil nor other legal technicalities give Plaintiffs moral absolution to providing coverage for items that they have religious beliefs against covering.*** This realization underscores the District Court's fundamental error: conceiving of the substantial burden analysis as an exercise in moral theology. The analysis does not measure moral beliefs, or weigh how morally "attenuated" one's theological objection is in relation to other immoral activity. It analyzes a "substantial burden," not "substantial beliefs."

The Supreme Court explicitly rejected the kind of moral theologizing that the District Court employed here. In *Thomas v. Review Board*, a plaintiff who objected to war was denied unemployment benefits after refusing to work in an armament factory. 450 U.S. 707, 714, 716 (1981). The government argued that working in a tank factory was not a cognizable burden on the plaintiff's beliefs because it was "sufficiently insulated" from his objection to war. *Id.* at 715. The

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op. at *12. Plaintiffs operate their business for the purpose of honoring God. (R-1: Ex. 1, Page ID #43-45). Plaintiffs are self-insured and run a closely held "s" corporation with tax through taxation. (R-10: Page ID #161-219; R-20: Page ID #409-66; R-23: Page ID #479-85; R-26: Page ID #498-504). Additionally, as in *Monaghan*, Plaintiffs fund Catholic causes. *Id.*; (R-28: Page ID #715-17).

Court rejected not only this conclusion, but the underlying premise that it is the court's business to draw moral lines. "*Thomas* drew a line, and it is not for us to say that the line he drew was an unreasonable one. Court should not undertake to dissect religious beliefs." *Id.* Likewise here, the notion that direct penalties and lawsuits are somehow not "substantial" burdens on an explicit religious belief (objecting to certain insurance coverage), because the court deems that activity morally insulated or attenuated from use of contraceptives, is plain legal error.

The District Court's error is not limited to for-profit plaintiffs. Under its rationale, churches themselves as well as Catholic hospitals, religious non-profit groups and others, would not even be able to bring RFRA claims against the mandate. Its rationale also applies beyond contraception and abortifacients, allowing the government to force even churches to include things such as surgical abortions in their health insurance coverage on the theory that insurance is "too attenuated" to merit moral offense. The mandate requires that Plaintiffs pay for and provide a health plan with contraception and abortifacients to employees. Plaintiffs' religious beliefs forbid such coverage—not just Plaintiffs' own use of the items but also covering these items. (R-10: Ex. 1, Page ID #193-213). The burden is *directly imposed on Plaintiffs* by the mandate, and not alleviated by an employee's decision whether to make use of these drugs or services. The burden is not alleviated by the corporate form when the mandate is being directly imposed

on Mersino Management and forcing action by Karen A. Mersino and Rodney A. Mersino.[15] Indeed, forcing Plaintiffs to pay for and provide a health plan that includes contraception is tantamount to forcing Plaintiffs to provide employees with vouchers for contraception paid for entirely by Plaintiffs themselves. This is exactly the type of direct burden RFRA was enacted to prevent.[16]

Several courts have also rejected the district court's inclination to find an insufficient burden on Plaintiffs' religious beliefs arising out of the distinction between Karen A. Mersino and Rodney A. Mersino as an individual and their life's work (Mersino Management).[17] The mandate imposes the same substantial burden on Mersino Management as it does on their closely held owners. *Korte*; *Monaghan*. The mandate requires Karen A. Mersino and Rodney A. Mersino to manage their company in a way that violates their religious faith. All penalties assessed against Mersino Management have a direct financial and practical impact

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[15] Defendants' argument that the corporation form attenuates Plaintiffs' actions nothing more than a red herring. A sole proprietor who chooses not to use the corporate form also must follow the mandate when providing insurance for his/her employees. A sole proprietor's actions under the Mandate are identical to a corporate owner. There is no "layer" of moral protection. The teachings of the Catholic Church contain no caveat that a person who acts in the name of a corporate entity receives a free pass to sin as she chooses with moral absolution.

[16] As noted in *Tyndale*, "Because it is the *coverage*, not just the use, of contraceptives at issue to which plaintiffs object, it is irrelevant that the use of 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." *Tyndale*, slip op. at *13 (citing *Thomas*, 450 U.S. at 718)(emphasis added).

[17] *See supra* note 1.

on Karen A. Mersino and Rodney A. Mersino. The mandate on Mersino Management applies unquestionably "substantial pressure" on Karen A. Mersino and Rodney A. Mersino to violate their beliefs. As in the many injunctions issued against the mandate at this point, multiple other courts have recognized that an owner of a company can bring religious exercise claims, because he/she is impacted by government burden on his/her business without a moral distinction between themselves and their companies. *See, e.g.*, *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 111-20 & n.9 (9th Cir. 2009); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n. 15 (9th Cir. 1988); *McClure v. Sports and Health Club, Inc.*, 370 N.W. 2d 844, 850 (Minn. 1985); *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 200 (2d Cir. 2012); *Tyndale House Publishers, Inc. v. Sebelius*, slip op. at *5-9.[18]

Just because Plaintiffs have entered the commercial marketplace, they have not abandoned their constitutional rights to the free exercise of religion. In *Lee*, for example, the Supreme Court held that the requirement to pay social security taxes sufficiently burdened a for-profit Amish employer's religious exercise. Noting courts "are not arbiters of scriptural interpretation," the Court held that it is beyond

[18] Corporations have also brought free exercise cases. *See*, *Church of the Lukumi Babalu Aye, **Inc.** v. City of Hialeah*, 508 U.S. 520, 525 (1993) (involving "not-for-profit corporation organized under Florida law"); *Okleveuha Native Am. Church of Hawaii, **Inc.** v. Holder*, 676 F.3d 829 (9th Cir. 2012); *Mirdrash Sephardi, **Inc.** v. Town of Surfside*, 367 F. 3d 1214 (11th Cir. 2004).

"the judicial function and judicial competence" to determine the proper interpretation of religious faith or belief. *U.S. v. Lee*, 455 U.S. 252 at 257 (1982) (quoting *Thomas*, 450 U.S. at 716). The Court therefore accepted Lee's own interpretation of his own faith and held that "[b]ecause the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights." *Id.* Although the *Lee* Court ultimately held that the tax survived the scrutiny it applied,[19] it did not deny—as the District Court did here—the existence of a substantial burden. *Id.*

The fact that Mersino Management is a distinct legal entity from Karen A. Mersino and Rodney A. Mersino is also not relevant.[20] The violation at issue here is moral and religious, not strictly legal. Karen A. Mersino and Rodney A. Mersino is morally the same actor vis-à-vis the mandate, even if for some purposes

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[19] *Lee* did not apply the strict scrutiny now required. *Lee*, instead, was a precursor to *Smith*'s lower level of scrutiny that RFRA later rejected. *See Employment Division v. Smith*, 494 U.S. 872 (1990). RFRA itself, when referring to the compelling interest test, cites *Sherbert* and *Yoder* but notably omits *Lee*. 42 U.S.C. § 2000bb. The point for present purposes is that whatever level of scrutiny applied in a particular case, *Lee* teaches that it cannot be sidestepped on a theory that the burden is not substantial. Under RFRA, full strict scrutiny must be imposed.

[20] The Supreme Court has expressly held that "First Amendment protection extends to corporations," and a right "does not lose First Amendment protection simply because its source is a corporation." *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 899 (2010); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978); *see also Monell v. Dept. of Social Services*, 436 U.S. 658, 687 (1978) ("corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis").

the company is legally distinct. Mersino Management does not think, act, and establish business values and practices, except through Karen A. Mersino and Rodney A. Mersino its human agency. The human agency is moral: it defines the purpose of the company, gives it character, hires employees, and complies with laws. The mandate forces Plaintiffs to violate their beliefs as they must run Mersino Management pursuant to the tenets of their Catholic faith. The mandate prohibits Plaintiffs from doing so.

B. RFRA imposes strict scrutiny.

The Defendants must demonstrate a compelling interest and the use of the least restrictive means, even at the preliminary injunction stage. *Gonzales*, 546 U.S. at 428-30; *Newland,* slip op. at *11. Strict scrutiny is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). There is "no actual problem in need of solving," and forcing Plaintiffs to violate their religious beliefs fails to offer any "actually necessary solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738-39 (2011). Defendants offer an ambiguous interest that *at best* would serve the interest of *marginally* increasing access to contraceptives. What radically undermines any claim that the mandate is needed to address a compelling harm to its asserted interests: *the tens of millions of employees and participants* for whom Defendants have voluntarily omitted. *Newland,* slip op. at *23; *Tyndale*, slip op. at *17. Defendants' interests

cannot be compelling against these Plaintiffs when, by the government's own choice in ***not*** applying this mandate to grandfathered plans, millions fall outside of the mandate.

Notably, the ACA does impose multiple requirements on grandfathered health plans, but the government has decided that the mandate is not of a high enough order to be imposed. The mandate, listed at § 2713 of ACA, is conspicuously omitted from the provisions that grandfathered plans must observe: §§ 2704, 2708, 2711, 2712, 2714, 2715, and 2718. 75 Fed. Reg. 34,538, 34,542. These include such requirements as dependent coverage until age 26, and restrictions on preexisting condition exclusions, and annual or lifetime limits. Thus Congress deemed that many interests were of the "highest order" to impose on 2/3 of the nation covered in grandfathered plans, but not this mandate. Congress deemed the mandate to be of a lower order, which fails the compelling interest standard. Defendants have voluntarily granted the equivalent of a preliminary injunction to all non-profit companies satisfying the one-year non-enforcement "safe harbor," and state that a permanent exemption for non-profit companies is in the rulemaking stage. 77 Fed. Register 8725 (Feb. 15, 2012); (http://www.hhs.gov/news/press/2013pres/02/20130201a.html) (*last visited* May 6, 2013). Furthermore, Defendants have agreed not to enforce the mandate against at least seven for-profit companies. (R-10: Page ID #161-91). As in *Gonzales*, where

exclusions applied to "hundreds of thousands" (here, tens of millions), RFRA requires "a similar exception" for Plaintiffs. *Id.* at 433.

The mandate is not the least restrictive means of furthering Defendants' interests. In *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), the Court required the government to use alternatives, even when alternatives are more costly or less directly effective. Defendants could further their interests without coercing Plaintiffs to violate their religious exercise. The government could subsidize contraception for employees at exempt entities; this in and of itself shows the mandate fails RFRA's least restrictive means elements.[21] *Gonzales*, 546 U.S. at 428-30. Defendants admit "preventive services" are readily available at community health centers, public clinics, and hospitals,[22] and *already* subsidize contraception.[23] Of the options, Defendants chose perhaps the *most burdensome*

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[21] Also, the government could offer tax deductions, reimburse citizens who pay to use contraceptives, provide incentives for pharmaceutical companies to provide such products free of charge, or offer tax credits to those companies who comply with the Mandate while not punishing those who do not based upon religious beliefs. As in *Riley*, Defendants could add to the already existing HHS website or the website for the exchanges to provide for the availability of free contraceptives.

[22] (http://www.hhs.gov/news/press/2012pres/01/20120120a.html) (*last visited* May 23, 2013).

[23] Family Planning grants in 42 U.S.C. § 300, et seq.; the Teenage Pregnancy Prevention Program, Public Law 112-74 (125 Stat 786, 1080); the Healthy Start Program, 42 U.S.C. § 254c-8; the Maternal, Infant, and Early Childhood Home Visiting Program, 42 U.S.C. § 711; Maternal and Child Health Block Grants, 42 U.S.C. § 703; 42 U.S.C. § 247b-12; Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq.; the Indian Health Service, 25 U.S.C. § 13, 42 U.S.C. § 2001(a), & 25 U.S.C. § 1601, et seq.; Health center grants, 42 U.S.C. § 254b(e),

for non-exempt employers with religious objections. If women receive free contraception from a different source, there is no evidence these women would face grave or paramount harms. *Gonzales*, 546 U.S. at 435-37. There are less restrictive ways for the Defendants to achieve their stated goals.

II. PLAINTIFFS SATISFY THE REMAINING INJUNCTION FACTORS

Because Plaintiffs have shown a likelihood of success on the merits, "the balance of harms favors granting preliminary injunctive relief. The public is not harmed by preliminarily enjoining the enforcement of a statute violating constitutional rights. *Monaghan*, slip. op. at *19; *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *Legatus,* slip op. at *28. Defendants are not harmed by the injunction. *Seneca Hardwood Lumber*, slip op. at *22.[24] Plaintiffs are irreparably harmed absent an injunction. The mandate deprives Plaintiffs of their fundamental rights; "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

(g), (h), & (i); the NIH Clinical Center, 42 U.S.C. § 248; the Personal Responsibility Education Program, 42 U.S.C. § 713; and the Unaccompanied Alien Children Program, 8 U.S.C. § 1232(b)(1).

[24] "[D]efendants cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in several similar cases. In light of the exemptions granted [exempting 2/3 of the nation through its exemptions and thousands others through the non-enforcement against non-profit companies], and defendants' position with respect to injunctive relief in other cases, this factor weighs strongly in favor of granting the requested relief."

CONCLUSION

Plaintiffs request that this Court grant this motion and enter an injunction pending appeal from the substantive requirement imposed in 42 U.S.C. § 300gg-13, as well as any penalties and fines for non-compliance.

Respectfully submitted this 16th day of July, 2013.

Attorney for Plaintiffs-Appellants:

THOMAS MORE LAW CENTER

By: /s/ Erin Mersino
Erin Mersino, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2013 I served a true and correct copy of the foregoing by electronic mail and U.S. Mail on the following:

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ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record No.	Page ID# Range	Description	
R-1	1-42	Complaint	
	43-45	Exhibit 1	Mersino Management Company – Core Values
R-8	156-60	Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction filed May 7, 2013	
R-10	161-91	Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction filed May 9, 2013	
	193-203	Exhibit 1	Declaration of Karen A. Mersino
	204-13	Exhibit 2	Declaration of Rodney A. Mersino
	214-16	Exhibit 3	Declaration of Jeffrey Lewis
	217-19	Exhibit 4	Declaration of Todd Stacy
R-13	224-26	Joint Notice Regarding Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction	
R-16	231-369	Defendants' Response Brief	
R-17	370-96	Amicus Brief submitted by ACLU	
R-19	399-408	Plaintiffs' Reply Brief	

R-20	409-11	Supplementary Exhibits in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction	
	413-25	Exhibit 1	Affidavit of Amy L. Glenn
	426-28	Exhibit 2	Affidavit Rodney A. Mersino, Jr.
	429-66	Exhibit 3	Articles of Incorporation for Mersino Management Companies
R-23	479-81	Supplementary Exhibit in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction	
	482-85	Exhibit 1	Affidavit of Amy L. Glenn
R-24	486-95	Plaintiffs' Response to Amicus Brief Submitted by ACLU	
R-26	498-99	Plaintiffs' Exhibit	
	500-04	Exhibit 1	Declaration of Rodney A. Mersino
R-28	507-09	Plaintiffs' Notice of Supplemental Authority	
	511-676	Exhibit 1	*Hobby Lobby v. Sebelius*, No. 12-6294 (10th Cir. June 27, 2013).

	677-714	Exhibit 2	*Beckwith Electric Co., Inc. v. Sebelius*, No. 8:13-cv-648 (M. D. Fla. June 25, 2013).
	715-17	Exhibit 3	Declaration of Karen A. Mersino
R-29	718-50	Opinion and Order Denying TRO and Preliminary Injunction	
R-30	751-52	Notice of Appeal	

INDEX OF EXHIBITS

Exhibit 1 *Beckwith Electric Co., Inc. v. Sebelius*, No. 8:13-cv-648 (M. D. Fla. June 25, 2013)

EXHIBIT 1

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

BECKWITH ELECTRIC CO., INC., and
THOMAS BECKWITH,

Plaintiffs,

vs. CASE NO. 8:13-cv-0648-T-17MAP

KATHLEEN SEBELIUS, Secretary of the
United States Department of Health and Human
Services; UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN SERVICES; SETH
D. HARRIS, Acting Secretary of the United States
Department of Labor; UNITED STATES
DEPARTMENT OF LABOR; JACK LEW,
Secretary of the United States Department of the
Treasury; and UNITED STATES DEPARTMENT
OF THE TREASURY

Defendants.

_______________________________________/

ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, Beckwith Electric Co., Inc. ("Beckwith Electric"), and Thomas R. Beckwith ("Beckwith"), seek a preliminary injunction to enjoin the enforcement of a regulatory mandate that compels health care coverage that would include provision of any FDA-defined emergency contraceptive and other named alternatives. As grounds for relief, plaintiffs rely on the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et seq.*, and the Free Exercise Clause of the First Amendment. Having considered the positions of the parties and the *amici curiae*, and having heard oral argument on June 17, 2013, the Court finds that plaintiffs satisfied their

burden at this stage and preliminary injunctive relief is appropriate. For the reasons stated below, the motion is **GRANTED**.

BACKGROUND

Beckwith maintains that his ancestors arrived on the shores of America in 1626 to escape religious persecution in England. In 1967, Beckwith's mother and father started a family business in their garage in Illinois with financing provided by Beckwith's grandfather. From that beginning, the small, family-run start-up grew into what is now Beckwith Electric, a Florida corporation that employees 168 full-time employees to engineer, manufacture, and market micro-processor-based technology for the implementation and utilization of generators, transformers, and power lines. Today, Beckwith is the Chief Executive Officer and 92% shareholder of Beckwith Electric, which, although a secular, for-profit corporation, is operated according to and consistent with Beckwith's personal religious beliefs.

In both his personal and business endeavors, Beckwith "strive[s] to follow the teachings and values of the Southern Baptist" faith. (Dkt. 10). Beckwith believes that "a company managed under the living God's direction and by God's principles cannot engage in or promote activities that are contrary to such direction, principles, or moral compass." *Id.* at ¶ 13. One such belief "prohibit[s] [him] from providing, participating in, paying for, training others to engage in, or otherwise supporting emergency contraception, abortion, abortifacients, and any drugs, devices, and services that are capable of killing innocent human life." *Id.* at ¶¶ 11-12. Consequently, according to Beckwith's religious beliefs, he asserts that he cannot direct the company, of which he is the chief executive and principal shareholder, to allocate its resources to providing emergency contraceptives or abortion-causing drugs or devices. *Id.*

Beckwith Electric further inculcates these religious beliefs in its corporate environment. Beckwith personally arranges for corporate chaplains to visit Beckwith Electric on a weekly basis to assist employees with "difficult issues of bereavement, marriage, children, finances, addictions, elder care, and other types of crises." *Id.* at ¶ 17. Beckwith Electric also donates to various charities, both secular and religious, including New Life Solutions' Family Ministries, which is a "Christ-centered ministry offering hope, help, and healing for women, teens and families by promoting healthy lifestyle choices and relationships." *Id.* at ¶ 20-22.

As a secular, for-profit corporation employing 168 full-time employees, Beckwith Electric is required to provide insurance coverage to his employees pursuant to regulations promulgated pursuant to the Patient Protection and Affordable Care Act ("ACA"), Pub. L. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Act, Pub. L. 111-152, 124 Stat. 1029. Through its insurance carrier, Humana, Beckwith provides insurance coverage to its employees. Beckwith was under the mistaken belief that the Humana group policy provided to Beckwith Electric's employees did not provide coverage for FDA-defined emergency contraceptives. *Id.* at ¶¶ 23-24. As it turns out, a Humana representative incorrectly informed Beckwith that his plan did not provide these services when in fact it may.[1] *Id.* Beckwith is now faced with the decision to either provide an insurance plan that meets the "minimum essential coverage" requirements, namely the FDA-defined emergency contraceptives, pursuant to the mandate, or face significant fines for noncompliance. Because Beckwith Electric's plan year anniversary is June 1, 2013, the date by which compliance was mandated has since come and gone. *Id.* at at ¶¶ 47-49.

[1] It is not entirely clear whether the Humana policy covers some (but not all) of the FDA-defined emergency contraceptives to which plaintiffs object. *See* (Dkt. 38). That will be borne out by a more complete record as the case develops. What is clear is that as of June 19, 2013, the group policy does not fully comply with the contraceptive mandate. *See id.*

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As a result, plaintiffs instituted this action on March 12, 2013. (Dkt. 1). By mandating insurance coverage for FDA-approved emergency contraceptives in contravention of their sincerely held religious beliefs, plaintiffs allege the defendants are violating: their First Amendment free exercise rights (Counts I-III), the Establishment Clause of the First Amendment (Count IV), the First Amendment freedom of speech (Count V), their First Amendment right of expressive association (Count VI), their religious freedom rights under the RFRA (Count VIII), and the Administrative Procedure Act ("APA") (Counts IX-XII). Plaintiffs ask this Court to declare the mandate unconstitutional, to preliminarily and permanently enjoin its enforcement against plaintiffs, and to award costs, including attorneys' fees, for bringing this action.

Currently before the Court is plaintiffs' motion for preliminary injunction filed on May 13, 2013, which is the same date plaintiffs effected service of process on the named defendants. (Dkts. 9, 10).[2] The government, of course, opposes plaintiffs' request for injunctive relief. (Dkt. 24).

In addition to the positions presented by the parties, the Court has had the benefit of several *amici curiae*.[3] With leave of this Court, the State of Florida, through the Office of the Attorney General, filed a brief supporting plaintiffs' request for injunctive relief. (Dkt. 36). Also supporting Plaintiffs' position, a collective *amici* brief was filed by the Association of Gospel Rescue Missions, Prison Fellowship Ministries, National Association of Evangelicals,

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[2] Given the June 1, 2013, "trigger date" for the new insurance policy, plaintiffs filed an Emergency Motion for Expedited Consideration of Preliminary Injunction Motion and/or Motion to Withdraw Oral Argument. (Dkt. 25). The Court denied that request on the grounds that plaintiff should have brought the June 1, 2013 deadline to the Court's attention earlier than May 28, 2013, four days before the deadline. *See* (Dkt. 31). The plaintiffs notified the Court, after the hearing, that Beckwith Electric does not have an insurance policy that complies with the contraceptive mandate. (Dkt. 38) ("Plaintiffs' current insurance policy expressly excludes . . . Plan B, Ella, or any alternative . . . and copper IUDs.").

[3] The Court thanks the *amici* for their helpful and informative submissions.

Association of Christian Schools International, Ethics & Religious Liberty Commission of the Southern Baptist Convention, Institutional Religious Freedom Alliance, the C12 Group, and Christian Legal Society (collectively, "Religious Supporters"). (Dkt. 33). The American Civil Liberties Union and the American Civil Liberties Union of Florida (collectively, "ACLU") filed a collective *amici* brief in opposition to plaintiffs' request for injunctive relief. (Dkt. 23).

ANALYSIS

Religious tolerance serves as an important foundational tenet in the governance of any society. A commonly misunderstood term, to "tolerate" does not mean with which to agree; it does not mean to understand; and, it most certainly does not mean to adopt a belief as one's own. By definition, to tolerate means "to recognize and respect (others' beliefs, practices, etc.) without sharing them." *Webster's New World Dictionary of the American Language* (2d College Ed. 1980). The notion of religious tolerance has echoed the halls of our country's history for centuries. *See* Patrick Henry, *Religious Tolerance*, Stokes 1:311-12 (1766) ("A general toleration of Religion appears to me the best means of peopling our country, and enabling our people to those necessarys [sic] among themselves, the purchase of which from abroad has so nearly ruined a colony, enjoying, from nature and time, the means of becoming the most prosperous on the continent."); Samuel Adams, *The Rights of the Colonists*, Writings 2:352-53 (Nov. 20, 1772) ("As neither reason requires, nor religeon [sic] permits the contrary, every Man living in or out of a state of civil society, has a right peaceably and quietly to worship God according to the dictates of his conscience . . . [i]n regard to religeon [sic], mutual tolleration [sic] in the different professions thereof, is what all good and candid minds in all ages have ever practiced . . ."). This case tests whether the challenged federal laws are "true to the spirit of practical accommodation that has made the United States a Nation of unparalleled pluralism and

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religious tolerance." *See Salazar v. Buono*, 559 U.S. 700, 130 S. Ct. 1803, 1821 (2010) (Alito, J., concurring in part).

The challenged statutory and regulatory provisions deal with the federally mandated provision of insurance coverage for, "with respect to women, such additional preventative care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a)(4). The Department of Health and Human Services ("HHS") tasked the Institute of Medicine ("IOM") to determine the appropriate guidelines for the provision of "preventative care" for women. *See* Institute of Medicine, Clinical Preventative Services for Women: Closing the Gaps 2 (2011). As a result, targeted insurance plans must now include all FDA-approved emergency contraceptives.

There are exemptions to the ACA and the HHS mandate. First, any plan that is "grandfathered" need not comply. Among other things, in order to qualify for "grandfathered" status, a plan must not have made any changes since March 23, 2010. Second, there is an exemption for non-profit companies that qualify as "religious employers." In response to concerns from various religious organizations the HHS proposed amendments to the regulations regarding the contraceptive mandate, and the advanced notice to the proposed rules states that the religious exemption would be broadened and there would be a "safe-harbor" for certain non-profit employers with religious exemptions. This exemption requires that employers have the following characteristics: (1) the inculcation of religious values is the purpose of the organization; (2) the organization primarily employs individuals who share the religious tenets of the organization; (3) the organization serves persons who share the religious tenets of the

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organization; and (4) the organization is a nonprofit organization. *See* 45 C.F.R. § 147.130(a)(1)(iv)(B).

Although there are several exemptions to the ACA and the HHS mandate, these plaintiffs do not qualify for any of them. The issue here is whether a non-exempt, secular, for-profit corporation has to comply with the ACA and contraceptive mandate in the face of an express religious belief that opposes the provision of contraceptive coverage.

The answer is entirely dependent on whether plaintiffs have a cognizable claim under the Religious Freedom of Restoration Act of 1993 ("RFRA").[4] In response to *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the case in which the Supreme Court upheld a generally applicable law that barred the receipt of unemployment compensation if a person was terminated for drug use (at issue was the sacramental use of peyote), Congress enacted the RFRA. According to the congressional findings enumerated in RFRA, "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment" and the Supreme Court in *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. 2000bb(a)(1). "Congress recognized that 'laws neutral toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise,' and legislated 'the compelling interest test' as the means for the courts to 'strike sensible balances between religious liberty and competing prior governmental interests.'" *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). Congress, in effect, adopted the "compelling interest test" as set forth in *Sherbert v. Verner*, 374 U.S. 398

[4] Plaintiffs do not present any argument to advance their claims under the First Amendment and the APA beyond those covered by the RFRA. It is of no consequence, however, because the remaining claims (if even cognizable) present a much more exacting standard than that under the RFRA.

(1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Id.* at 431. Although the Supreme Court struck down the RFRA as to state laws, *see City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), it at least implicitly recognized its constitutionality with respect to federal laws in *O Centro*.

Plaintiffs seek now seek preliminary injunctive relief under the RFRA and the First Amendment. The Court must, therefore, determine whether the plaintiffs can satisfy the requisite elements for a preliminary injunction: (1) likelihood of success on the merits, (2) irreparable harm, (3) the balance of the hardships, and (4) the public interest. *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1246-47 (11th Cir. 2002). Before reaching the merits, the Court must determine if there is a cognizable case and controversy under Article III in order to establish the standing of each plaintiff before this Court. *Thomas v. Howze*, 348 Fed. App'x 474, 476 (11th Cir. 2009).

I. Plaintiffs have standing to bring the claim.

As a threshold matter, the Court has to determine whether a secular, for-profit corporation has standing to challenge the mandate to provide FDA-defined emergency contraceptives. "The three prerequisites for standing are that: (1) the plaintiff ha[s] suffered an 'injury in fact' – an invasion of a judicially cognizable interest, which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there be a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) it be likely, not merely speculative, that the injury will be redressed by a favorable decision." *31 Foster Children v. Bush*, 329 F.3d 1255, 1263 (11th Cir. 2003) (quoting *Bennett v. Spear*, 520 U.S. 154, 162 (1997)). Neither the Supreme Court nor the Eleventh Circuit has had occasion to decide whether a secular, for-profit

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corporation has standing to assert a claim for free exercise of religion under either the First Amendment or the RFRA.

Although several district and circuit courts outside of the Eleventh Circuit have considered the issue, they have not taken a consistent analytical approach. First, some courts simply avoid the standing issue altogether.[5] Second, other courts hold (expressly or impliedly) that a corporate plaintiff has standing to challenge the contraceptive mandate but further hold that secular, for-profit corporations do not enjoy the right to exercise religion under either the First Amendment or the RFRA.[6] In other words, a corporation has a sufficient injury to establish constitutional standing even though that same corporation does not have the right to exercise religion as a matter of substance. As discussed later, that approach, which the government seems to be taking here, fails to appreciate the extent of the plaintiffs' alleged injury. Third, there are courts that hold that corporations have standing to assert the shareholder's free exercise rights under a pass-through instrumentality theory.[7] That approach focuses on the free exercise rights

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[5] *See Annex Med., Inc. v. Sebelius,* 2013 WL 1276025 (8th Cir. 2013) (granting injunction pending appeal without discussing standing); *Autocam Corp. v. Sebelius,* No. 12-2673 (6th Cir. 2012) (denying injunction pending appeal without discussing standing).

[6] *See Conestoga Wood Specialties Corp. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 140110, at *7 (E.D. Pa. Jan. 11, 2013) (holding that a corporation has standing, but "that the nature, history and purpose of the Free Exercise Clause demonstrate that it is one of the 'purely personal' rights referred to in *Bellotti* [435 U.S. 765, 778 (1978)], and as such, is unavailable to a secular, for-profit corporation."); *see generally Grote v. Sebelius*, 708 F.3d 850, 856 (7th Cir. 2013) (Rovner, J., dissenting) ("I begin my analysis with a threshold point: on the record before us, it is only the Grotes, and not the corporate entities, which can claim to have the right to exercise religious freedoms.").

[7] *See Geneva College v. Sebelius*, 2013 WL 838238, at *6 (W.D. Pa. March 6, 2013) ("At this stage, the court finds that SHLC pleaded sufficient facts for the court to find that it has standing to assert its owners' RFRA and First Amendment claims."); *Monaghan v. Sebelius*, __ F. Supp. 2d __, 2013 WL 1014026, at *6 (E.D. Mich. Mar. 14, 2013) (finding that the corporate entity is the instrument through and by which the individual owner expresses his religious beliefs);

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of the individual without any consideration of whether the corporation has any rights independent of the individual to exercise religion. Finally, another court, citing the Supreme Court's recent decision in *Citizens United*, held that an individual's decision to operate its business using a particular corporate form is simply "not dispositive," without elaborating any further.[8] By its citation to *Citizens United*, it is reasonable to presume that the court found no reason to distinguish between a corporation's right to exercise religion and the corporation's right to engage in political speech, as both are contained in the First Amendment. However, no court has expressly held that a secular, for-profit corporation can assert its own right to exercise religion.

Ostensibly retreating from earlier cases in which the government challenged the standing of the corporate plaintiff,[9] the government in this case concedes that the corporate plaintiff has standing but argues that the individual plaintiff does not.[10] Conceding that the corporate plaintiff has standing, although seemingly innocuous, presents a curious inconsistency. That is, to say that a corporation has standing to assert a claim challenging the contraceptive mandate, on the

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Legatus v. Sebelius, 901 F. Supp. 2d 980, 988 (E.D. Mich. 2012) (same); *Tyndale House Pub., Inc. v. Sebelius*, 904 F. Supp. 2d 106, 114-20 (D.D.C. Nov. 16, 2012) (same).

[8] *See Korte v. Sebelius*, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012).

[9] "The parties initially dispute whether Tyndale has standing to raise RFRA and free exercise claims. According to the defendants, [the corporation] is unable to assert such claims on its own behalf because it is a 'for-profit corporation [that] does not exercise religion' within the meaning of the RFRA and the First Amendment." *Tyndale House*, 904 F. Supp. 2d at 114.

[10] During the hearing on Plaintiffs' Motion for Preliminary Injunction, held on June 17, 2013, the government conceded that Beckwith Electric has standing to bring this claim, but maintained that Mr. Beckwith did not. During oral argument in *Grote v. Sebelius*, before a panel of judges in the Seventh Circuit, the government's lawyer argued that "the individual plaintiffs lack standing . . . but the corporate plaintiff has standing." *See* Audio File of Oral Argument, May 22, 2013, available at http://media.ca7.uscourts.gov/sound/external/lj.13-1077.13-1077_05_22_ 2013.mp3.

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one hand, and then, on the other hand, argue later that it is not "substantially burdened" by the contraceptive mandate because it does not have the right to exercise religion seems to not fully appreciate an important component of the pending claims—that compliance with the contraceptive mandate is violative of its religious beliefs. *See Conestoga*, 2013 WL 140110, at *7; *Grote*, 708 F.3d at 856 (Rovner, J., dissenting). Not convinced that the standing analysis is wholly distinct from the question of whether a corporate plaintiff can exercise religion (either directly or indirectly through its majority shareholder), the Court must examine the constitutional and prudential limitations, if any, on this Court's subject matter jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *ACLU of Florida, Inc. v. Miami-Dade County School Board*, 557 F.3d 1177, 1190 (11th Cir. 2009) ("Because standing is a necessary component of our jurisdiction to hear cases and controversies under Article III of the Constitution, we must address it first.") (internal citations omitted).

It is prudent to begin by defining the injury. One could characterize the injury to the corporate plaintiff as simply being subject to the regulations. *See, e.g., Conestoga*, 2013 WL 140110, at *5 (holding that the plaintiffs had Article III standing because the corporate plaintiff "would be subject to the regulations eventually"). "When the suit is one challenging the legality of government action or inaction . . . [and] the plaintiff is himself an object of the action . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-62. Of course, Beckwith Electric is subject to the contraceptive mandate, and there is little doubt that it will be subject to substantial financial penalties if it refuses to supply insurance coverage consistent with the regulatory mandate. But that does not address the alleged injuries in this case.

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As alleged, "the [m]andate forces employers and individuals to violate their religious beliefs because it requires employers and individuals to pay for and provide insurance from insurance issuers which fund and directly provide for drugs, devices, and services which violate their deeply held religious beliefs." (Dkt. 1, ¶ 9). More specifically, the "[m]andate violates Plaintiffs' rights to the free exercise of religion and the freedom of speech under the First Amendment to the United States Constitution, the Religious Freedom Restoration Act, and the Administrative Procedure Act." (Dkt. 1, ¶ 12). By their own allegations, the plaintiffs are seeking redress from the contraceptive mandate's purported violation of their right to exercise religion, as opposed to merely being subject to eventual fines for non-compliance. Beyond the constitutional limitations of standing, the court's own prudential constraints typically require that a party assert only a violation of its own rights even when an injury-in-fact is demonstrated. *See Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988). Beckwith Electric can, therefore, only have standing to bring this suit if, as a secular, for-profit corporation, it either has its own or can assert its individual owner's free exercise rights under the RFRA and the First Amendment. Each will be discussed in turn.

A. Corporations have the right to exercise religion under the First Amendment and the RFRA.

Beginning with its statutory text, a stated purpose of the RFRA is "to provide a claim or defense to *persons* whose religious exercise is substantially burdened by the government." 42 U.S.C. § 2000bb(b)(2) (emphasis added). Often times, the relevant statutory text will unambiguously apply to a corporation, either by direct reference or by defining the term "person" to include corporations and the like. The RFRA does neither. Plaintiffs suggest the Court turn to the Dictionary Act in Title 1 of the United States Code, which defines "person" as including "corporations, companies, associations, firms, partnerships, societies, and joint stock

companies, as well as individuals." 1 U.S.C. § 1. Absent some indication that Congress meant to exclude corporations, it is generally fair to assume that corporations are considered "persons" under most statutory schemes. *See F.C.C. v. AT&T, Inc.*, __ U.S. __, 131 S. Ct. 1177, 1183 (2011) ("We have no doubt that 'person,' in a legal setting, often refers to artificial entities."); *see, e.g., Ruppel v. CBS Corp.*, 701 F.3d 1176, 1181 (7th Cir. 2012).[11] The statute itself purports to impose a heightened burden on the free exercise claims of "persons." While the RFRA does not define the term "person," it is evident that Congress responded to what it perceived as an incorrect decision in *Smith*. *See* 42 U.S.C. §§ 2000bb(a)(1) (referring to the recognition of free exercise by the Framers of the Constitution); (b)(1) (finding that the "compelling interest test in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests"). Recognizing that Congress only has the power to enforce—but not redefine—constitutional principles, *see Boerne*, 521 U.S. at 519, it seems likely that Congress used the term in the statute as being co-extensive with the term "person" as used in the Constitution.[12]

The Supreme Court has interpreted the Constitution to provide corporations with a wide array of what may often be considered individual rights protections. The Supreme Court has recognized, for instance, that corporations are persons under the First Amendment for various forms of speech. *See, e.g., Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 342

[11] In *F.C.C. v. AT&T*, the Supreme Court held that the term "personal privacy," as used in the Freedom of Information Act, did not extend to corporations because it made little sense in the context of a statutory scheme that served to protect an individual's privacy interest in certain records. *Id.* at 1185-86. The Supreme Court was not defining the term "person," and the statutory scheme constructed in the FOIA did "not call upon [them] to pass on the scope of a corporation's 'privacy' interests as a matter of constitutional or common law." *Id.* at 1184.

[12] It is appropriate to apply First Amendment jurisprudence to claims brought pursuant to the RFRA. *See Tyndale House*, 904 F. Supp. 2d at n. 9.

(2010) (holding that corporations have the right to engage in political speech by spending money to support candidates for public office); *Pittsburgh Press Co. v. Pittsburg Comm'n on Human Rel.*, 413 U.S. 376 (1973) (holding that corporations have the right to engage in commercial advertising). Corporations have also been afforded constitutional guarantees outside of the First Amendment. *See, e.g., United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575-76 (1977) (holding that corporations are entitled to double jeopardy protection); *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977) (citing *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931)) (holding that corporations have Fourth Amendment rights); *Kentucky Fin. Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544, 550 (1923) ("That a corporation is a 'person' within the meaning of the due process and equal protection clauses of the Fourteenth Amendment . . . is equally well settled."). In contrast, the Supreme Court has identified certain "purely personal" guarantees for which the Constitution does not provide protection for corporations. *See, e.g., Wilson v. United States*, 221 U.S. 361 (1911) (holding that corporations are not afforded the privilege against self-incrimination); *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 66 (1974) (recognizing that "corporations can claim no equality with individuals in the enjoyment of the right to privacy"). These cases drive home the point that corporations are not always entitled to the protections of the Constitution—it depends on the rights at issue. Because the Supreme Court has never resolved "the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment[,]" *see First National Bank of Boston v. Bellotti*, 435 U.S. 765, 779 at n. 14 (1978), the question here is whether a secular, for-profit corporation enjoys the right, independent of the individuals who operate and own it, to freely exercise religion under the First Amendment.

"Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reasons depends on the nature, history, and purpose of the particular constitutional provision." *Bellotti*, 435 U.S. at n. 14. Starting with its text, the First Amendment reads:

> Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I. (emphasis added). The Supreme Court has already determined that the text of the First Amendment does not provide any reason to distinguish between a "natural person" and a corporation for political speech purposes. *See Citizens United*, 558 U.S. at 365 ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity."). As Justice Scalia pointed out in his concurrence, "[i]ts text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals—and the dissent offers no evidence about the original meaning of the text to support any exclusion." *Id.* at 393 (Scalia, J., Alito, J., concurring, Thomas, J., concurring in part). Likewise, there is nothing to suggest that the right to exercise religion, which immediately precedes the right to free speech in the First Amendment, was intended to treat any form of the "corporate personhood," including corporations, sole proprietorships and partnerships, any differently than it treats individuals. To write into the text of the First Amendment such a distinction, especially when there seems to be no evidence that such a distinction mattered to the Framers, would seem to be in conflict with the Supreme Court's holding in *Citizens United*. While the issue is a close one, the Court concludes that a corporation is a "person" under the First Amendment and the RFRA.

B. Closely-held corporations, such as Beckwith Electric, can assert the free exercise rights of their owners under the RFRA and the First Amendment.

Close calls can go either way. In this case, even if the earlier question come outs differently the result is the same because Beckwith Electric has standing to assert the free exercise rights of Beckwith. Several courts addressing this precise issue have already determined that a corporation has standing to assert the free exercise rights of its owners. *See Geneva College*, 2013 WL 838238, at *6; *Monaghan*, 2013 WL 1014026, at *6; *Legatus*, 901 F. Supp. 2d at 988; *Tyndale House*, 904 F. Supp. 2d at 114-20. These cases rely on two Ninth Circuit decisions that held that the secular, for-profit corporation was "merely the instrument through and by which [the plaintiffs] express[ed] their religious beliefs." *See, e.g., Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009); *EEOC v. Townley, Eng'g & Mfg. Co.*, 859 F.2d 610, 620 (9th Cir. 1988). For the reasons that follow, the Court finds this line of reasoning quite persuasive. *See Tony and Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290, 303 at n. 26 (1985) (finding that a non-profit foundation had standing to bring free exercise claim on behalf of it associates, "who are members of the religious organization as well as employees under the Act").

A brief foray into the nature, history, and purpose of the Free Exercise Clause and the role of corporations during the founding era is instructive on the matter. *See generally Bellotti*, 435 U.S. at n. 14; *but see Citizens United*, 558 U.S. at 386 (Scalia, J., Alito, J., concurring, Thomas, J., concurring in part) (criticizing the dissent's approach to "embark[] on a detailed exploration of the Framer's views about the 'role of corporations in society"). "Of course the

Framers' personal affection or disaffection for corporations is relevant only insofar as it can be thought to be reflected in the understood meaning of the text they enacted—not . . . as a freestanding substitute for that text." *Id.*

The purpose of the Free Exercise Clause is "to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." *Sch. Dist. Of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963). The freedom to exercise religion, along with the other freedoms encompassed by the First Amendment, has consistently been viewed as a "fundamental component[] of the liberty safeguarded by the Due Process Clause." *Bellotti*, 435 U.S. 765 (1978) (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *see generally* Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 Harv. L. Rev. 431 (1926). Even prior to the Constitutional Convention, and certainly before the Bill of Rights was proposed and ratified, the freedom to exercise religion was understood as a liberty of conscience; in other words, the people enjoyed the inalienable right to engage in religious worship "according to the dictates of their own consciences." Constitution of New Hampshire, Pt. 1, Art. IV (1784); Constitution of Massachusetts, Art. II (1780); Constitution of South Carolina, Art. XXXVIII (1778); Constitution of New York, Art. XXXVIII (1777); Constitution of Vermont, Ch. 1, Sec. 3 (1777); Constitution of North Carolina, Declaration of Rights, Art. XIX (1776); Constitution of Virginia, Declaration of Rights, Sec. 16 (1776); Constitution of Delaware, Declaration of Rights and Fundamental Rules, Sec. 2 (1776); Constitution of Maryland, Declaration of Rights, Art. XXXIII (1776); Constitution of New Jersey, Art. XVIII (1776); Constitution of Pennsylvania, Declaration of Rights, Art. II (1776).

It, therefore, cannot be reasonably disputed, if at all, that the purpose of the right to exercise religion was to secure to all *individuals* the liberty of conscience without government

interference. What happens, then, when the individual chooses to participate in free enterprise? Does this liberty of conscience travel with an individual in his or her commercial endeavors as a shareholder of a corporation? This Court believes it does.

However, the government argues, and other federal judges addressing this issue have concluded, that an individual voluntarily relinquishes this liberty when he or she elects to engage in free enterprise under the veil of certain corporate forms. *See Grote*, 708 F.3d at 856 (Rovner, J., dissenting);[13] *see also Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012). With respect to closely-held corporations, Judge Rovner, in her dissent, warns of what is perceived as a "natural inclination for the owners of [closely held] companies to elide the distinction between themselves and the companies they own." *Grote*, 708 F.3d at 857. The basic purpose of incorporation, it has been held, is to "'create a legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.'" *Id.* (quoting *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001)). "[Corporations] do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors." *Hobby Lobby*, 870 F. Supp. 2d at 1291. This principled demarcation of obligations and benefits seems to hinge in part on the benefit of limited liability gained by the individual in exchange for the relinquishment of the right to exercise religion. Judge Rovner

[13] It should be noted that Judge Rovner addressed this argument in terms of whether the contraceptive mandate placed a substantial burden on the individual plaintiff in that suit, as opposed to whether the corporate plaintiff had standing. In other words, the issue was framed as whether an individual can be burdened by a regulation that imposes financial penalties on a corporation it owns. Again, that mischaracterizes the injury. The fines imposed on the company are not the true harm here; the fines are simply the means by which the government coerces the individual to comply with the applicable law. The fundamental question remains the same—as between an individual and a corporation he owns, which of the two (or both) suffers the harm of a regulation that burdens religious freedom.

ultimately concludes, based on that reasoning, that it is the individual—not the corporation—who enjoys the right to exercise religious freedom. *Grote*, 708 F.3d at 856-57. This argument fails to take into account the entire historical context of corporations during the founding era.

First, the Court will address why shareholders' enjoyment of limited liability is simply inapposite to whether that shareholder can exercise religion while engaging in free enterprise. To be sure, even late into the nineteenth century, limited liability was still not even uniformly accepted by all the states as a guaranteed attribute of the corporate form. *See* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 Geo. L.J. 1593, 1651 (June 1988) ("During the first third of the nineteenth century, American states experienced a general legislative and judicial reaction against limited liability."); *see also* Dante Figueroa, *Comparative Aspects of Piercing the Corporate Veil in the United States and Latin America*, 50 Duq. L. Rev. 683, 703 (Fall 2012) ("Limited liability statutes were not initially enacted across the United States, because many jurisdictions imposed shareholder liability in a number of areas of law for various causes of action."). Indeed, corporations—as opposed to joint ventures, sole proprietorships, and partnerships—were an attractive vehicle for commerce because of the elements of centralized management, perpetual life, and the ability to hold property in the corporate name. Stephen B. Presser, *Piercing the Corporate Veil* § 1:3 (2013 ed.). True as it is that limited liability is oft regarded as the most important principle in modern corporate law, it cannot be said that such was the mindset at the time the Bill of Rights grafted into the constitution the inalienable right to exercise religion without interference by the government. It is not sound, therefore, to rely on the premise that individuals bartered for the privilege of limited personal liability in exchange for the relinquishment of their free exercise rights when engaging

in commerce under the corporate form. That is so because it cannot be said that there even existed a guarantee of limited liability at that time.

Of course there is a meaningful distinction between shareholder and corporation, and over time the contours of the distinction have changed.[14] Chief Justice John Marshall, in what is often considered the primordial veil piercing case in the United States, writing for a unanimous Court, espoused the original "associational view" of corporations as "invisible, intangible, and artificial beings . . . [that] may be considered as having corporeal qualities[,]" such that the corporation's citizenship (for federal jurisdictional purposes) was the citizenship of its shareholders rather than the state of incorporation or its principal place of business." *See United States v. Deveaux*, 9 U.S. 61, 86, 89 (1809). In *Louisville, C. & C.R. Co. v. Letson*, the Taney Court overruled *Deveaux* and adopted a "fictional" view of corporations, defining the corporate entity as an "artificial person" that inhabits the state of incorporation for jurisdictional purposes. 43 U.S. 497, 558 (1844).

That the corporeal and incorporeal dichotomy of the corporate personhood has transformed over centuries of Supreme Court jurisprudence is revealing, but not dispositive. It is true that a corporation is a fictional entity, separate and apart from its association of individuals, and it enjoys certain privileges benefitting both the association as a whole and the individuals alike. But the individuals are the real parties that make up the association and these individuals bring with them certain rights that, unless incompatible with the corporate form, should not be relinquished. It cannot be said here that the exercise of religion by an individual in association

[14] *See* Hovenkamp, *supra*, at 1597 (explaining the transition of the jurisprudential concept of the corporation from the "associational" view of the Marshall Court, to the "fictional" view of the Taney Court, to finally the "personal" or "entity" view that developed near the end of the 19th century).

with other individuals is incompatible with any of its corporate privileges, whether we speak of the privilege of a shareholder to enjoy limited liability or the privilege of a corporation to exist in perpetuity. Put simply, an individual's right to freely exercise religion includes the right to exercise religion in association with others under the corporate umbrella. *See generally Citizens United*, 558 U.S. at 392 ("But the individual's right to speak includes the right to speak *in association with other individual persons*.") (emphasis in original).

In fact, history teaches us that religious tolerance was intended to, and in fact did, inspire commercial prosperity in the early colonization of our nation. *See* Patrick Henry, *Religious Tolerance*, Stokes 1:311-12 (1766). Alexander Hamilton proclaimed that "[m]anufacturers, who (listening to the powerful invitations of . . . what is far more precious than mere religious toleration, a perfect equality of religious privileges) would probably flock from Europe to the [U]nited [S]tates to pursue their own trades or professions . . . ."). *Report on Manufactures*, Papers 10:253-54 (Dec. 5, 1791). Hamilton was eventually proven correct. "Indeed, it was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.'" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (Burger, C.J.)).

Although it cannot be stated with any degree of certainty that the prosperity of our nation is attributable to the religious freedom Americans enjoy, history certainly cannot be ignored. To hold today that the one's unalienable "liberty of conscience" rests entirely on the form in which that individual elects to participate in free enterprise is counter to this Court's understanding of, and appreciation for, the right to the free exercise of religion guaranteed by the Constitution. *But see United States v. Lee*, 455 U.S. 252, 261 (1982). The historical backdrop of the First Amendment does not support the conclusion that an individual who engages in free enterprise

utilizing a certain corporate form sheds the right to exercise his religion in his commercial endeavors.

The intersection of corporate form with individual rights is even more central when dealing with a closely held corporation, such as the case here. It would truly be form over substance to say there is a meaningful distinction between Beckwith Electric and Beckwith when it comes to religion. The government disagrees and argues that the regulations impose no obligation on Beckwith personally; rather, the obligation is on Beckwith Electric (a legally distinct entity) to use its corporate funds to purchase the group policy and those same corporate funds to pay for the fines in the event Beckwith Electric fails to comply with the contraceptive mandate. The flaw in the government's argument is that it focuses on the financial burden instead of the religious burden on Beckwith personally.[15]

The government insists that it would be an error to hold that the religious beliefs of a corporation's owner are imputed to the corporation for purposes of the First Amendment and the RFRA. (Dkt. 24, pp. 6-7). Otherwise, the government argues, every secular corporation with a religious owner would be considered religious and impermissibly expand the scope the freedom to exercise religion and the RFRA. The government's "slippery slope" argument is not wholly without merit to the extent it is concerned that corporations might conjure up religious beliefs in an effort to escape compliance with a federal law with which they do not agree. But those cases are sure to be scant and are just as sure to be obvious. When an individual is acting through an incorporeal form, whether secular or religious, nonprofit or for-profit, incorporated or a partnership, the individual does not shed his right to exercise religion merely because of the

[15] Although this discussion focuses on the corporate plaintiff, redefining the injury makes it much clearer that Beckwith is also suffering an injury that is causally related to the action by the government and, therefore, has standing independent of Beckwith Electric.

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"corporate identity" he assumed. *See Citizens United*, 558 U.S. at 365 ("[T]he Government may not suppress political speech on the basis of speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

This Court is persuaded by Judge Walton's well-reasoned analysis in *Tyndale House*, in which he relied heavily on *Stormans* and *Townley*. The corporate plaintiff in *Tyndale House* is a closely-held, for-profit Christian publishing company founded in 1962 by Dr. Kenneth Taylor and his wife, Margaret Taylor. *See* 904 F. Supp. 2d at 111. The publishing company employs 260 full-time employees and provides each of them with health insurance through a self-insured plan. *Id.* The publishing company's CEO, Mark Taylor, joined as a plaintiff to challenge the application of the contraceptive mandate because it requires them "to provide and pay for drugs and devices that violate their religious beliefs, and subjects the plaintiffs to heavy fines and penalties if they choose to violate those beliefs." *Id.* at 112 (internal citations omitted). The government challenged the standing of the corporate plaintiff on the grounds that "'for-profit corporation[s] [do] not exercise religion' within the meaning of the RFRA and the First Amendment." *Id.* at 114. Judge Walton found several facts relevant to the inquiry: the mission statements and corporate charters of the related companies to "minister to the spiritual needs of people," the corporation held a weekly "chapel service" for its employees, the majority shareholder (a nonprofit corporation) had a similarly faith-based mission statement, and the entire board of directors had to sign a "statement of faith" to show that they held certain religious beliefs. Declining to address whether for-profit corporations can exercise religion under the RFRA or the First Amendment, Judge Walton ultimately found that, "as in *Townley* and *Stormans*, the beliefs of [the corporate plaintiff] and its owners are indistinguishable" and,

therefore, it has "shown an 'actual or imminent' injury-in-fact that is 'concrete and particularized' and 'fairly . . . traceable' to the contraceptive coverage mandate." *Id.* at 117 (quoting *Lujan*, 504 U.S. at 560).

Similarly, the facts in this case show that Beckwith Electric is inculcated with the beliefs of its owner and CEO. Beckwith manages the day-to-day operations of Beckwith Electric and is responsible for establishing all its operational policies. Beckwith believes that "a company managed under the living God's direction and by God's principles cannot engage in or promote activities that are contrary to such direction, principles, or moral compass." As such, Beckwith's personal religious beliefs, those of the Southern Baptist faith, pervade the corporate atmosphere at Beckwith Electric. Beckwith allocates corporate resources to fund weekly visits by corporate chaplains to visit the premises of Beckwith Electric and to counsel willing employees on issues regarding "bereavement, marriage, children, finances, addictions, elder care, and other types of crises." Beckwith Electric, at the behest of Beckwith, also donates to religious charities that provide religious-based services to the community, including New Life Solutions' Family Ministries, which is a "Christ-centered ministry offering hope, help, and healing for women, teens and families by promoting healthy lifestyle choices and relationships." Importantly, Beckwith, according to his religious beliefs, established Beckwith Electric's corporate policy that it will not obtain a group insurance policy that provides emergency contraceptive drugs or devices. Beckwith asserts that his religious beliefs prohibit him from managing a company, or allocating its resources, in any manner inconsistent with those beliefs, and the government does not challenge the sincerity of those beliefs.

The only arguably material distinction between *Tyndale House* and the extant case is that the corporate plaintiff in *Tyndale House* was "religious," i.e., it was a Christian publishing

company, it had a mission statement with religious undertones, and its board of directors had to sign a statement of faith. Notably, the corporation was also for-profit. Seizing on this distinction, the government relies on the dictionary definition of "secular" (meaning "not overtly or specifically religious") to posit that it would "dramatically expand" the scope of the RFRA and the First Amendment to permit a secular corporation with a religious owner to avail itself the protection of the right to exercise religion. The Court disagrees. Clearly, an individual employed by a secular corporation has the right to exercise religion concomitantly with her employment. *See Sherbert*, 374 U.S. at 404 (holding that an employee did not have to work a six-day week—in contravention of her religious beliefs—in order to qualify for state unemployment benefits). But, following the government's logic, that same individual would lose the right to exercise religion merely by changing hats and becoming the *employer* instead of *employee*. Hypothetically, that same individual (acting now as an employer) would not be able to challenge—on religious freedom grounds—a federal law that compelled (by threat of substantial fines) all "secular," for-profit businesses to remain open seven days a week. The Court sees no reason to distinguish religious freedom rights based upon the manner and form that one chooses to make a living. As plaintiffs' counsel remarked at the hearing, "the Southern Baptist faith doesn't give a pass to Mr. Beckwith because he's operating his business in the corporate form." Pragmatically, as the owner and operator of the company who is charged with setting policy, the beliefs of Beckwith are, in essence, the beliefs of Beckwith Electric.

I will end this discussion where it began. The contraceptive mandate does not, at this stage, seem to accommodate the notion of religious tolerance that is embedded in the Constitution and made applicable here through the RFRA. On this record, the Court finds that Beckwith's unalienable right to freely exercise his religion is not relinquished simply because he

chooses to engage in free enterprise using an available corporate form. Here, Beckwith is the majority shareholder and CEO of a closely-held corporation that is inculcated with his religious beliefs. Beckwith Electric is merely the instrument through and by which Beckwith expresses his religious beliefs, and, therefore, has a sufficient nexus with Beckwith to surpass the constitutional and prudential limitations of the Court's jurisdiction. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1958). Beckwith Electric has shown an actual or imminent injury, that is "concrete and particularized," "fairly traceable" to the contraceptive coverage mandate, and one that can be redressed by a decision of this Court. *See Lujan*, 504 U.S. at 560. To hold otherwise would place too great a burden on religious freedom based solely upon the manner and form in which an individual decides to conduct business. Accordingly, the Court finds that Beckwith Electric and Beckwith both have standing to challenge the contraceptive mandate in the extant case.

II. Plaintiffs are likely to prevail on the merits.

Having decided that Beckwith Electric can exercise religion, or at the very least can assert the free exercise rights of Beckwith, the Court now turns to whether plaintiffs are likely to prevail on the merits of their claim. The RFRA forbids the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the government can "demonstrate[ ] 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(a), (b).

A. Does the ACA "substantially burden" the plaintiff's exercise of religion?

The next question is whether the contraceptive mandate is a "substantial burden." Under the RFRA, "exercise of religion" is defined as "any exercise of religion, whether or not

compelled by, or central to, a system of religious belief." *See* 42 U.S.C. § 2000bb–2 (defining "exercise of religion" as defined in 42 U.S.C. § 2000cc–5 (2006)). According to the record, plaintiffs' faith-based beliefs "prohibit them from providing, participating in, paying for, training others to engage in, or otherwise supporting emergency contraception, abortion, abortifacients, and any drugs, devices, and services that are capable of killing innocent human life." (Dkt. 10-1, ¶ 12). Consequently, Beckwith Electric alleges it cannot allocate its resources to providing FDA-approved emergency contraceptives. *Id.* It is not within the province of the Court to question the soundness or validity of a religious belief; it is enough that plaintiffs say they have the belief. See *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981). In any event, the government does not challenge the sincerity of their beliefs. (Dkt. 24, p. 6). The contraceptive mandate clearly places a burden on plaintiffs, but the question is whether it is a "substantial" one.

To determine whether the contraceptive mandate is a "substantial burden" on the Plaintiffs' religious exercise, the Court must consider whether the government action puts substantial pressure on them "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *See Yoder*, 406 U.S. at 218. It is also a "substantial burden" if the government action puts "substantial pressure on an adherent to modify his behavior and to violate their beliefs[.]" *Thomas*, 450 U.S. at 716-17. The Supreme Court has held that the "collection and payment of generally applicable taxes" do not typically impose a significant burden, but recognized that a "more onerous tax" may effectively "choke off" an adherent's religious practices so as to constitute a substantial burden. *Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378, 392 (1990).

The two cases expressly referenced in the RFRA—*Sherbert* and *Yoder*—are particularly instructive. In *Sherbert*, the Supreme Court held that the denial of state unemployment benefits because the plaintiff refused to work on Saturdays, in accordance with her religious beliefs, was a substantial burden on her religious exercise rights. 374 U.S. at 403-404. The state unemployment law "forces 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. In *Yoder*, the Supreme Court held that a state compulsory education law mandating high school attendance until the age of sixteen substantially burdened the plaintiffs' religious exercise because the "law affirmatively compel[led] them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218. The Amish plaintiffs in *Yoder* believed that formal education beyond the eighth grade placed their youth in an environment hostile to their religious tenets because it placed too great an emphasis on competitive grades and sports, as opposed to the Amish lifestyle that favored manual labor and self-reliance. *Id.* at 211.

Just as in *Sherbert*, the plaintiffs in the extant case are faced with the impossible choice of either complying with the contraceptive mandate and forfeiting their deeply held religious beliefs, on the one hand, or staying true to the tenets of their faith and facing substantial fines, on the other hand. *See* (Dkt 10-1, ¶ 41). The burden of compliance is substantial in the extant case because of the specific manner in which Beckwith Electric currently operates its business. Beckwith Electric currently provides health insurance for its employees, but carves out coverage for contraceptive drugs and devices consistent with the beliefs of the Southern Baptist faith. As an alternative, Beckwith Electric provides its employees with counseling by corporate chaplains on matters relating to, among other things, family planning and women's health issues. As a

means by which to force plaintiffs into compliance, the contraceptive mandate carries with it substantial penalties against those who do not comply. *See* 26 U.S.C. § 4980D(a), (b) (imposing a tax against employers that do not provide compliant group plans in the amount of $100 per day for each employee); 26 U.S.C. § 4980H (establishing tax penalties in the amount of $2,000 per each full-time employee against any employer that fails to provide "minimal essential coverage"); 29 U.S.C. § 1132(a) (providing for civil enforcement actions). This type of compulsory compliance with a federal law is certainly a "substantial burden" on Beckwith Electric. *See Boerne*, 521 U.S. at 534 ("Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest.").

The government argues that any burden imposed by the contraceptive mandate is far too attenuated to constitute a "substantial burden." (Dkt. 24, p. 12-13). Equating a group health plan with a salary, the government posits that Beckwith Electric, through Mr. Beckwith, "has no right to control the choices of his company's employees, who may or may not share his religious beliefs, when making *use* of their benefits." (Dkt. 24, p. 12) (emphasis added); *see also O'Brien v. HHS*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012) ("[T]he 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 company's] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiffs' religion.") (emphasis in original); *Hobby Lobby*, 870 F. Supp. 2d at 1294, *aff'd*, 2012 WL 6930302, at *3 (10th Cir. 2012). The fallacy in this argument is that it mischaracterizes the burden placed on plaintiffs. Plaintiffs are not objecting to the *use* of emergency contraceptives by Beckwith Electric's employees. Rather, the particular burden to which plaintiffs object is the provision of group insurance premiums that covers emergency contraception. (Dkt. 10-1, ¶ 14).

"Because 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." *Tyndale House*, 904 F. Supp. 2d at 123.

Accordingly, the Court finds that plaintiffs have met their burden of showing that the contraceptive mandate substantially burdens their religious exercise.

B. The contraceptive mandate does not further of a compelling governmental interest, nor is it the least restrictive means.

The inquiry does not end merely because the government action is found to substantially burden religious exercise rights. Once a plaintiff demonstrates a "substantial burden" on its religious freedom, the government then bears the burden of demonstrating a "compelling interest to justify that burden." *O Centro*, 546 U.S. at 429.

The government asserts two compelling interests. First, the government claims to have a generalized interest in "safeguarding the public health by regulating the health care and insurance markets." (Dkt. 24, p. 13) (citing *Dickerson v. Stuart*, 877 F. Supp. 1556, 1559 (M.D. Fla. 1995)) (additional internal citations omitted). As a direct benefit of a regulated health care and insurance market, the public will enjoy improved health conditions resulting from "reduced transmission, prevention or delayed onset, and earlier treatment of disease." (Dkt. 24, p. 13) (quoting 75 Fed. Regs. 41,726 and 41,733). Relying on the finding of the IOM, the government claims that increased access to FDA-approved contraceptive services are essential to the continued improvement of the predicted health outcomes. IOM Rep. at 20, 103. According to the IOM, the health risks stemmed largely from unintended pregnancies, which may delay access to prenatal care, prolong risky behavior that can endanger the fetus, as well as cause certain mental illness such as depression and anxiety. *Id.* Second, the government also claims a

compelling interest in "removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." (Dkt. 24, p. 14) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984)). The government asserts that the ACA and contraceptive mandate are Congress's "attempt to equalize the provision of preventative care services, with the resulting benefit of women being able to equally contribute as healthy and productive members of society, furthers a compelling governmental interest." (Dkt. 24, p. 14) (internal citations omitted).

The government's interest in promoting public health and equality of health care for women is certainly compelling in a broad, general sense. Citing the two cases expressly referenced in the RFRA, the Supreme Court noted, however, that courts should look "beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 431. For instance, in *Yoder*, the Supreme Court exempted Amish children from a compulsory school attendance law even though the state had a "paramount" interest in education." 406 U.S. at 213. Absent a showing "with more particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption *to the Amish*[,]" the state was not able to satisfy its burden. Similarly, in *Sherbert*, the Supreme Court exempted a worker from a state law that denied unemployment benefits to persons that refused to work on Saturdays, but noted that this exemption would not apply to an individual whose "religious convictions serve to make him a nonproductive member of society." 374 U.S. at 410. "RFRA requires the Government to demonstrate that the compelling interest test is satisfied 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 (citing 42 U.S.C. §

2000bb-1(b)); see also 42 U.S.C. § 2000bb-1(b)(1) ("[The] Government] may substantially burden a person's exercise of religion *only if it demonstrates that application of the burden to the person* . . . .") (emphasis added).

The Court is not particularly persuaded by the government's evidence to support its compelling interest. For example, there is no empirical data or other evidence in the cited provisions of the IOM that would support the conclusion that the provision of the FDA-approved emergency contraceptives (in addition to the contraceptives to which plaintiffs do not object) would result in fewer unintended pregnancies, an increased propensity to seek prenatal care, or a lower frequency of risky behavior endangering unborn babies. *See, e.g., Tyndale House*, 904 F. Supp. 2d at 126-27.

Additionally, plaintiffs argue that the "massive" number of employees and plan participants omitted from the contraceptive mandate vis-à-vis the several exemptions "radically undermines" any claim that the mandate furthers a compelling interest. (Dkt. 10, pp. 1520). The parties disagree mightily as to the size and the effect of the exemptions. The government characterizes the plaintiffs' 200 million figure as a "gross" overstatement of the individuals in grandfathered plans. (Dkt. 24, p. 16, at n. 13) (citing statistics from the Kaiser Family Foundation and Health Research & Educational Trust, Employer Health Benefits 2012 Annual Survey, available at http://ehbs.kff.org/pdf/2012/ 8345.pdf). Unfortunately, while the empirical data supplied by the government does show a downward trend of grandfathered health plans, the government fails to provide the Court with any meaningful information from which it can derive the actual number of employees exempted from compliance with the contraceptive mandate. Even on this record, it appears the number is quite large. *See also Geneva College*, 2013 WL 838238, at *25 ("[S]everal other courts addressing similar challenges to the mandate's

requirements pointed out that over 190 million individuals have already been exempted from the mandate's requirements as a result of the grandfathering provisions in the ACA.") (citing *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012) ("[t]he government has exempted over 190 million health plan participants . . . from the preventative care coverage mandate"); *Tyndale House*, 2012 WL 5817323, at *18 ("Indeed, the 191 million employees excluded from the contraceptive coverage mandate include those covered by grandfathered plans alone.")). The government's best case scenario is that by the end of 2013, 51 percent of employer plans will have lost "grandfathered" status. *See* (Dkt. 24, p. 16, n. 13 (citing 75 Fed. Reg. at 34,552-53). That still leaves roughly a third of America's population (i.e., 100 out of 313.0 million) exempt from the contraceptive mandate.

Generally speaking, that several million Americans are already exempt from the RFRA cuts against a finding that the government has a compelling interest here to be served by the contraceptive mandate. *See, e.g., O Centro*, 546 U.S. at 432-34 ("The fact that the [Controlled Substances] Act itself contemplates that exempting certain people from its requirements would be 'consistent with the public health and safety' indicates that congressional findings with respect to Schedule I substances should not carry the determinative weight, for RFRA purposes, that the Government would ascribe to them."); *Church of the Lukumi Babalu*, 508 U.S. at 537 ("As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of religious hardship without compelling reasons.'") (internal citations omitted).

Turning to whether the purportedly compelling interest is satisfied with respect to these plaintiffs, as this Court must do, *see id.* at 430-31, the result remains the same. On this record, it is undisputed that as of August 2012, "no plan participant has used the coverage for any

abortifacient drugs from the list of emergency contraceptives." *See* (Dkt. 10-2, ¶ 12). Importantly, the government has the burden to establish this prong of the analysis because it is an affirmative defense. *See O Centro*, 546 U.S. at 429-30. Taking what each party says at face value—plaintiffs claim that hundreds of millions are exempt and the government says it's a fraction of that—the Court is left with record evidence that is, at best, in equipoise. Accordingly, the government failed to meet its burden of proof that the contraceptive mandate furthers a compelling government interest. *See id.* (affirming injunctive relief granted because the evidence of the government's compelling interest was in equipoise).[16]

III. Plaintiffs will suffer irreparable harm if the injunction does not issue.

It is well-settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). "Although a violation of the First Amendment 'does not automatically require a finding of irreparable injury, thus entitling a plaintiff to a preliminary injunction if he shows a likelihood of success on the merits,' the injury in this case constituted 'direct penalization, as opposed to incidental inhibition' of First Amendment rights and thus could not be remedied absent an injunction." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) (quoting *Hohe v. Casey*, 868 F.2d 69, 72-73 (11th Cir. 1989)). Since June 1, 2013, the plaintiffs

[16] Because the Court finds that the government failed to satisfy its burden that the contraceptive mandate furthers a compelling government interest, the Court need not reach the question of whether it is the least restrictive means. That being said, the Court notes that the government is currently subsidizing contraceptives. Enacted in 1970, Title X of the Public Health Service Act provides funding for family planning and related preventative health services. *See* 42 C.F.R. 59.5. In 2011, $276 million of the $1.3 billion spent on delivering Title X-funded family planning services came directly from Title X revenue sources. Certainly forcing private employers to violate their religious beliefs in order to supply emergency contraceptives to their employees is more restrictive than finding a way to increase the efficacy of an already established program that has a reported revenue stream of $1.3 billion. *See* Family Planning Annual report: 2011 National Summary, available at http://www.hhs.gov/opa/pdfs/fpar-2011-national-summary.pdf.

have been in violation of the contraceptive mandate. The penalties for continued noncompliance could be crippling, and effectively force Beckwith Electric to close its door or violate its sincerely held religious beliefs. The Court finds that the record supports a finding that plaintiffs will suffer irreparable harm in the event an injunction does not issue.

IV. The balance of harms tips in favor of the plaintiffs.

The government argues that "[e]njoining the regulations as to for-profit, secular companies would undermine the government's ability to achieve Congress's goals of improving the health of women and children and equalizing the coverage of preventative services for women and men." (Dkt. 24, p. 20). In light of the several million Americans already exempted from coverage under the contraceptive mandate, the Court is not persuaded that there is any real harm to the government in this case. Moreover, as the plaintiffs point out, the government has already consented to the entry of injunctive relief in several other cases. *See* (Dkt. 10, p. 23) (citing *Geneva College*, 2013 WL 1703871, at *12 (identifying several cases in which the government acquiesced to injunctive relief)). If the government is willing to grant exemptions for no less than one third of all Americans, and it is willing to consent to injunctive relief in cases that do not fall within those exemptions, then it can suffer no appreciable harm by permitting an additional 168 employees (i.e., less than .0002 percent of those already exempted) to be exempted. Accordingly, the balance of harms tips in favor of plaintiffs.

V. It is in the public interest to grant the injunction.

As the Eleventh Circuit has noted, it is never in the public interest to enforce unconstitutional laws. *See KH Outdoor*, 458 F.3d at 1272 (citing *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004) (noting "it is always in the public to protect First Amendment liberties")). Defendant argues counter that "[i]t would be contrary to the public

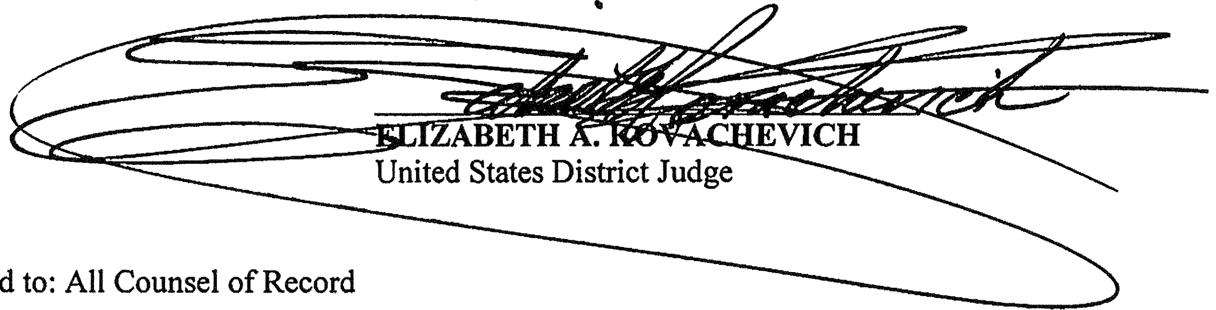
interest to deny Beckwith Electric's employees (and their families)—who may not share Mr. Beckwith's beliefs—the benefits of the preventative coverage regulations. (Dkt. 24, p. 20) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 212 (1982)). The flaw in the government's argument is that the record evidence suggests that Beckwith Electric's employees are not burdened at all by the decision to withhold coverage for emergency contraceptives from the group policy. There is no evidence that Beckwith Electric's employees sought but were refused access to the FDA-approved emergency contraceptives to which plaintiffs object. In fact, there is evidence to the contrary. *See* (Dkt. 10-2, ¶ 12). As such, and having found that the contraceptive mandate likely violates the religious freedom rights of the plaintiffs, the Court finds that it is in the public interest to grant the injunction.

VI. Conclusion

The First Amendment, and its statutory corollary the RFRA, endow upon the citizens of the United States the unalienable right to exercise religion, and that right is not relinquished by efforts to engage in free enterprise under the corporate form. No legislative, executive, or judicial officer shall corrupt the Framers' initial expression, through their enactment of laws, enforcement of those laws, or more importantly, their interpretation of those laws. And any action that debases, or cheapens, the intrinsic value of the tenet of religious tolerance that is entrenched in the Constitution cannot stand. On this record, the plaintiffs have established all four elements for the entry of a preliminary injunction. Accordingly, it is

ORDERED that plaintiffs' motion for preliminary injunctive relief is **GRANTED**. The government is enjoined from enforcing the contraceptive mandate consistent with the terms of this order. Plaintiffs are required to post a bond in the amount of $75,000.00.

DONE AND ORDERED in Chambers in Tampa, Florida this 25th day of June, 2013



ELIZABETH A. KOVACHEVICH
United States District Judge

Copies furnished to: All Counsel of Record