ORAL ARGUMENT REQUESTED

No. 12-1380

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM NEWLAND; PAUL NEWLAND; JAMES NEWLAND; CHRISTINE KETTERHAGEN; ANDREW NEWLAND; and HERCULES INDUSTRIES, INC., a Colorado Corporation,

Plaintiffs-Appellees,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Colorado
The Honorable Judge John L. Kane, Jr.
No. 1:12-cv-01123

APPELLEES' OPENING BRIEF

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Fed. R. App. P. Rule 26.1. Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Appellees states the following:

Appellee Hercules Industries, Inc., is a privately-held Colorado corporation wholly owned by the individual Appellees William Newland, Paul Newland, James Newland, and Christine Ketterhagen. Appellee Andrew Newland, effective January 1, 2013, is the president and chief executive officer of Appellee Hercules Industries, Inc. No publicly-held corporation owns 10% or more of the stock of Hercules Industries, Inc.

s/ Matthew S. Bowman
Attorney for Appellees

Dated: February 22, 2013

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PRIOR OR RELATED APPEALS

None. As counsel for the Plaintiffs-Appellees understand this Court's rule regarding "related" cases that should be identified, such "related" cases are limited to cases filed by the same plaintiff or based on the same transaction and occurrence. *See, e.g.*, *Sligar v. Tulsa Regional Medical Center*, 52 F.3d 338 (10th Cir. 1995); *Smith v. Kitchen*, 156 F.3d 1025 (10th Cir. 1997). This understanding was telephonically confirmed by an employee of the Court Clerk's office.

Therefore, it is the position of counsel for the Plaintiffs-Appellees that there are no "related" cases, and the government erred in identifying *Hobby Lobby* and cases filed in other courts of appeals as "related" to this appeal merely because they raise similar challenges to the law at issue this case. To the extent this Court interprets cases to be "related" based on the latter reason alone, the cases listed by the government qualify.

GLOSSARY

HHS	U.S. Department of Health and Human Services
HRSA	Health Resources and Services Administration
PPACA	The Patient Protection and Affordable Care Act of 2010
RFRA	Religious Freedom Restoration Act

STATEMENT OF ISSUES PRESENTED

1. Did the District Court act within its discretion in granting a preliminary injunction under the four prongs of the Religious Freedom Restoration Act (RFRA), because:

(a) refraining from providing abortifacient and contraceptive coverage in a business health plan for religious reasons constitutes "any" exercise of religion under RFRA;

(b) a government Mandate making that exact conduct illegal constitutes a "substantial burden" thereupon;

(c) the government cannot show a compelling interest to coerce believers when the government voluntarily exempts tens of millions of others for secular as well as religious reasons; and

(d) the government could easily achieve its goals through the less restrictive means of expanding its own existing and wide scale provision of contraception?

Raised at R.5-1 at pp. 7–9, 11; Ruling at App. 65–70.

2. Should this Court affirm the District Court's injunction for the alternative reason, raised below, that the government's Mandate violates the Free Exercise Clause of the First Amendment due to its categorical and discretionary exemption regime? **Raised at R.5.1 at p. 19; proposed as alternative basis to affirm.**

3. Should this Court affirm the District Court's injunction for the alternative reason, raised below, that the government's Mandate violates the Establishment Clause of the First Amendment due to discriminating among religious beliefs and practices? **Raised at R.5.1 at p. 24; proposed as alternative basis to affirm.**

4. Should this Court affirm the District Court's injunction for the alternative reason, raised below, that the government's Mandate violates the Free Speech Clause of the First Amendment due to mandating education and counseling in favor of abortifacients and contraception? **Raised at R.5.1 at p. 26; proposed as alternative basis to affirm.**

STATEMENT OF FACTS

The material facts are based on the Verified Complaint (R.19; App.19), were undisputed, and were incorporated in the District Court's July 27, 2012, preliminary injunction order (R.30; App.54; herein "Order").

Plaintiff-Appellee Hercules Industries, Inc., is a Colorado S-corporation engaged in the manufacture and distribution of heating, ventilation, and air conditioning products and equipment. R.30 (App.57.) Hercules is owned by siblings William, Paul, and James Newland and Christine Ketterhagen (herein the "Newlands") who also comprise the company's board of directors. *Id.* William

Newland is President of Hercules. *Id.* His son Andrew is the President. *Id.*[1] Hercules Industries, Inc., employs 265 full-time employees. *Id.*

Although Hercules Industries, Inc., is a for-profit company, the Newlands adhere to the Catholic denomination of the Christian faith and seek to run Hercules in a manner that reflects their sincerely held religious beliefs. *Id.* The Newlands' commitment to Catholic religious ethics permeates their management of Hercules. App.26–27. They have established a mission statement of Hercules that strives for the holistic good of their employees, including "spiritually." Order, App.57. In recent years Hercules has donated significant amounts of money to Catholic organizations and causes. *Id.* at App.57–58. Because of their Catholic beliefs, Hercules Industries, Inc.'s self-insured employee health insurance plan does not cover abortifacient drugs, contraception, or sterilization. *Id.* at App.58.[2] The Newlands and Hercules religiously object not merely to the use of contraception, but to covering it in their health plan. App.26–28 at ¶¶ 32, 41.

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[1] Andrew Newland was the Vice President of Hercules when the case was filed, but became the President on January 1, 2013. *See* App.24 ¶ 16.

[2] The government raises what is essentially a semantic dispute about whether the Mandate includes "abortifacient" items. Even in this attempt, the government admits that many of the Mandated items act by "inhibiting implantation" of a newly conceived/fertilized human embryo. Gov. Br. at 5. Defendant Sebelius likewise insists that the Mandated items "are designed to prevent implantation." Interview, *available at* http://www.ivillage.com/kathleen-sebelius-guidelines-cover-contraception-not-abortion/4-a-369771 (last visited February 19, 2013).

The Patient Protection and Affordable Care Act of 2010 (PPACA) requires group health plans to provide no-cost coverage for "preventive care and screening for women. 42 U.S.C. § 300gg-13(a)(4); Order, App.55. HHS's Health Resources and Services Administration (HRSA) mandated that preventive care for women include "All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity" (hereinafter, the "Mandate"). *Id.* However, this preventive care coverage mandate does not apply to many healthcare plans existing on March 23, 2010 ("grandfathered" plans), which, according to government estimates, include tens of millions of women. *Id.* at App.55–56. In addition, the government exempts certain religious employers from the Mandate, has given a one-year "safe harbor" of non-enforcement, and proposes to accommodate many nonprofit organizations who object to the Mandate. *Id.* at App.56.

The government has excluded Hercules from all its exemptions. *Id.* at App.58. As a result, the Newlands and Hercules are faced with either complying with the PPACA or complying with their religious beliefs and being subject to a variety of penalties including approximately $100 per employee *per day* for providing noncompliant health insurance, 26 U.S.C. § 4980D, or a $2,000 per employee per year penalty if they omit health insurance altogether. 26 U.S.C.

§ 4980H. Order, at App.56. Noncompliance also triggers lawsuits from the Secretary of Labor or from plan participants. 29 U.S.C. § 1132.

In its Order, the District Court ruled that the fundamental purpose of preliminary injunctive relief was to preserve the relative positions of the parties until a trial on the merits. Order, at App.60. The District Court concluded that the harm to the government in being prevented from enforcing the Mandate "pales in comparison to the possible infringement upon [the Newlands' and Hercules'] constitutional and statutory rights." *Id.* at App.60–61. The government's alleged interests "are countered, and indeed outweighed, by the public interest in the free exercise of religion." *Id.* at App.62.

SUMMARY OF ARGUMENT

Of fourteen rulings on the likelihood of success of RFRA challenges to the Mandate at issue here, eleven of them have issued preliminary injunctions, including four injunctions from Courts of Appeals.[3] The District Court did not abuse its discretion in siding with this supermajority. Its ruling should be affirmed.

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[3] *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357 (8th Cir. Nov. 28, 2012); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012); *Grote Indus. LLC v. Sebelius*, No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013); *Annex Med., Inc. v. Sebelius*, No. 13-1118 (8th Cir. Feb. 1, 2013); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012) ; *Legatus v. Sebelius*, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012) (preliminary injunction for Weingartz plaintiffs); *Tyndale House Publishers, Inc. v. Sebelius*, 2012 WL 5817323 (D.D.C. Nov. 16, 2012); *Am. Pulverizer Co. v. U.S. Dep't of Health and Human Servs.*, No.

The government's appeal is premised on an artificially constricted notion of religious exercise: that a family cannot exercise religion in business. But there is no business exception in RFRA or the Free Exercise Clause. Nothing in the Constitution, precedent, or law requires—or even suggests—that families forfeit their religious liberty protection when they try to earn a living by operating a corporate business. The idea that "a corporation has no constitutional right to free exercise of religion" is "conclusory" and "unsupported." *McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985).

The government proposes that specific limitations enacted in the Civil Rights Act, which is separate and distinct from RFRA, should constrain the meaning not only of RFRA but also of the First Amendment itself. Of course, no statute can change the First Amendment. Congress could have written into RFRA the government's proposed prohibition on free exercise of religion in business, but chose not to. Instead, RFRA protects "any" exercise of religion, and requires strict scrutiny when a government action substantially burdens the same.

6:12-cv-03459 (W.D. Mo. Dec. 20, 2012); *Monaghan v. Sebelius*, 2012 WL 6738476 (E.D. Mich. Dec. 30, 2012) (temporary restraining order); *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs.*, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012) (temporary restraining order); and *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). *But see Hobby Lobby Stores, Inc. v. Sebelius,* No. 12-6294 (10th Cir. Dec. 20, 2012); *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012); *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144 (3d Cir. Feb. 7, 2013).

The Mandate here forces the Newland family and the entity through which they act, Hercules Industries, Inc., to choose between violating their religious beliefs, paying crippling fines on their property and livelihood, or abandoning business altogether. This "requires participation in an activity prohibited by a sincerely held religious belief," so as to constitute a substantial burden. *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010).

The strict scrutiny required by RFRA is true strict scrutiny, just as it is applied under First Amendment doctrines like free speech. The Supreme Court has confirmed that strict scrutiny cannot be satisfied where, as here, the government exempts many other people. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006). In *O Centro Espirita*, the government's exemption of merely "hundreds of thousands" led the Supreme Court to require a RFRA exemption for a few hundred more. *Id.* Here the government has exempted *tens of millions* of women from the Mandate under its politically motivated "grandfathering" clause. It cannot claim that "paramount" interests will suffer from an injunction protecting a few hundred at Hercules. The government incorrectly labels its grandfathering exclusion temporary, but in fact it lasts indefinitely and encompasses millions more than do religious objecting entities.

Moreover, the government could fully accomplish its purported interests in giving women free contraception to achieve health and equality by providing such

items itself instead of by applying the Mandate against Plaintiffs' beliefs. The government seeks to neuter the least-restrictive-means test by not actually considering alternative options. This is incompatible with RFRA and precedent.

The Mandate also violates the Free Exercise Clause, Establishment Clause, and Free Speech Clause. Each of these violations form independent grounds on which to affirm the District Court order.

STANDARD OF REVIEW

Orders granting a motion for preliminary injunction are reviewed for abuse of discretion. *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 698 F.3d 1295, 1301 (10th Cir. 2012).

"An abuse of discretion occurs when the district court 'commits an error of law or makes clearly erroneous factual findings.'" *Att'y. Gen. of Okla. v. Tyson Foods, Inc.,* 565 F.3d 769, 775 (10th Cir. 2009) (citing *Gen. Motors Corp. v. Urban Gorilla, LLC,* 500 F.3d 1222, 1226 (10th Cir. 2007)). This Court's review of the District Court's exercise of discretion is narrow; this Court is to consider the merits of the case only as they affect that exercise of discretion. *Gen. Motors,* 500 F.3d at 1226. The movant is not required to "prove his case in full at a preliminary-injunction hearing. . . ." *Tyson Foods,* 565 F.3d at 776 (citing *Univ. of Tex. v. Carmenisch,* 451 U.S. 390, 395 (1981)).

This Court has characterized an abuse of discretion as "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Id*. (citing *RoDa Drilling Co. v. Siegal,* 552 F.3d 1203, 1208 (10th Cir. 2009). A prohibitory (as opposed to mandatory) preliminary injunction such as this one, which maintains the status quo between the parties, contemplates consideration of four factors: 1) likelihood of success on the merits, 2) irreparable harm in the absence of preliminary relief, 3) the balance of equities tips in the movant's favor, and 4) the preliminary injunction is in the public interest. *Tyson Foods,* 565 F.3d at 776.

ARGUMENT

The District Court's ruling should be affirmed. It coincides with the decisions of eleven courts around the country that have issued preliminary injunctions against this Mandate for religious families running businesses.[4]

I. The District Court applied the correct injunction standard, and its specific findings support the likelihood of success standard.

A. The District Court did not apply an erroneous injunction standard.

It was appropriate for the District Court to issue the injunction based on the possibility of using the standard by which "serious questions" about the legality of the government's unprecedented Mandate were raised. The District Court correctly concluded that the Newlands and Hercules sought to preserve the "status

[4] *See supra* note 3.

quo ante bellum" rather than seeking a "disfavored" mandatory injunction.[5] As a result, relying on *RoDa Drilling Co. v. Siegal,* 552 F.3d 1203, 1209 n.3 (10th Cir. 2009), the District Court ruled that the Newlands and Hercules were entitled to "meet the requirement for showing success on the merits by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." Order, at App.60 & n.7. Because *RoDa Drilling* left open the possible use of that test, the District Court did not err in using it. The Second and Ninth Circuits continue to use the same test. *Citigroup Global Mrkts., Inc. v. VCG Special Opportunities Master Fund*, 598 F.3d 30, 35 (2d Cir. 2010); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2010).

B. The record supports Plaintiffs' likelihood of success.

This Court can affirm on the alternate grounds that the Newlands and Hercules meet the likelihood of success standard for injunctive relief. This Court is reluctant to send cases back to the District Court for duplicative rulings, and will adjudicate on alternate grounds that were addressed in the District Court. *Jordan v. U.S. Dept. of Justice*, 668 F.3d 1188, 1200 (10th Cir. 2011) (citations omitted).

The likelihood of success standard was fully briefed and argued before the District Court. And not only did the Newlands and Hercules show a likelihood of

[5] *See also* Gov. Br. at 11–12 (not urging the "disfavored injunction" standard).

success, the District Court's findings and rulings actually satisfy those elements even though it cited a lower standard. Namely: (1) The Court specifically rejected, "out of hand," the government's argument that no substantial burden exists. Order, App.65 n.9. (2) The Court determined that the government's decision not to apply the Mandate to millions of women is a "massive exemption [that] completely undermines any compelling interest." *Id.* at App.68. Though this ruling alone shows that the Mandate fails strict scrutiny, (3) the District Court also determined that "the government has failed to meet this burden" that the Mandate is the least restrictive means to achieve its interests. *Id.* at App.70. The District Court also specifically held that the Plaintiffs demonstrated irreparable harm, *id.* at App.61–62, made an overwhelming balance of harms showing, *id.* at App.62, and showed that the public interest is in their favor, *id.* at App.63.

To the extent that the District Court left open the question of whether a business corporation can exercise religion, the government has conceded the sincerity of the Plaintiffs' beliefs. *See, e.g.*, Gov. Brief at 10. But if Plaintiffs possess religious beliefs, they can exercise them. This Court can resolve the legal question of whether Plaintiffs can exercise religion, which was fully briefed and argued. Since the injunction is reviewed for abuse of discretion, this Court should affirm under either the "serious questions" or the "likelihood of success" standard.

II. The Mandate violates RFRA.

The Newlands and Hercules have shown a likelihood of success on the merits because the Mandate violates the Religious Freedom Restoration Act (RFRA). The government, by its argument, seeks to judicially amend RFRA and the Free Exercise Clause. It tries to exclude categories from "free exercise" that Congress and the Constitution did not exclude: profit vs. non-profit activity, corporate vs. individual activity, and direct vs. indirect activity. RFRA asks a much simpler question: whether the government is imposing a substantial burden on the exercise of religion. 42 U.S.C. § 2000bb-1. If so, RFRA requires strict scrutiny, which the government cannot satisfy. Among the eleven cases to issue injunctions for RFRA claims against this Mandate, the Seventh and Eighth Circuits have four times found "a sufficient likelihood of success on the merits." *Annex Medical*, No. 13-1118, slip op. at 5 (concluding that the finding also "necessarily" occurred in *O'Brien*, No. 12-3357); *Grote*, No. 13-1077, slip op. at 5; *Korte*, 2012 WL 6757353 at *4.

The purpose of RFRA was "to restore the compelling interest 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). Thus, the government must satisfy strict scrutiny. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006).

A. The Newlands exercise religious beliefs in operating Hercules.

1. Families can exercise religion when they run a business.

RFRA protects "any" free exercise of religion. 42 U.S.C. § 2000bb-2 (referencing 42 U.S.C. § 2000cc-5). Conduct constitutes the "exercise of religion" if it is based upon a religious belief that is both sincere and founded on an established religious tenet. *See*, *e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 210–19 (1972) (holding that the Amish objection to formal education beyond the eighth grade is an "exercise of religion" because it is "firmly grounded in . . . central religious concepts").

The government argues that the Newlands forfeited their rights to religious liberty as soon as they endeavored to earn their living by running a corporation. Yet caselaw is to the contrary. In *United States v. Lee* the Court explained that the question of whether a business owner is exercising beliefs is a simple one: "Because 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." 455 U.S. 252, 257 (1982). The same is true here: because providing coverage of abortifacients and contraception violates beliefs that the government concedes are sincerely held, compulsory compliance with the Mandate interferes with the Newlands' free exercise rights.

Similarly, in both *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119–20 & n.9 (9th Cir. 2009), and *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988), the Ninth Circuit recognized that individual owners of a for-profit, "secular" corporation had their religious beliefs burdened by regulation of that corporation. Moreover, each corporation could sue to protect those beliefs. *Id.* As the Seventh Circuit concluded in relation to this mandate on another "family-run business," the Mandate infringes on the individual family members' religious exercise because they "would have to violate their religious beliefs to operate their company in compliance with" the Mandate. *Korte*, 2012 WL 6757353, at *3.

The government's premise seems to be that one cannot exercise religion while engaging in business.[6] But Free Exercise Clause cases have often involved the commercial sphere. In *Sherbert*, 374 U.S. at 399, an employee's religious beliefs were burdened by not receiving unemployment benefits; the same occurred in *Thomas v. Review Bd.*, 450 U.S. 707, 709 (1981). In *U.S. v. Lee*, 455 U.S. at

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[6] The government appears to adopt a literal interpretation of the Bible's injunction that you "cannot serve both God and money," *Matthew* 6:24. This scriptural interpretation by the government cannot change the meaning of religious exercise.

257, the Court held an employer's religious beliefs were burdened by paying taxes for workers. In *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (Alito, J.), an employee's bid to continue his employment was burdened by discriminatory grooming rules.

Congress has rejected the government's view in many ways. The PPACA itself lets employers and "facilit[ies]" assert religious beliefs for or against "provid[ing] coverage for" abortions, without requiring them to be nonprofits.[7] 42 U.S.C. § 18023. Congress has repeatedly authorized similar objections, including to contraceptive insurance coverage.[8] These protections cannot be reconciled with the government's view that religious exercise cannot occur in the world of commerce. If facilities and health plans have conscience protections under federal law, a mandate on a family business also burdens the family's religious beliefs.

The Tenth Circuit has likewise recognized the robust meaning of "free exercise." Both RFRA (42 U.S.C. § 2000bb-2) and "RLUIPA" define free exercise under 42 U.S.C. § 2000cc-5, which "include[s] 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" *Abdulhaseeb*, 600

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[7] One out of every five community hospitals is for-profit. American Hospital Association, http://www.aha.org/research/rc/stat-studies/fast-facts.shtml (last visited Feb. 22, 2013).

[8] *See, e.g.*, Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, Title VII, Div. C, § 727; *id.* at Title VIII, Div. C, § 808; *see also* 42 U.S.C. § 300a-7; 42 U.S.C. § 2996f(b)(8); 20 U.S.C. § 1688; 42 U.S.C. § 238n; 42 U.S.C. § 1396u-2(b)(3)(B); 42 U.S.C. § 1395w-22(j)(3)(B); Pub. L. 112-74, Title V, § 507(d); 48 C.F.R. § 1609.7001(c)(7).

F.3d at 1314 (quoting *Kay v. Bemis*, 500 F.3d 1214, 1221 (10th Cir. 2007)). Many of the government's case citations interpret other terms, such as "religious employer" in Title VII—not "free exercise."

2. RFRA cannot be judicially amended to exclude family businesses.

The government's central argument seems to be that laws such as the Civil Rights Act prevent Hercules from exercising religion under RFRA or the First Amendment. This contention is a *non sequitur*. First, Congress cannot possibly change the First Amendment by statute. But RFRA's concept of "free exercise" is entirely coextensive with the First Amendment. There is no justification for imposing Title VII's narrow scope on RFRA or the Free Exercise Clause.

The government claims that RFRA was enacted before a "backdrop" by which Title VII of the Civil Rights Act somehow declared there to be no exercise of religion in business. This misconstrues RFRA, Title VII, and ordinary canons of statutory interpretation. Title VII contains explicit language limiting its religious exemption from applying beyond "religious corporations." But this "backdrop" is an argument for, not against, Hercules' ability to exercise religion under RFRA. *Congress could have used Title VII's language in RFRA but chose not to.* Since these sections are so near each other in the U.S. Code (42 U.S.C. § 2000e & 2000bb), the term "religious corporation" in Title VII should be given a different meaning than "any exercise of religion" in RFRA. "Where the words of a later

statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning." *Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846, 849 n.5 (10th Cir. 1990) (quoting *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444 (D.C. Cir. 1988)). Moreover, RFRA explicitly declares that *it trumps other statutes* unless those statutes explicitly exempt themselves from RFRA. 42 U.S.C. § 2000bb-3. Title VII cannot be read to trump RFRA when RFRA insists upon the opposite. The fact that Congress felt the need in Title VII to explicitly limit its religious protections suggests that Congress believed that if it had not done so, the default of free exercise belonging to everyone would have ruled the day.

The government tries to inflate its position by claiming that a "special solicitude" for only religious non-profits is reflected in "Acts of Congress." But it cites only one "Act" of Congress, Title VII, which addresses only one issue (employment discrimination) among the myriad of ways businesses could exercise religion. RFRA is also an "Act" of Congress, giving "solicitude" to "any" exercise of religion in any context. Title VII has not been canonized into the Bill of Rights. *See also Tyndale House*, 2012 WL 5817323 at *9 n.13 (Title VII's protection of religious corporations can include for-profit businesses).

The government also relies heavily on *United States v. Lee* for its claim that religion is incompatible with commerce. But *U.S. v. Lee* made no such holding.

Instead, the Court found that the plaintiff in *U.S. v. Lee* did exercise religion, in a way that the Social Security tax *did* create an "interfere[nce] with the[] free exercise rights" of the Amish employers. 455 U.S. at 257. The government's oft-repeated quote from *U.S. v. Lee* about plaintiffs who "enter into commercial activity" having to suffer violations of their religious beliefs is lifted out of context to suggest that those business people did not exercise religion in the first place. But *U.S. v. Lee*'s statement came under the court's scrutiny standard, *after* the Court had found that the business exercised religion and a mere tax burdened it.

The government suggests that if the Court recognizes that people in business can exercise religion, all government will collapse. This scare tactic errs by blurring RFRA's elements. The fact that a company can exercise religion and is burdened thereupon does not mean the company wins its claim automatically. All it means is the government must satisfy the applicable scrutiny level. The government knows this Mandate does not even remotely satisfy strict scrutiny as required under RFRA. But that in no way means other laws, like Title VII, are imperiled by merely recognizing that religion can be exercised in business.

The government argues that because its Mandate applies to Hercules, the Newlands are isolated from its effect. *U.S. v. Lee*, *Stormans*, *Townley*, the other cases cited above, and the ten other injunctions against this Mandate instead recognize the commonsense view that an imposition on a family-business

corporation is no less an imposition on the family owners themselves. This can be seen in the present case. First, as a "close corporation," Hercules is characterized by "unity of ownership and control."[9] The Mandate on Hercules can only possibly be implemented by Hercules' family owners, Board, and officers: the Newlands. Hercules' corporate papers cannot implement the Mandate, nor can its brick-and-mortar buildings. Hercules is even an S-corporation, whereby taxes pass through as if its income belongs to its owners as individuals. App.23; *see United States v. Rice,* 52 F.3d 843, 844 (10th Cir. 1995) (describing S-corporations).

The government proposes the *non sequitur* that because Hercules has limited corporate liability it cannot exercise religion. But limited liability is only one corporate characteristic, and not the morally relevant one here. The Newlands have duties as shareholders, Board members, and officers, and the Mandate's lawsuit remedy is extensive. 29 U.S.C. § 1132. The corporate form does not isolate the Newlands from the Mandate—it is actually the mechanism the Mandate uses to impose its burden. Operating "business in the corporate form is not dispositive." *Korte*, 2012 WL 6757353, at *3

Second, the four Newland owner-Plaintiffs are the sole owners of Hercules. Hercules is not only their well-being but also their property. The Supreme Court has stated that coercion against an individual's financial interests is a substantial

[9] Harwell Wells, "The Rise of the Close Corporation and the Making of Corporation Law," 5 *Berkeley Bus. L.J.* 263, 274 (Fall 2008).

burden on religion. *Sherbert*, 374 U.S. at 403–04. The Mandate coerces the Newlands to use their property in a way that violates their religious beliefs, and penalizes their property if they do not comply. This is an intense burden. The government could not claim that when it fines a person it is not burdening her, but merely burdening her bank account and assets. Finally, to the extent the government is arguing that its Mandate does not really burden the Newlands because they are free to abandon their jobs, their livelihoods, and their property so that others can take over Hercules and comply, this expulsion from business would be an extreme form of government burden.

B. Hercules, Inc., can and does exercise religious beliefs.

1. Corporate law allows Hercules to exercise religion.

The Mandate also burdens Hercules, Inc.'s own free exercise. Notably, Plaintiffs' detailed factual affirmation that Hercules has actually adopted and followed the Newlands' religious beliefs is left unchallenged by the government. App.26–28. Instead the government contends that for-profit corporations cannot engage in "free exercise" as a categorical matter. But no law forbids a corporation from operating according to religious principles.

Colorado law generously empowers Hercules to operate according to its religious beliefs. The government alleges that Hercules' articles of incorporation state its "overriding" purpose of HVAC manufacturing. Yet like most corporate

articles, in addition to stating manufacturing and other business purposes, Hercules' articles distinctly declare "general" purposes "to have and to exercise all of the powers conferred by law upon corporations formed under the laws of this State, and to do any or all things hereinbefore set forth to the same extent as natural persons might or could do."[10]

Hercules' "all legal powers" purpose triggers Colo. Rev. Stat. § 7-103-101(1), under which for-profit corporations are empowered to "engage[e] in any lawful business unless a more limited purpose is stated in the articles of incorporation."[11] Hercules' purposes are not so limited: the purpose to exercise every lawful activity is not textually limited by the other expressed purposes. Therefore Colorado law empowers Hercules to operate according to its adopted religious norms. Colorado law does not let the government object here that Hercules lacks this power. Only shareholders, or a dissolution action, can raise that objection; otherwise, "the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act." Colo. Rev. Stat. § 7-103-104. Notably, Colorado law also acknowledges that an "institution" or

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[10] Hercules, Inc., Articles of Incorporation at 1, *available at* http://www.sos.state.co.us/biz/ViewImage.do?fileId=19871159893&masterFileId=19871159893 (last visited Feb. 22, 2013).

[11] Attempts to create a "benefit corporation" structure in Colorado have failed. "Colorado Lawmakers Hobble to End of Special Session," Aurora Sentinel (May 16, 2012), *available at* http://www.aurorasentinel.com/news/colorado-lawmakers-hobble-to-end-of-special- session/.

"facility" can have a "religious" objection to providing contraception, without requiring it to be a nonprofit. Colo. Rev. Stat. § 25-6-102(9). As noted above, the government's view also contradicts PPACA itself and multiple federal statutes.[12]

To the extent that the government insists on a formalistic approach, the Newlands amended their articles to add explicitly what was always true: that all Hercules' lawful powers continue to allow them to adopt and follow religious beliefs even at the expense of profits.[13] The government offers no rebuttal of the factual affirmation that Hercules both adopted and follows religious beliefs. This also illustrates the common religious identity between the Newlands and Hercules.

2. Caselaw recognizes that Hercules can exercise religion.

The government's argument against any exercise of religion in business is an unprecedented and sweeping view that would push religion out of every sphere of life except the four walls of church. This has never been the legal meaning of "free exercise." "First Amendment protection extends to corporations," and a First Amendment right "does not lose First Amendment protection simply because its source is a corporation." *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 899 (2010). As the Seventh Circuit declared in granting an injunction against this Mandate for another family-run business, "[t]hat the

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[12] *See supra* n.2, n.3 & accompanying text.

[13] Hercules Supply Co., Inc., Articles of Amendment (June 25, 2012), *available at* http://www.sos.state.co.us/biz/ViewImage.do?fileId=20121346636&masterFileId=19871159893 (last visited Feb. 22, 2013). *See also* Order, at App.57.

Kortes operate their business in the corporate form is not dispositive of their claim." *Korte*, 2012 WL 6757353, at *3 (citing *Citizens United* generally). Recent scholarship shows that a large "backdrop of precedent" exists allowing businesses to bring free exercise claims, while there "stands not one published decision in which a court has definitively held that a for-profit corporation lacks standing to bring a free exercise claim as a matter of course."[14]

The government assumes two untenable premises when it denies that the Newlands and Hercules can exercise religion. First, it assumes that the corporate form allows no religious exercise. But the United States Supreme Court has vindicated religious freedom claims for many incorporated plaintiffs. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (captioned as a "New Mexico corporation" in the lower courts' decisions); *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and Sch.*, 597 F.3d 769, 772 (6th Cir. 2010), *rev'd by Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694 (2012) (an "ecclesiastical corporation"). The fact that these corporations were churches or were not-for-profit is beside the point. They were corporations, yet they exercised religion. Likewise, RFRA applies to

[14] Colombo, Ronald J., "The Naked Private Square" (Oct. 21, 2012), at 75, available at http://ssrn.com/abstract=2173801 (last visited Feb. 22, 2013).

"persons," 42 U.S.C. § 2000bb(b), and that term includes corporations, 1 U.S.C. § 1. This is a case of statutory interpretation, and the United States Code is clear: corporations can exercise religion under RFRA. Concluding otherwise would mean that churches, hospitals, and nonprofits could not bring free exercise claims.

It is not true, under *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978), that religious exercise is purely "personal." Instead, *Bellotti* stands for the opposite position: that the First Amendment's scope cannot be resolved on formalities such as whether the plaintiff is a corporation or a sole proprietorship; instead it depends on whether the law in question "abridges [rights] that the First Amendment was meant to protect." *Id.* at 776. A law forcing Christians to choose between their family business and their religious beliefs is squarely within the concern of religious exercise protections.

The government's second incorrect premise is that an entity cannot exercise religion if it operates for profit. No prior Supreme Court or Court of Appeals precedent takes this view. Instead, courts often recognize the ability of for-profit enterprises to exercise religion. The Supreme Court held that an Amish for-profit business exercised religion in *U.S. v. Lee*, 455 U.S. at 257. Although that employer lost on another element of the claim, the Court specifically said the mere act of a business complying with a government requirement that violates its religious beliefs "interferes with their free exercise rights." *Id.; see also McClure*, 370

N.W.2d at 850 (finding that a health club and its owners could assert free exercise of religion claims); *Stormans*, 586 F.3d at 1119–20 & n.9 (allowing for-profit pharmacy to bring Free Exercise claims on behalf of its family owners); *Townley*, 859 F.2d at 620 n.15 (same for manufacturer); *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 200 (2012) (allowing a corporate kosher deli and its owners to bring Free Exercise and Establishment Clause claims).

The Supreme Court has repeatedly recognized free exercise claims in money-making activities. *See, e.g.*, *Sherbert*, 374 U.S. at 399 (an employee's religious beliefs were burdened by the government's refusal to give her unemployment benefits); *Thomas,* 450 U.S. at 709 (same); *Lee*, 455 U.S. at 257 (an employer exercised religious beliefs and was sufficiently burdened by having to pay taxes). The Court has also emphasized that "First Amendment protection extends to corporations," and a First Amendment right "does not lose First Amendment protection simply because its source is a corporation." *Citizens United*, 130 S. Ct. at 899; *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"). For-profit corporations such as the New York Times could never have won seminal cases without possessing First Amendment rights. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The government misconstrues *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), when the government contends that only "religious organizations" can exercise religion. No Supreme Court case, including *Hosanna-Tabor*, makes that assertion. In *Hosanna-Tabor* the Court made clear that religious corporations are protected by special Establishment Clause concerns relating to their selection of ministers, but the Court in no way concluded that no company has protection unless it is a religious nonprofit.

The government's view imposing a chasm between "religious" and "secular" activities begs the question by assuming that business is one thing and religion is an entirely different thing. That assumption is not supported as a matter of law. It is instead an imposition of the government's own essentially theological view that the exercise of religion should be confined to the four walls of a person's church, or home, or mind. But religion is not an isolated category of human activity that can be cordoned off from other "separate" activities such as business.[15] Religion is, among other things, a *viewpoint* from which people engage in *any* kind of activity or purpose, not excluding business. *See Good News Club v. Milford Central School*, 533 U.S. 98, 107–12 (2001) (activities of any kind, whether "social," "civic," "recreational," or educational, are not different *kinds* of activities when religious, they are the same kind of activity simply done from a religious

[15] "Secular" is not an antonym of religion, but simply connotes activities that happen "in the world," whether or not those activities are religious.

perspective).[16] This court would likewise venture into deep theological waters by declaring religion to be purely "personal" as a matter of law. Many religions require exercise in groups, and guide believers in all their daily activities. American law protects religious "exercise," not religious subjectivism.

Finally, there is no precedent saying that the confluence of these two realities—corporate status and profit motive—make religious exercise impossible. Several cases cited above show the opposite. The First Amendment has never contained a "dichotomy between religious and secular employers." Corporations are no more purely "secular" or purely religious than are the people that run them. It is essential to freedom in America for citizens to be able to live out their faith in their everyday lives, including in the way they run their businesses. The government's view would mean that a Jewish family cannot exercise religion in running a kosher deli for profit or through a corporation. The government's position would even reach beyond religion and require the pursuit of profit over any ethical value such as respect for the environment, generous treatment of workers, charitable efforts, community service, or even just plain honesty. The government would cause businesses to care about greed and nothing else. This

[16] To the extent the government may be contending that corporations can adopt ethics as long as they are not *religious* ethics, that position would be unconstitutional viewpoint discrimination. *Id.* (discussing *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), and *Rosenberger v. Rector and Visitors of U. of Va.*, 515 U.S. 819, 831 (1995)).

would be a disastrous public policy. Such a view is counseled neither by law, by precedent, nor by common sense.

C. The Mandate substantially burdens the Plaintiffs' beliefs.

The Mandate is an archetypal substantial burden, because it "make[s] unlawful the religious practice itself." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). The Newlands and Hercules exercise their religious beliefs in this case by refraining from covering abortifacient items, contraception, sterilization, and related counseling in their employee health insurance plan. To outlaw that religious exercise and "*compel* a violation of conscience," as here, is a quintessential substantial burden. *Thomas v. Review Bd.*, 450 U.S. at 717.

As stated above, in order to prevail under RFRA, a claimant must show a religious exercise that is "substantially burdened" by the government. § 2000bb(b). The Tenth Circuit directs that "[i]n assessing this burden, courts must not judge the significance of the particular belief or practice in question." *Abdulhaseeb*, 600 F.3d at 1314 n.6 (quoting *Lovelace v. Lee*, 472 F.3d 174, 187 n. 2 (4th Cir. 2006)). "Neither this court nor defendants are qualified to determine that" the Mandate "*should* satisfy [Plaintiffs'] religious beliefs." *Id.* at 1314 n.7 (emphasis added; citation omitted). Even if "the compulsion [is] indirect, the infringement upon free exercise is nonetheless substantial." *Id.* at 1315 (quoting *Thomas v. Review Bd.*, 450 U.S. at 717–18). A substantial burden exists if "a government . . . requires

participation in an activity prohibited by a sincerely held religious belief" or "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief." *Id.* at 1315; *see also Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007) (Congress intended "to create a broad definition of substantial burden").

Such a burden happens even in indirect instances, such as where a law forces a person or group "to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order to accept [government benefits], on the other hand." *Sherbert*, 374 U.S. at 404. *Sherbert* held that it was "clear" that denying unemployment benefits to an employee was a substantial burden, even though the law did not directly command her to violate her beliefs against working on Saturdays. *Id.* at 403–04. 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. For their violation 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.

Contrary to the government's view, the coercion here is even more direct than in *Sherbert*. The Mandate requires the Newlands and Hercules to purchase

coverage for medications and devices that can bring about early abortions, contraception, or sterilization. This explicitly meets the "requires participation" standard of *Abdulhaseeb*, not to mention its "places substantial pressure" standard. Not only is the religious belief of the Newlands clear—that they cannot in good conscience facilitate such coverage—the substantial burden is also clear—penalties of $100 per employee per day, more than $90,000 per day, and government lawsuits for non-compliance with an order to violate that exact belief.

The Mandate explicitly makes unlawful the Newlands' and Hercules' religious practice of refraining from covering contraceptives. The Mandate is a "fine imposed against appellant for" their religious practice, *Sherbert*, 374 U.S. at 404, and requires them "to perform acts undeniably at odds with fundamental tenets of their religious belief." *Yoder*, 406 U.S. at 218. Thus, the Mandate bears direct responsibility for placing substantial pressure on the Newlands and Hercules to offer a health plan that violates their religious and ethical beliefs, rendering their religious exercise on this issue effectively impracticable.

The government itself has expressly acknowledged the burden that the Mandate imposes upon religious exercise. Recognizing that providing insurance coverage of contraceptive and sterilization services would conflict with "the religious beliefs of certain religious employers," the government has granted a wholesale exemption for a class of employers, e.g., churches and their auxiliaries,

from complying with the Mandate. 76 Fed. Reg. 46,621, 46,623; 77 Fed. Reg. 8,725; 78 Fed. Reg. 8,456, 8,460. In addition, the government has provided a temporary enforcement safe harbor for any employer, group health plan, or group health insurance issuer that fails to cover some or all recommended contraceptive services and that is sponsored by a *nonprofit* organization that meets certain criteria.[17] During the time of this temporary safe harbor, the government will refrain from enforcing the Mandate against qualifying entities, thereby providing such entities with the basic equivalent of the preliminary injunction that the District Court granted in this case. The government cannot contend it was an abuse of discretion to grant an injunction when it is offering its own non-enforcement safe harbor.[18]

The government has also proposed ways of "accommodating the religious objections to contraceptive coverage" by religious nonprofit organizations. 78 Fed. Reg. at 8,460. And the government last year explicitly considered whether "for-profit religious employers with [religious] objections should be considered as

[17] Dep't of Health & Human Servs., Revised Guidance on the Temporary Enforcement Safe Harbor (Aug. 15, 2012), http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf (last visited Feb. 19, 2013).

[18] In litigation brought by such groups, the government claims its safe harbor fully removes any of the Mandate's burdens. *See, e.g.*, Gov. Mot. to Dismiss at 14–16, *Belmont Abbey College v. Sebelius*, No. 1:11-cv-01989-JEB (D.D.C. doc.# 23-1, Apr. 5, 2012).

well," 77 Fed. Reg. at 16,504, thus underscoring the government's acknowledgment of a religious burden on for-profit corporations.

The government wrongly contends that the Mandate's burden is not substantial because it is too morally "attenuated." This view, adopted by a minority of cases ruling on this Mandate, "misunderstands the substance of the claim" of a substantial burden. *Korte*, 2012 WL 6757353 at *3. The argument is legally erroneous because "substantial burden" is not an exercise in moral theology. A "substantial burden" measures the government's penalties—the pressure to violate religious beliefs. 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 has explicitly rejected the kind of moral theologizing that the government employs 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, 714–16 (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 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. Courts should not undertake to dissect religious beliefs . . . ." *Id.* Likewise here, it is plain legal error to contend that direct penalties are somehow not "substantial" burdens on an explicit religious belief (objecting to certain insurance coverage) because the government deems them *theologically* (morally) attenuated from the use of contraceptives.

Even if "substantial burden" did involve theological weighing of moral attenuation, it would be factually erroneous (and would violate discretionary review) to conclude that the Newlands' and Hercules' beliefs are not substantially burdened. Their religious beliefs forbid not only personally using birth control, but providing the coverage to which they object. App.26–28 at ¶¶ 32, 41. The burden is therefore not attenuated at all: it requires exactly the activity the Newlands' and Hercules' beliefs prohibit. This is exactly the type of direct burden RFRA was enacted to prevent.[19] Concluding the opposite would improperly question the sincerity and centrality of Plaintiffs' beliefs. *See Thomas v. Review Bd.*, 450 U.S. at 714 (the burden on a religious belief "is not to turn upon a judicial perception of the particular belief or practice"); *Employment Div. v. Smith*, 494 U.S. 872, 886–87

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[19] As the District Court in *Tyndale* correctly noted, "*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. 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*, 2012 WL 5817323 at *13 (citing *Thomas*, 450 U.S. at 718) (emphasis added).

(1990) (rejecting the "centrality" test). But the government has already conceded the sincerity of Plaintiffs' beliefs. Gov. Brief at 10.[20] The District Court's explicit rejection of the government's substantial-burden argument "out of hand," App.65 n.9, constitutes a recognition of these facts, which cannot be reversed for abuse of discretion.

Finally, the federal government itself recognizes that mandates to provide contraceptive coverage substantially burden religious exercise. Federal statutes shield companies from contraception coverage mandates.[21] Even under the present Mandate the government created a four-part religious exemption and proposed other accommodations, implicitly conceding that the Mandate imposes a substantial burden on religious beliefs.

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[20] Also notably, Catholic Cardinal Raymond Burke has declared compliance with a Mandate such as this one constitutes "formal cooperation" in evil. Cardinal Burke Discussing Religious Freedom, Apr. 11, 2012, *available at* http://catholicaction.org/2012/04/cardinal-raymond-burke-discussing-religious-freedom/ (last visited Feb. 22, 2013). Pope Benedict XVI likewise has declared: "It is not "consistent to profess our beliefs in church on Sunday, and then during the week to promote business practices . . . contrary to those beliefs." Celebration of Vespers and Meeting with the Bishops of the United States of America: Address of His Holiness Benedict XVI, Apr. 16, 2008, *available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080416_bishops-usa_en.html (last visited Feb. 22, 2013).

[21] *See, e.g.*, Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, Title VII, Div. C, § 727 (protecting religious health plans in the federal employees' health benefits program from being forced to provide contraceptive coverage); *id.* at Title VIII, Div. C, § 808 (affirming that the District of Columbia must respect the religious and moral beliefs of those who object to providing contraceptive coverage in health plans).

D. No compelling interest exists to burden the Plaintiffs' beliefs.

The government cannot establish that its coercion of the Newlands and Hercules is "in furtherance of a compelling governmental interest." RFRA, with "the strict scrutiny test it adopted," *O Centro Espirita*, 546 U.S. at 430, imposes "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). A compelling interest is an interest of "the highest order," *Lukumi*, 508 U.S.at 546, and is implicated only by "the gravest abuses, endangering paramount interests." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

The government cannot propose its interest "in the abstract," but must show a compelling interest "in the circumstances of this case." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000); *O Centro Espirita*, 546 U.S. at 430–32 (test applies "the challenged law 'to the person'—the particular claimant"); *see also Lukumi,* 508 U.S. at 546 (rejecting the assertion that protecting public health was a compelling interest "in the context of these ordinances").

The government must "specifically identify an 'actual problem' in need of solving" and show that coercing Plaintiffs is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011). If the government's "evidence is not compelling," it fails to satisfy its burden. *Id.* at 2739. The government's evidence must show not merely a correlation but a "caus[al]" nexus

between its Mandate and a grave interest. *Id.* The government "bears the risk of uncertainty[;] . . . ambiguous proof will not suffice." *Id.*

The government's interest in coercing the Newlands and Hercules to provide coverage of abortifacients, contraception, and sterilization is not compelling. The government asserts that its Mandate will achieve women's health and equality. But these interests are generic and abstract. *O Centro Espirita* requires the government to demonstrate a compelling interest against "granting specific exemptions to particular religious claimants." 546 U.S. at 431. The government has not even alleged such an interest, much less offered specific evidence.

1. By excluding tens of millions of women for various reasons, the government shows that its interest is not compelling.

What radically undermines the government's alleged compelling interest is the massive number of people who the government has voluntarily decided to omit from its supposedly paramount health and equality interests. *See* App.67; *Tyndale House*, 2012 WL 5817323 at *17. The Mandate does not apply to thousands of plans that are "grandfathered" under the PPACA. *See* 76 Fed. Reg. at 46,623 & n.4. These plans will cover tens of millions of women as far out as the government's data projects. 75 Fed. Reg. at 34,540–53.

"[T]he government is generally not permitted to punish religious damage to its compelling interests while letting equally serious secular damage go unpunished." *United States v. Friday*, 525 F.3d 938, 958 (10th Cir. 2008). "[A]

law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 520. No compelling interest exists when the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Id*. at 546–47.

If the government really possessed an interest "of the highest order" to justify coercing the Newlands and Hercules, the government could not voluntarily use grandfathering to omit tens of millions of women from this Mandate. The pedestrian reason for the grandfathering exemption illustrates this point: it exists because "[d]uring the health reform debate, President Obama made clear to Americans that 'if you like your health plan, you can keep it.'"[22] Such a cosmically large exclusion, made for a mere political reason, betrays the alleged grave character of this interest. The government is content to leave millions of women with "health risks" and "competitive disadvantages." Religious freedom objections under RFRA cannot be considered less important.

Even more importantly, Congress considered some of PPACA's requirements paramount enough to impose on grandfathered plans. *See* App.55 n.4; Table 1, at 75 Fed. Reg. at 34,542 (listing PPACA §§ 2704, 2708, 2711, 2712,

[22] HealthCare.Gov, "Keeping the Health Plan You Have: The Affordable Care Act and 'Grandfathered' Health Plans," *available at* http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (last visited Feb. 15, 2013).

2715, 2718 as applicable to grandfathered plans). These requirements actually surround this Mandate, § 2713. But by statute, Congress intentionally omitted this Mandate from ones it considered important enough to impose on all plans. Moreover, Congress did not consider abortifacients, contraception, and sterilization important enough to list in § 2713. As far as Congress was concerned, PPACA need not impose any birth control mandate. And the government admits that Congress gave HHS authority to exempt *any* religious objectors it wanted to exempt from this Mandate. 76 Fed. Reg. at 46,623–24; 77 Fed. Reg. at 8,726. As far as Congress was concerned, the government could have exempted Hercules. Therefore, by layers upon layers of indifference, Congress deemed certain interests to be "of the highest order" for all health plans, but not this Mandate. Such a second-class interest cannot be considered compelling under strict scrutiny, and cannot trump religious objections under RFRA.

The government cannot justify this exemption on the theory that it is not an exemption from the Mandate itself, but from PPACA overall. That is irrelevant to the analysis. The question isn't how to *label* grandfathering, but whether it "leaves appreciable damage to [its] supposedly vital interest unprohibited." *Id.* The government is responsible for PPACA and its regulations. It voluntarily caused galactic damage to the Mandate's interests of health and equality.

Nor can the government claim that the grandfathering exclusion is transitory. This contradicts the text of PPACA, the government's website, and its own data. *See* App.67 n.11. The government insists that grandfathering "preserves the ability of the American people to keep their current plan if they like it," and "allows plans that existed on March 23, 2010[,] to innovate and contain costs by allowing insurers and employers to make routine changes without losing grandfather status."[23] "Most of the 133 million Americans with employer-sponsored health insurance through large employers will maintain the coverage they have today." *Id.* In contrast to speculation that the grandfathering rule is temporary, the government admits that "[t]here is considerable uncertainty about what choices employers will make over the next few years" regarding whether they will abandon grandfathered status. *Id.* There is no sunset on grandfathering status in PPACA or its regulations. Instead, a plan can keep grandfathered status in perpetuity, even if it raises fixed-cost employee contributions and, for several items, even if the increases exceed medical inflation plus 15% every year. *Id.* The government repeatedly calls it a "right" for a plan to maintain grandfathered status. *See* 75 Fed. Reg. 34,538, at 34,540, 34,558, 34,562, & 34,566.

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[23] HealthReform.gov, *available at* http://www.healthreform.gov/newsroom/keeping_the_health_plan_you_have.html.

The government asserts that "most" plans from employers the size of Hercules will maintain grandfathered status (and therefore not be subject to the Mandate).[24] As in *O Centro Espirita*, where government exclusions apply to "hundreds of thousands" (here, millions), RFRA requires "a similar exception for the 130 or so" affected here. 546 U.S. at 433. Insisting on Mandate compliance at a company where "most" similar companies need not comply is an improper attempt to claim "a compelling interest in each marginal percentage point by which its goals are advanced." *Brown v. Entm't Merchs*, 131 S. Ct. at 2741.

2. The government misinterprets the compelling interest test.

The government relies on *Lee* to characterize RFRA's scrutiny as not being very strict in commercial contexts, but the government gives short shrift to *O Centro*. That case does not allow the Court to apply a "strict scrutiny lite" for any RFRA claim. "[T]he compelling interest test" of "RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test," such as in speech cases. 546 U.S. at 430. *O Centro Espirita* explicitly cabined *U.S. v. Lee* to its context of a tax that was nearly universal, and did not allow the government to claim "that a general interest in uniformity justified a substantial burden on religious exercise." *Id.* at 435.

[24] HealthReform.gov, *supra* n.22.

The government claims from *Lee* that conscience objections should not be applied "on the statutory schemes which are binding on others in that activity." 455 U.S. at 261. But the Mandate is emphatically not "binding on others in th[e] activity" of employer-provided insurance. Whereas *U.S. v. Lee*'s tax contained only a tiny exemption for some Amish, the Mandate here avoids:

- Tens of millions of women in "grandfathered" plans, including at "most" large employers;
- Members of certain objecting religious groups. *See*, *e.g.*, 26 U.S.C. § 5000A(d)(2)(a) ("recognized religious sect or division"); *id.* § 5000A(d)(2)(b)(ii) ("health care sharing ministries");
- Small employers allowed to drop employee insurance altogether. 26 U.S.C. § 4980H(c)(2);
- Churches, church auxiliaries, and religious entitled to a blanket exemption from the mandate. 78 Fed. Reg. 8,456.
- Certain religiously affiliated nonprofits offered an additional year before enforcement, *see, e.g.*, 78 Fed. Reg. at 8,458, then subjected to an "accommodation" relieving them of some involvement, *id.* at 8,461.

This Mandate is many things, but uniform is not one of them.

O Centro Espirita is impatient with the insistence on uniformity:

> The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rule[s] of general applicability."

546 U.S. at 436. *Lee*'s tax was far more universal than this Mandate. The law upheld in *Lee* was a tax to raise government funding. Governments cannot

function without taxes. 455 U.S. at 260. But the United States has functioned for over 200 years without a federal mandate of employer contraception coverage in insurance. This Mandate is not a "government program" as in *U.S. v. Lee*. Here the Plaintiffs do not fund the government; they give specific services to private citizens. The government has decided *not* to pursue its goals with a government program, but instead to conscript religiously objecting citizens.

Lee's scrutiny test was not strict. Instead it was a precursor to *Employment Division* v. *Smith*, which adopted a lower standard that RFRA affirmatively rejected. RFRA codifies the test "in *Sherbert*, 374 U.S. 398 and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb. RFRA omits *U.S. v. Lee* from this list. *U.S. v. Lee* never says it is imposing the "compelling interest" test. But *Sherbert* and *Yoder* did apply RFRA's strict scrutiny test. As scholars note:

> The standard thus incorporated [by RFRA] is a highly protective one. . . . The cases incorporated by Congress explain "compelling" with superlatives: "paramount," "gravest," and "highest." Even these interests are sufficient only if they are "not otherwise served," if "no alternative forms of regulation would combat such abuses". . . .[25]

3. The government has failed to show compelling evidence.

The government also fails the compelling interest test because its "evidence is not compelling." *Brown v. Entm't Merchs.*, 131 S. Ct. at 2739. Centrally, the government presents no evidence that the Mandate will actually work, much less

[25] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 224 (1994).

that it is necessary. There are twenty-eight similar state mandates around the country. But the government has cited zero evidence—not one study—showing that even a single state mandate yielded health and equality benefits for women, much less that one of those laws did so more than "marginal[ly]" as required by *Brown v. Entm't Merchs. Id.* at 2741. There is no evidence to carry the government's burden that this Mandate will help, in a "paramount" way, the problems that the government alleges exist.

The government points only to generic interests, marginal benefits, correlation not causation, and uncertain methodology. The Institute of Medicine ("IOM") Report on which the Mandate is based ("2011 IOM"),[26] does not demonstrate the government's conclusions. At best, its studies argue for a generic health benefit from contraception, lacking the specificity required by *O Centro Espirita*, 546 U.S. at 430–31.

The government cites no pandemic of unwanted births in religiously objecting entities like Hercules, nor catastrophic consequences for health and employee equality. For all the government knows, it could be that employees of such entities have better health and workplace equality than elsewhere. At best,

[26] Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited Feb. 22, 2013).

the government does not know. But it "bear[s] the risk of uncertainty" under strict scrutiny. *Brown v. Entm't Merchs,* 131 S. Ct. at 2739.

Nowhere does IOM cite evidence showing that the Mandate would actually increase contraception use—which is a necessary corollary to saying health and equality from unintended births will result. Instead, IOM's sources show: 89% of women avoiding pregnancy are already practicing contraception;[27] among the other 11%, lack of access is not a statistically significant reason why they do not contracept;[28] and even among the most at-risk populations, cost is not the reason those women do not contracept.[29] The studies cited at 2011 IOM pp. 109 do not show that cost leads to non-use generally, but relate only to women switching from one contraception method to another.

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[27] The Guttmacher Institute, *Facts on Contraceptive Use in the United States* (June 2010)," *available at* http://www.guttmacher.org/pubs/fb_contr_use.html (last visited Feb. 22, 2013).

[28] W.D. Mosher & J. Jones, *Use of Contraception in the United States: 1982–2008*, 23 VITAL AND HEALTH STAT. 14, Table E (2010), *available at* http://www.cdc.gov/NCHS/data/series/sr_23/sr23_029.pdf (last visited Feb. 22, 2013).

[29] R. Jones et al, *Contraceptive Use Among U.S. Women Having Abortions*, 34 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 294 (2002) (PERSPECTIVES is a publication of the Guttmacher Institute). The Centers for Disease Control released a study this year showing that even among those most at risk for unintended pregnancy, only 13% cite cost as a reason for not using contraception. Ctrs. for Disease Control and Prevention, *Prepregnancy Contraceptive Use Among Teens with Unintended Pregnancies Resulting in Live Births — Pregnancy Risk Assessment Monitoring System (PRAMS), 2004–2008*, 61 MORBIDITY AND MORTALITY WEEKLY REPORT 25 (Jan. 20, 2012), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6102a1.htm?s_cid=mm6102a1_e (last visited Feb. 22, 2013).

The government's evidence fails to apply to the Mandate's target population of women who are employed with health insurance. Women who suffer "unintended pregnancy" are instead primarily young, unmarried, and low-income. 2011 IOM at 102. Hercules' employees by definition have jobs, health insurance with generous women's benefits, and significant wages. App.36–37. The government asserts that women incur more preventive care costs generally, 2011 IOM at 19–20, but IOM's studies don't say they specifically include contraception as part of that cost, nor at what percentage. PPACA already erases any preventive services cost gap, including at Hercules. 42 U.S.C. § 300gg-13. There is no evidence that any gap, much less a grave one, will remain *at Hercules*.

The government cannot show that the Mandate would prevent negative health consequences. "Nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology." *Brown v. Entm't Merchs.*, 131 S. Ct. at 2739 (quotation marks omitted). IOM admits that for negative outcomes from unintended pregnancy, "research is limited." 2011 IOM at 103. IOM therefore cites its own 1995 report, which similarly emphasizes the fundamental flaws in determining which pregnancies are "unintended," and "whether the effect is caused by or merely associated with unwanted pregnancy."[30] The 1995 IOM Report admits that

[30] Institute of Medicine, *The Best Intentions* (1995) ("1995 IOM"), available at

no causal link exists for most of its alleged factors. This makes sense, since the intendedness or unintendedness of a pregnancy cannot itself physiologically change its health effect. Thus, a delay in seeking prenatal care upon unintended pregnancy is "no longer statistically significant" for women not already disposed to delay or who have a "support network"[31]—which exists in Hercules' plan. The IOM's recital of possible health consequences shows that the evidence is not compelling:

- The alleged increase in smoking and drinking drops significantly where studies control for other causes, while data on domestic violence and depression "provide little systematic assessment" and merely "suggest" association (not causation).[32]

- The alleged reduction in low birth weight and prematurity overlooks the fact that, like other cited factors, these are merely "associated" with, not caused by, unintended pregnancy (1995 IOM at 70; 2011 IOM at 103). Several studies show no connection between it and pregnancy-spacing in the U.S.[33] And several studies show that low birth weight is associated not with contraception but with shorter pregnancy *intervals*, further distancing itself from a contraception connection. 2011 IOM at 103.

- Evidence is not compelling that the Mandate against Hercules would certainly cause pregnancy-prevention. In 48% of all unintended pregnancies, contraception was used.[34] Multiple peer-reviewed

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http://books.nap.edu/openbook.php?record_id=4903&page=64 (last visited Feb. 22, 2013).

[31] *Id.* at 68.

[32] *Id.* at 69, 73, 75.

[33] *Id.* at 70–71.

[34] L.B. Finer & S.K. Henshaw, *Disparities in Rates of Unintended Pregnancy in the United States, 1994 and 2001*, 38 PERSP. ON SEXUAL & REPROD. HEALTH 90

> studies demonstrate that there is no scholarly consensus that increased contraception use reduces either abortion (which occurs upon pregnancy) or sexually transmitted diseases.[35]

Notably, no evidence shows that the Mandate is the only method to provide the items in question. Hercules suggests that such evidence would not be possible. Birth control has the same effect regardless of who provides it.

E. Less-restrictive means could fully achieve the government's interests.

The Government cannot show that the Mandate is "the least restrictive means of furthering" its interests. 42 U.S.C. 2000bb-1. The fact that the Government could subsidize contraception itself and give it to employees at exempt entities shows that the Government fails RFRA's least restrictive means requirement. The government bears the burden to show the least restrictive means element, including at the preliminary injunction stage. *O Centro Espirita*, 546 U.S. at 428–30.

(2006), *available at* http://www.guttmacher.org/pubs/journals/3809006.html (last visited Feb. 22, 2013).

[35] K. Edgardh, et al., *Adolescent Sexual Health in Sweden*, 78 SEXUAL TRANSMITTED INFECTIONS 352 (2002), *available at* http://sti.bmjjournals.com/cgi/content/full/78/5/352; Sourafel Girma & David Paton, *The Impact of Emergency Birth Control on Teen Pregnancy and STIs*, 30 J. OF HEALTH ECON. 373 (2011); A. Glasier, *Emergency Contraception*, 333 BRIT. MED. J. 560 (2006); J.L. Duenas, et al., *Trends in the Use of Contraceptive Methods and Voluntary Interruption of Pregnancy in the Spanish Population During 1997–2007*, 83 CONTRACEPTION 82 (2011).

The Government could, if the political will existed, achieve its desire for free coverage of birth control *by providing that benefit itself*. The government already amply provides contraception and contraceptive subsidies on a massive scale.[36] Rather than coerce the Newlands and Hercules to provide this coverage in their plan, the government could pursue other means. It could raise the maximum income level for Medicaid to allow women to get free contraception, or offer that program to employees of objecting entities. It could offer tax deductions or credits for the purchase of contraceptives. It could reimburse citizens who pay to use contraceptives. It could create its own contraceptive insurance company. It could provide incentives for states or pharmaceutical companies to provide such products free of charge. These and other options could fully achieve the government's goals without forcing the Newlands and Hercules to provide the coverage.

RFRA requires the Mandate to be "the least restrictive means," not the least restrictive means the government chooses. 42 U.S.C. § 2000bb-1. The government cannot satisfy the least restrictive means analysis imposed in *Riley v.*

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[36] *See, e.g.*, 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), (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).

Nat'l Fed'n of the Blind of North Carolina, Inc., 487 U.S. 781 (1988). There, North Carolina sought to curb fraud by requiring professional fundraisers to disclose during solicitations how much of the donation would go to them. *Id.* at 786. Applying strict scrutiny, the Supreme Court declared that the state's interest could be achieved by publishing the same disclosures itself online, and by prosecuting fraud. *Id.* at 799–800. Although these alternatives would be costly, less directly effective, and a restructuring of the governmental scheme, strict scrutiny demanded they be viewed as acceptable alternatives. *See id.* "The lesson" of RFRA's pedigree of caselaw "is that the government must show something more compelling than saving money."[37]

The government cannot claim that honoring the Newlands' rights under RFRA would involve the government in subsidizing private religious practices. The Newlands are not asking the government to subsidize it or any religious practice. It is not even asking the government to buy contraceptives and abortifacients. It is simply asserting the self-evident fact that if the government wants to give private citizens contraceptives and abortifacients, it can do so itself instead of forcing the Newlands and Hercules to do it. Such an alternative renders the Mandate a violation of RFRA. The government is simply redefining coercion and calling it a requirement for women's freedom. All the Newlands want is to be

[37] Laycock & Thomas, *supra* n.17, at 224.

free from government coercion of their religious beliefs. To call this "subsidizing private religious practices" is an Orwellian attempt to make coercion the default status in America. This would render the First Amendment itself a government "subsidy," since it explicitly protects religious exercise. The Declaration of Independence instead declares that the right to Liberty belongs to citizens as "endowed by their Creator," not as graciously "subsidized by their government." *See* DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

The government's interpretation of *United States v. Wilgus*, 638 F.3d 1274, 1284–95 (10th Cir. 2011), is inconsistent with strict scrutiny. It is not true that under *Wilgus*, least restrictive means need only consider the government's chosen means. According to *Wilgus,* a less restrictive means can be proposed outside an existing governmental scheme, and it can have a different cost. *See* 638 F.3d. at 1289. *Wilgus* requires the government to "support its choice of regulation" and "refute the alternative schemes offered by the challenger," not to assume its choice and refuse to contemplate alternates. *Id.*

Exemptions would not undermine the government's interest if it adopted other means. *The government already provides free contraception to women*, and provides health insurance including contraception outside the employer-based system. There is no compelling reason that the government cannot do so for women working at exempt entities, without coercing religiously objecting

employers. The present case is not like *Lee*, where taxes cannot be raised if people opt out of paying them—*O Centro Espirita* distinguished *U.S. v. Lee* on this point. 546 U.S. at 435. Likewise in *Braunfeld*, 366 U.S. 599, exemptions from a Sunday closing law undermine the overall rule by causing competition, but here government itself providing contraception does not undermine its interests at all.

When the government insists on imposing its Mandate in employer-based insurance, it is actually redefining its interest. Claiming an interest in women's health and equality through free contraception is one thing. Claiming that women's health and equality are harmed depending on who gives them the free contraception is something else altogether. There is no evidence that women are helped, not merely by getting free contraception, but by making sure their religious employers are coerced in the process. Coercion is not a compelling interest in itself. If women received their contraception from a different source, there is no evidence they would face "grave" and "paramount" harms for that reason. "[T]he Government has not offered evidence demonstrating" compelling harm from an alternative. *O Centro Espirita*, 546 U.S. at 435–37.

III. The Mandate violates the Free Exercise Clause.

The Newlands and Hercules have also demonstrated a likelihood of success on the merits of their claim that the Mandate violates the Free Exercise Clause. The District Court did not address this claim, and this Court also does not need to

do so if it affirms the injunction based on RFRA. But the Free Exercise Clause also presents an independent basis to affirm the District Court's decision.

For the reasons stated above, the Newlands and Hercules exercise religion, and the Mandate sufficiently burdens that exercise under the First Amendment. A claim under the Free Exercise Clause also requires that the law be either not generally applicable or not neutral. *See Lukumi*, 508 U.S. at 542–43. Strict scrutiny applies when discretionary or categorical exemptions exist but religious objections are denied. *See Blackhawk v. Pennsylvania*, 381 F.3d 202, 209–11 (3d Cir. 2004) (Alito, J.).

For the reasons explained above regarding the Mandate's exemptions, including its massive grandfathering exemption, the Mandate is not generally applicable. These represent not only categorical exemptions, but discretionary ones. The government admits it possesses and is exercising discretion in deciding whom to exempt from the Mandate. 76 Fed. Reg. at 46,623–24; 77 Fed. Reg. at 8726. Defendants-Appellants continually use this discretion to change who is exempt, or accommodated, or "safe harbored," and how (*compare* 76 Fed. Reg. 46,621; 77 Fed. Reg. 8,725; 77 Fed. Reg. 16,501; 78 Fed. Reg. 8,456; "Guidance on Temporary Enforcement Safe Harbor," Feb. 10, 2012, *available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf; Revised "Guidance on Temporary Enforcement Safe

Harbor," Aug. 15, 2012, *available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf). Yet § 2713 itself contains no standards at all to constrain the government in its unfettered exercise of this discretion.

The Mandate is also not "neutral" under the Free Exercise Clause because when the "object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 533. The object of a law can be determined by examining its text and operation. *Id*. at 534–35. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Id.* at 533. The Mandate picks and chooses among "religious employers," and then exempts plans for secular reasons such as by grandfathering. *See Hartmann v. Stone,* 68 F.3d 973, 978 (6th Cir. 1995) (requiring "neutrality between religion and non-religion"); *see also Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 167 (3d Cir. 2002) (law is not neutral when secular and religious exemptions are offered to others but denied to plaintiff).

The Mandate's massive categorical exemptions, discretionary exemptions, and lack of neutrality subject the Mandate to strict scrutiny. For the reasons established above, the government cannot carry its burden under that test.

IV. The Mandate violates the Establishment Clause.

The Mandate also violates the Establishment Clause of the First Amendment. The Mandate's "religious employer" exemption sets forth the government's notion of what "counts" as religion and what doesn't for the purposes of who will be exempt under the Mandate. But the government may not create a caste system of different religious organizations and belief-levels when it imposes a burden. Instead it "must treat individual religions and religious institutions 'without discrimination or preference.'" *Colo. Christian U. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008); *Larson v. Valente*, 456 U.S. 228 (1982); *see also Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990) (holding that section 19 of the National Labor Relations Act, which exempts from mandatory union membership any employee who "is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations," is unconstitutional because it discriminates among religions and would involve an impermissible government inquiry into religious tenets), *cert. denied*, 505 U.S. 1218 (1992).

The government used its unfettered discretion to pick and choose what criteria qualify a group as "religious" enough for an exemption, and it imposed its constricted theological view of religion on all Americans. The government went

on to create an "accommodation" for yet another level of religious organizations, but still denies any exemption or accommodation for religious objectors such as Hercules. The government did so on the theological judgment that religion has no place in the lives of believers when they engage in business. This involves "intrusive judgments regarding contested questions of religious belief or practice" in violation of the First Amendment. *Weaver*, 534 F.3d at 1261.

In *Weaver* the Tenth Circuit held unconstitutional a discrimination-among-religions policy that is very similar to the Mandate. The discrimination among religions in that case attempted to treat "pervasively sectarian" education institutions differently than other religious institutions. *Id.* at 1250–51. The Mandate here likewise draws its line around "religious employers" based on whether they are churches, or whether they are religious nonprofits, or whether they are nonprofits deserving of a non-enforcement safe-harbor, or whether they are just religious families in business. The Tenth Circuit rejected as "puzzling and wholly artificial" the government's argument that their law "distinguishes not between types of religions, but between types of institutions." *Id.* at 1259–60. The Court held that "animus" towards religion is not required to find a First Amendment violation in the presence of such facial discrimination. *Id.* at 1260.

Under *Weaver*, discrimination because of different types of religious practice violates the constitution. *Id.* at 1256, 1259. The Mandate picks and

chooses between different kinds of religious people and practices, so as to respect some and coerce others. The government has made it clear that one cannot practice Catholicism while selling air conditioners. The government is explicitly deciding that the tenets of the Catholic religion do not "substantially" prohibit coverage of abortifacients and contraception in health insurance, and have no role in any business. That is precisely the type of non-neutrality and entangling that the Establishment Clause prohibits. The government essentially seeks to resurrect the "pervasively sectarian" categorization, and apply it to only allow those groups exemptions, even though *Weaver* ruled that category abrogated. *Weaver*, 534 F.3d at 1251–52.

V. The Mandate violates the Free Speech Clause.

The Mandate additionally violates the First Amendment by coercing Plaintiffs to provide for speech that is contrary to their religious beliefs. The "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Here, the Mandate unconstitutionally coerces Plaintiffs to speak a message they find morally objectionable by requiring that they cover in their insurance plan not only abortifacients, contraception, etc., but also "patient

education and counseling" in favor those items, forcing Plaintiffs to contradict their own religious beliefs.

The government contended below that the Mandate requires conduct, not speech. But the conduct it requires in this instance is "inherently expressive" in two ways. First, the Mandate requires Plaintiffs to cover "education and counseling" in favor of items to which they object. Education and counseling are, by definition, speech. Second, the Mandate requires the Plaintiffs to fund this objectionable speech. The Supreme Court has explained that its compelled speech jurisprudence is triggered when the government forces a speaker to fund objectionable speech. *See, e.g.*, *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 234-35 (1977) (forced contributions for union political speech); *United States v. United Foods*, 533 U.S. 405, 411 (2001) (forced contributions for advertising). The Supreme Court recently reaffirmed that "compulsory subsidies for private speech" violate the First Amendment unless they involve a "mandated association" that meets the compelling interest / least restrictive means test. *Knox v. Service Employees Int'l Union*, 132 S. Ct. 2277, 2289 (June 21, 2012). Here there is no "mandated association" preventing strict scrutiny because the government omits many employer plans from the Mandate, and the Mandate violates the compelling interest test. Allowing the Mandate in light of *Knox* would be like allowing half of a company's employees not to join a union, but still forcing speech-objectors to

pay the union's full dues. These factors, and because the Mandate is not a condition on government funding, distinguish it from *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47 (2006).

VI. Plaintiffs meet the other preliminary injunction factors.

The government's Opening Brief contains no issue or section arguing for reversal on the basis that the injunction failed to meet the other three factors of the test for relief, namely, those showing irreparable harm, a balance of equities, or the public interest. By failing to raise these issues in its opening brief, the government has waived them. *See Anderson v. U.S. Dep't of Labor*, 422 F.3d 1155, 1174–75 (10th Cir. 2005). The only mention of these issues that Plaintiffs-Appellees can locate is a perfunctory reference, at the end of the government's section on the proper standard for injunctive relief, that the "balance of harms" weighs in the government's favor because of alleged harm an injunction causes to Hercules employees. This reference is insufficient to prevent waiver. *United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002). To the extent it is not, the District Court's fact-finding to the contrary was not an abuse of discretion. As discussed above, there is zero evidence that the Mandate remedies any harms at all, much less at Hercules. The government is content to inflict this very "harm" upon tens of millions of women at entities with grandfathered plans. It cannot claim that a few hundred Hercules employees are inequitably harmed by the injunction here.

CONCLUSION

For these reasons, and the reasons offered by 11 out of 14 cases granting similar injunctions, the Newlands and Hercules respectfully request that this Court affirm the District Court's order granting them a preliminary injunction.

STATEMENT REGARDING ORAL ARGUMENT

The Newlands and Hercules request oral argument. This case is of national importance and several other circuits have already issued preliminary rulings.

Respectfully submitted this 22nd day of February, 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of Plaintiffs-Appellees has been produced using proportionately spaced 14-point Times New Roman typeface. According to the "word count" feature in the Microsoft Word 2010 software, this brief contains 13,888 words in the relevant sections.

s/ Matthew S. Bowman
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CERTIFICATE OF SERVICE

I certify that on February 22, 2013, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system and caused seven hard copies of the brief to be sent to this Court by Federal Express, next day delivery. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system..

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