ORAL ARGUMENT REQUESTED

No. 14-6028

In the United States Court of Appeals for the Tenth Circuit

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THOMAS PEREZ, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, JACOB J. LEW, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants,

v.

REACHING SOULS, INC., an Oklahoma non-profit corporation, and TRUETT-MCCONNELL COLLEGE, INC., a Georgia non-profit corporation, by themselves and on behalf of all others similarly situated; GUIDESTONE FINANCIAL RESOURCES OF THE SOUTHERN BAPTIST CONVENTION, a Texas non-profit corporation,

Appellees.

On Appeal from the United States District Court for the Western District of Oklahoma
Judge Timothy D. DeGiusti
Civil Action No. 5:13-cv-1092-D

BRIEF FOR THE APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, GuideStone Financial Resources of the Southern Baptist Convention represents that it is a nonprofit corporation. Its sole member is the Southern Baptist Convention, a Georgia religious-nonprofit corporation. The remaining Appellees each represent that they do not have any parent entities and do not issue stock.

Respectfully submitted,

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Little Sisters of the Poor v. Sebelius, No. 13-1540 (10th Cir.)

Little Sisters of the Poor v. Sebelius, No. 13A691 (S. Ct.)

The following appeal involves church plan and non-church plan participants raising RFRA claims against the same defendants:

Southern Nazarene Univ. v. Sebelius, No. 14-6026 (10th Cir.)

A list of appeals raising similar claims against the same defendants is available at HHS Mandate Information Central, http://www.becketfund.org/hhsinformationcentral/.

JURISDICTIONAL AND PROCEDURAL STATEMENT

Appellees filed their Complaint on October 11, 2013, challenging the Affordable Care Act's Mandate under the Religious Freedom Restoration Act ("RFRA"), the First Amendment, the Fifth Amendment, and the Administrative Procedure Act. On October 25, 2013, they filed a motion for preliminary injunction. The district court had jurisdiction over Appellees' lawsuit under 28 U.S.C. §§ 1331 and 1361, had authority to issue an injunction under 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. § 2000bb, *et seq.*, and granted Appellees' motion for a preliminary injunction on December 20, 2013. This Court has jurisdiction over this appeal under 28 U.S.C. § 1292(a).

STATEMENT OF THE ISSUES

Appellees are religious non-profits and the church benefits provider, GuideStone Financial Resources of the Southern Baptist Convention ("GuideStone"), through which Appellees provide employee health benefits that are consistent with their shared Christian faith. The Affordable Care Act's final regulations (the "Mandate") require employer-provided health coverage to include free access to all FDA-approved contraceptives, sterilization treatments, and some abortifacients. Appellees can only comply with that requirement by either (1) providing the required coverage in their health plans, or (2) signing and incorporating into their health plans a form authorizing, directing, and creating

legal obligations and incentives for third parties to provide the coverage. As a matter of religious exercise, Appellees cannot take either action and therefore must pay severe penalties. The district court granted a preliminary injunction under RFRA enjoining the government from taking any enforcement action against Appellees and eligible organization employers who provide health benefits to employees under the GuideStone Plan and do not provide coverage for contraceptive services as required by 42 U.S.C. § 300gg-13(a)(4) and related regulations, including any penalties, fines and assessments for noncompliance with that statute.

The issue presented is: Did the district court abuse its discretion in granting Appellees' motion and concluding that the Mandate "substantially burdens" Appellees' religious exercise of refusing to provide the coverage or sign EBSA Form 700 (the "Form")?

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In 1918, the Southern Baptist Convention created Appellee GuideStone to provide benefits for ministers of the gospel and denominational workers. For nearly a century, Southern Baptist religious ministries have exercised religion by joining with GuideStone to provide benefits consistent with their shared Christian faith. That religious exercise continues to this day, with Appellees Reaching Souls International, Inc. ("Reaching Souls") and Truett-McConnell College, Inc.

("Truett-McConnell"), along with a putative class of approximately 187 other religious employers, joining with GuideStone to offer health benefits consistent with their shared religious beliefs. A165.[1]

That longstanding religious exercise is threatened here, and for no good reason. The government seeks to force the religious ministries and GuideStone to do something their shared faith forbids: trigger coverage for abortion-inducing drugs and devices in connection with their health plan. It is undisputed that the Appellees cannot comply with this mandate without violating their sincere religious beliefs. It is also undisputed that the government has many other ways to make this insurance available without the forced involvement of these religious ministries. Yet if these religious ministries refuse to participate, the government promises millions of dollars in fines, which would crush the ministries and force a mass exodus from GuideStone.

The government admits that the Mandate affects the religious liberty of non-profit organizations and has exempted a narrow category of "religious employers"—institutional churches, their integrated auxiliaries, and the exclusively religious activities of religious orders. Religious ministries like Reaching Souls and Truett-McConnell, however, are not deemed by the government to be "religious employers" and thus must designate their insurer or health benefits

[1] "A__" refers to Appellants' Appendix.

administrator to deliver the objectionable abortifacients in order to comply with the Mandate. The government calls this an "accommodation," but it fails to accommodate Reaching Souls' and Truett-McConnell's religious beliefs, which preclude them from designating anyone to provide abortifacients and from participating in the Mandate's scheme. Appellees believe that obeying the Mandate's requirement to participate in the provision of abortion-causing drugs and devices would harm their public witness of and advocacy for protecting human life from conception to natural death, and would risk leading others astray. A263-A314, A163 ¶¶ 20-21, A179 ¶ 10, A191 ¶ 11. Signing the Form and providing it to a third party administrator ("TPA")—and, in the case of GuideStone, having to cooperate and provide information to the TPA so that the coverage is effectuated—violates Appellees' religious beliefs by making them complicit in the government's scheme to provide abortifacients. A396-99 ¶¶ 7-10, A427-28 ¶¶ 7-9, A435-36 ¶¶ 7-9.

But for the district court's injunction, the Mandate would impose massive fines on the non-exempt ministries that receive health benefits through GuideStone unless and until they cooperate with the Mandate in a manner that violates their religious beliefs. The Mandate would also force GuideStone to shrink its religious mission of offering faith-compliant health benefits to Southern Baptist and evangelical Christian employers.

That kind of coercion—a direct government penalty imposed on an undisputedly sincere religious exercise—is a textbook substantial burden under RFRA, and a clear violation of the First Amendment. And because the government properly conceded below that its Mandate fails strict scrutiny, the district court properly entered a preliminary injunction protecting Appellees.

It is, therefore, no surprise that virtually every religious ministry challenging the Mandate has received an injunction. Of twenty-four decided cases, only two cases—the Seventh Circuit's *Notre Dame* decision and a recent district court opinion that adopted the reasoning in *Notre Dame*—have been denied a preliminary injunction. In the *Notre Dame* case, however, the government itself told the Seventh Circuit that the case was "not similar" to cases like the case at hand and, indeed, provided a "sharp contrast" to it. *See infra* at 46.

The government can only make its argument by completely ignoring controlling precedent on how to apply the "substantial burden" test. Thus, the government devotes most of its brief to arguing that Appellees misunderstand the Mandate and should not object to signing the Form (Br.12-16); that RFRA does not protect religious objections that relate to the actions of third parties (Br.16-21); and that RFRA does not protect religious exercises that "impose burdens on third parties" (Br.21-23). These arguments are all squarely foreclosed.

The government's arguments also contradict themselves, the facts, and the law. The government claims that Appellees Reaching Souls and Truett-McConnell should not object to signing the Form because it will have no impact (Br.16-17), but then argues that Appellees somehow impose a "burden on third parties" by not signing (Br.21). The government claims the Department of Treasury's version of the Mandate is only enforceable under ERISA (Government Br.16), but ignores the fact that Treasury stated the opposite *in the text of the regulation itself,* which cites the Internal Revenue Code, not ERISA, as the "authority" for its rule. 78 Fed. Reg. 39870, 39892 (July 2, 2013) (citing "sections 7805 and 9833 of the [Internal Revenue] Code."). The government denies that its Form would facilitate, trigger, or designate others to provide abortifacient coverage (Br.17), but said the opposite in the Federal Register and to other courts. And the government offers no reason at all—not a single word—to explain why the solution formulated by the Supreme Court in the *Little Sisters of the Poor* case would not be perfectly adequate to satisfy any alleged need for religious ministries to indicate merely "that they are entitled to the religious exception." Br.26.

Ultimately, the government is forced to tie itself in knots because the simple and undisputed facts, analyzed under the controlling case law, confirm the obvious: federal law prohibits this attempt to force Appellees to violate their religious beliefs. For that reason, this Court should reject the government's attempt to

expose Appellees to crushing penalties or other severe consequences and instead affirm the injunctive relief entered by the district court.

STATEMENT OF THE CASE

I. APPELLEES AND THEIR SHARED RELIGIOUS EXERCISE

The Southern Baptist Convention formed GuideStone in 1918 to provide benefits for ministers of the gospel and denominational workers, "within the bounds" of the Southern Baptist Convention. A159. In carrying out that mission, GuideStone established a health benefits plan for and limited to current and former employees of organizations (and their dependents) that are "controlled by or associated with" the Southern Baptist Convention—the GuideStone Plan. *Id.* The GuideStone Plan is one of the largest church health care plans in the country, serving hundreds of churches and ministries and providing health benefits to more than 78,000 people. *Id.*

The Southern Baptist Convention has passed Resolutions supporting the sanctity of life and condemning elective abortions in general and abortifacient drugs in particular:

> 1988 – "we call upon all Southern Baptists to take an active stand in support of the sanctity of human life"
>
> 1991 – "we oppose the testing, approval, distribution, and marketing in America of new drugs and technologies which will make the practice of abortion more convenient and more widespread"

> 1993 – "we oppose the testing, approval, distribution, marketing and usage in the United States of any abortion pills and urge U.S. corporations which are considering such business ventures to refuse to do so"
>
> 2000 – "[we] reaffirm our abhorrence of elective abortion"

A19-20, A53, A161-62. As an arm of the Southern Baptist Convention, GuideStone shares the beliefs about the sanctity of human life in these Resolutions and as stated in Article 15 of the *Baptist Faith and Message 2000* adopted by the Southern Baptist Convention:

> All Christians are under obligation to seek to make the will of Christ supreme in our own lives and in human society. . . . **We should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death.** . . . In order to promote these ends Christians should be ready to work with all men of good will in any good cause, always being careful to act in the spirit of love without compromising their loyalty to Christ and His truth.

A134-35, A162, A189. Consistent with those beliefs, the GuideStone Plan does not pay or reimburse for expenses associated with "elective termination of a pregnancy by any method," including contraceptive methods that may cause early abortions. A23, A135, A162.

Reaching Souls is an Oklahoma not-for-profit corporation founded in 1986 by a Southern Baptist minister and evangelist and has a mission of training pastors and evangelists and caring for orphans in Africa, Cuba, and India. A177. Reaching Souls believes the Bible teaches that all people are our neighbors, including the

unborn. *Id.* Reaching Souls' beliefs are consistent with the Southern Baptist Convention's teachings about the sanctity of all human life, and Reaching Souls has adopted the GuideStone Plan to provide health benefits for its 10 full time employees in a manner that is consistent with its commitment to the sanctity of human life and the well-being of its employees. A178, A180.

Truett-McConnell is a private, Christian, coeducational liberal arts college that has adopted the Southern Baptist Convention's *Baptist Faith and Message 2000* as its own statement of faith. A189. Truett-McConnell is committed to the sanctity of life from conception to natural death and has adopted the GuideStone Plan to provide health benefits for its employees, including approximately 78 full-time employees, consistent with those beliefs. A189-90.

As a matter of religious exercise, Appellees exclude coverage of abortifacients from the health benefits plan they offer through participation in the GuideStone Plan.[2] A130. Appellees adhere to Southern Baptist beliefs that prohibit encouraging, supporting, or partnering with others in the provision of abortion. A140. Following this teaching, they believe that it is wrong for them to intentionally facilitate the provision of these medical drugs and devices, and that

[2] Appellees object to four of the twenty currently FDA approved methods (similar to the *Hobby Lobby* plaintiffs), namely: (1) Ella; (2) Plan B, Plan B One-Step, and Next Choice (Levonorgestrel); (3) the Copper IUD; and (4) the IUD with Progestin.

they should avoid participating in a system requiring the provision of such things. *Id.*

The class represented by Reaching Souls and Truett-McConnell consists of employers that: (i) have adopted or will in the future adopt the GuideStone Plan to provide medical coverage for their "employees" or former employees and their dependents ("employees" for purposes of this requirement has the meaning set forth in section 414(e)(3)(B) of the Internal Revenue Code of 1986 (the "Code")); (ii) are or could be reasonably construed to be "eligible organizations" within the meaning of the Mandate; and (iii) are not "religious employers" within the meaning of the Mandate. A165. The class includes approximately 187 employers in 26 states. *Id.* ¶ 31. The government agreed that members of the putative class would receive any protections offered the named plaintiffs. A260, A566.

II. THE ABORTIFACIENT MANDATE

The Affordable Care Act ("ACA") mandates that any "group health plan" must provide coverage for certain "preventive care" without "any cost sharing." 42 U.S.C. § 300gg-13(a). Congress did not define "preventive care" but instead allowed the Health Resources and Services Administration ("HRSA"), a division of Appellee Department of Health and Human Services ("HHS"), to define the term. 42 U.S.C. § 300gg-13(a)(4). HRSA's definition includes all FDA-approved contraceptive methods, sterilization procedures, and patient education and

counseling, including abortifacient "emergency contraception" such as Plan B (the "morning-after" pill) and ella (the "week-after" pill). A132. The FDA's Birth Control Guide notes that these drugs and devices may work by preventing "attachment (implantation)" of a fertilized egg in the uterus. *Id*.

Failure to provide this coverage triggers a variety of penalties, including crippling daily and annual penalties. *See, e.g.*, 26 U.S.C. § 4980D(b)(1) ("$100 for each day in the noncompliance period with respect to each person to whom such failure relates" if coverage is provided that does not comply with the Mandate); 26 U.S.C. § 4980H(c)(1) ($2,000 annually for each full-time employee if no coverage is provided beginning in 2015 (2016 for certain employers with 50 to 99 average full-time employees)).

A. "Exempt" Employers

Many employers are exempt from the Mandate and need not provide the objectionable coverage. Nor are they required to sign and deliver forms designating, authorizing, incentivizing, or obligating anyone else to provide the coverage.

Employers who provide "grandfathered" health care plans, which cover tens of millions of Americans, are exempt from the Mandate. *See* 42 U.S.C. § 18011 (2010); A134; *Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013) (en banc), *cert. granted* 134 S. Ct. 678 (2013) ("Grandfathered plans may remain so

indefinitely."). These employers must state that their healthcare plan is grandfathered, 26 C.F.R. 54.9815-1251T(a)(2), but they are not required to sign the Form, to make it part of their healthcare plan, or to deliver it to anyone. Grandfathered employers are not required to designate, authorize, incentivize, or obligate anyone else to provide contraceptive coverage to claim their exemption.

Employers with fewer than fifty employees, covering an estimated 32 million Americans, also may avoid fines under the Mandate by not offering health coverage at all. *See* 26 U.S.C. § 4980H(c)(2)(A); *id.* § 4980D(d); A119, A134.

"Religious employers" are also exempt from the Mandate. HHS granted HRSA "discretion" to create an exemption for "certain religious employers." 76 Fed. Reg. 46621 (Aug. 3, 2011); 45 C.F.R. 147.130(a)(1)(iv)(A)-(B). But the resulting rule permits exemptions for only a very narrow subset of "religious employers"—namely, institutional churches, their integrated auxiliaries and the exclusively religious activities of a religious order—that are "organized and operate[d]" as nonprofit entities and "referred to in section 6033" of the Internal Revenue Code. 78 Fed. Reg. 39870, 39874 (July 2, 2013); 45 C.F.R. 147.131(a).[3] These

[3] Whether an entity is an "integrated auxiliary" of a church turns primarily on the degree of the church's control over and funding of the entity. *See* 26 C.F.R. 1.6033-2(h)(2) & (3) (affiliation); *id.* at 1.6033-2(h)(4) (internal support). The definition was promulgated to address tax disclosure considerations, not religious conscience concerns, and thus can arbitrarily turn on whether a religious non-profit receives 49% or 50% of financial support from a formal church in a given year. *Id.*

government-designated "religious employers" are not required to sign the Form, to make it part of their plan, or to deliver it to anyone. "Religious employers" are automatically exempt; they are not required to certify their religious beliefs to anyone, or to designate, authorize, incentivize, or obligate anyone else to provide the objectionable services.

B. "Non-Exempt" Employers and the Form

Despite widespread concerns about the scope of the religious employer exemption, the government decided that it would not expand the exemption, but would instead develop an "accommodation" for "non-exempt" religious organizations. 77 Fed. Reg. 16501. Unlike the grandfathering and religious employer exemptions, the accommodation for "non-exempt" employers would "assur[e] that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage without cost sharing." *Id.* at 16503.

The accommodation in the resulting final rule is available if a non-exempt religious organization (1) "[o]pposes providing coverage for some or all of the contraceptive services required"; (2) "is organized and operates as a nonprofit entity"; (3) "holds itself out as a religious organization"; and (4) "self-certifies that it satisfies the first three criteria." 78 Fed. Reg. at 39874; 45 C.F.R. 147.131(b). But objecting entities can only self-certify in one government-designated way: by

executing the Form and delivering it to their insurer or TPAs. 78 Fed. Reg. at 39875; 26 C.F.R. 54.9815–2713A.

The government imposed the requirement to sign and deliver the Form as part of its effort to ensure that beneficiaries of plans of non-exempt employers "will still benefit from separate payments for contraceptive services without cost sharing or other charges." 78 Fed. Reg. at 39874. Non-exempt employers with self-insured plans are required to use the Form to expressly designate their TPA as the "plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." *Id.* at 39879; 26 C.F.R. 54.9815–2713A. Receipt of the executed Form triggers a TPA's legal obligation to make "separate payments for contraceptive services directly for plan participants and beneficiaries." *Id.* at 39875-76; *see* 45 C.F.R. 147.131(c)(2)(i)(B); 26 C.F.R. 54.9815–2713A(b)(2). According to the government, forcing the non-exempt employer to designate the TPA in this manner "ensures that there is a party with legal authority" to make payments to beneficiaries for contraceptive services, 78 Fed. Reg. at 39880, and ensures that employees of employers with religious objections receive these drugs "so long as [they remain] enrolled in [the] group health plan." *See* 26 C.F.R. 54.9815–2713A(d); 29 C.F.R. 2590.715–2713A(d); *see also* 45 C.F.R. 147.131(c)(2)(i)(B).

EBSA Form 700—a complete copy of which is reproduced at Addendum 1—includes the following legally operative language:

> The organization or its plan must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.
>
> Notice to Third Party Administrators of Self-Insured Health Plans
>
> In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:
>
> (1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and
>
> (2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.
>
> This certification is an instrument under which the plan is operated.

See also A284, A355-56. By means of this language, the Form (a) directs the TPA to portions of the Mandate that require that the TPA "shall provide" payments for contraceptive services, (b) instructs the TPA that these regulations set forth the TPA's "obligations," and (c) purports to make the Form, including the Notice section thereof, "an instrument under which the plan is operated."

These "obligations"—both for the non-exempt employer to execute the Form and the TPA to provide the coverage upon receiving the Form—are replicated in two sections of the Code of Federal Regulations, giving enforcement authority both to the Department of Treasury via the Internal Revenue Code (26 C.F.R. 54.9815–2713A), and also to the Department of Labor via its ERISA enforcement authority (as described in 29 C.F.R. 2590.715–2713A).

Furthermore, to induce TPAs to provide the coverage, the regulations also offer a "carrot": an extra government payment to make the scheme profitable. In particular, a separate, non-ERISA-based regulation provides that, if a TPA obtains an executed Form from a non-exempt employer, the TPA becomes eligible for government payments that will both cover the TPA's costs and include an additional payment (equal to at least 10% of costs) for the TPA's margin and overhead. 45 C.F.R. 156.50. The government has acknowledged that this bonus payment is dependent on receipt of the Form. A464-65, A534.

Finally, the regulations command non-exempt religious organizations that they "must not, directly or indirectly seek to influence the [TPA's] decision" whether to provide the coverage. *See* 26 C.F.R. 54.9815–2713A(b)(iii). The government has acknowledged that this provision prohibits a religious organization from discouraging a TPA from using an executed Form to distribute abortifacients or to collect reimbursement from the government. A476-77, A549-51.

III. Appellees' Religious Objections to the Mandate

Appellees Reaching Souls and Truett-McConnell do not qualify for any exemption from the Mandate. The GuideStone Plan is not a grandfathered plan. A22-23. And although they share the same religious beliefs as exempt "religious employers," Appellees do not fall within the Mandate's exemption for "religious employers" because they are not formal churches (or integrated auxiliaries) and in

the eyes of the IRS, their religious ministries to orphans, young adults, and others in need are not an "exclusively religious activity." *See* 26 U.S.C. § 6033(a).

Because they are non-exempt, there are only two ways that Appellees can comply with the Mandate. First, they could provide the required coverage through the GuideStone Plan or another plan. Because this would violate their religious beliefs, Appellees cannot comply with the Mandate in this manner. A162-64, A169-71, A179, A182-83, A191, A194-96. Alternatively, Appellees could "comply" with the Mandate by signing and sending the Form. But this too would violate their religious beliefs. *Id.* Thus, each of the two ways through which Appellees could comply—distributing the drugs and signing the Form—would require them to do something they understand to be forbidden by their religion and religious beliefs.

Appellees' religious beliefs prohibit them from complying with the Mandate. Reaching Souls, Truett-McConnell, and the other class members cannot trigger the provision of abortion-causing drugs and devices by providing a certification to another party, or by designating another party to do it for them. A179, A182-83, A191, A194-96. These Appellees are barred by their religion from facilitating access to these products. *Id.* Likewise, GuideStone cannot facilitate access to these products, whether by paying for them, contracting with a TPA who will pay for them, or otherwise allowing or helping any party to be designated to distribute

them in connection with the GuideStone Plan. A162-64. Appellees also believe that executing and delivering the Form would violate their religious beliefs and harm their public witness of and advocacy for protecting human life from conception to natural death, and would risk leading others astray. A263-A314, A163 ¶¶ 20-21, A179 ¶ 10, A191 ¶ 11. Signing the Form and providing it to a TPA violates Appellees' religious beliefs by making them complicit in the government's scheme to provide abortifacients. A396-99 ¶¶ 7-10; A427-28 ¶¶ 7-9, A435-36 ¶¶ 7-9. These religious beliefs are deeply held, sincere, and undisputed. *See, e.g.*, A64, A141, A508. If Appellees continue their religious exercise of providing health benefits without abortion-inducing drugs and devices, however, they face enormous penalties or other devastating consequences from the government. A180, A192.

The Mandate's burden on Appellees' religious exercise is severe. For example, Reaching Souls currently has approximately 10 full time employees covered under its health plan and could incur penalties of approximately $365,000 per year based on its current employee count, which would have a fatal impact on its ministry. A180. Truett-McConnell has approximately 78 full time employees and could incur penalties of approximately $2,847,000 per year, which would also have a devastating impact. A192. With 187 non-exempt employers and their 5,144 full-time employees, A165-66, if GuideStone continues to offer employee health

benefits without the mandated items, class members would incur penalties of approximately $514,400 per day–$187,756,000 per year—and expose themselves to private enforcement suits. A167; *see* 26 U.S.C. §§ 4980D & 9815 (preventive services requirements set forth in 42 U.S.C. § 300gg-13(a)(4)); 29 U.S.C. §§ 1132, 1185d(a)(1). These threatened penalties impose substantial pressure on Appellees to stop their religious exercise. A164, A181, A193.

Similarly, GuideStone would be prevented from fully exercising its religious mission of providing health benefits to non-profit organizations associated with the Southern Baptist Convention, and GuideStone estimates losses of $39 million in contributions from "eligible organizations" that may be forced to leave the GuideStone Plan. A169. This departure would have a dramatic financial impact upon GuideStone and likely require it to reduce its personnel and other resources that carry out its ministries. *See* A168. There would also be a significant impact upon the employers that remain in the GuideStone Plan because of increased costs resulting from loss of scale and the impact on the financial stability of the GuideStone Plan. *See* A169. These consequences impose substantial pressure on GuideStone to stop its religious exercise. *See* A164.

Moreover, forcing Appellees to cancel their health plans would compromise their shared religious beliefs, which motivate them to promote the spiritual and physical well-being of their employees by providing health benefits. *See* A168,

A178, A190. By discontinuing all coverage, Appellees would also be placed at a severe competitive disadvantage in their efforts to hire and retain employees, adversely impacting Appellees' ministries. A168, A180-81, A193. Some Appellees and class members would also face separate fines for canceling their plans. 26 U.S.C. § 4980H (a), (c)(1); A167 ($7,608,000 penalty for the class); A192 ($156,000 penalty for Truett-McConnell). The Mandate also substantially burdens GuideStone's religious ministry by pressuring it to stop its religious exercise of providing benefits without abortifacients, and forcing GuideStone to reduce its mission of providing health benefits to organizations sharing the core beliefs of the Southern Baptist Convention. *See* A164.

STANDARD OF REVIEW

The grant of a request for a preliminary injunction is reviewed for abuse of discretion. *See Aid for Women v. Foulston*, 441 F.3d 1101, 1115 (10th Cir. 2006). A preliminary injunction will be overturned "'only when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling.'" *Newland v. Sebelius*, 542 F. App'x 706, 710 (10th Cir. 2013) (quoting *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012)).

A preliminary injunction is appropriate if the party seeking it shows: "(1) a likelihood of success on the merits; (2) a likely threat of irreparable harm to the movant; (3) the harm alleged by the movant outweighs any harm to the non-

moving party; and (4) an injunction is in the public interest." *Hobby Lobby*, 723 F.3d at 1128.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT APPELLEES ARE ENTITLED TO A PRELIMINARY INJUNCTION ON THEIR RFRA CLAIMS.

The district court properly acted within its discretion in entering a preliminary injunction in favor of Appellees under RFRA, finding that (1) Appellees had a likelihood of success on the merits under RFRA; (2) there was a likely threat of irreparable harm to Appellees; (3) the harm alleged by Appellees outweighed any harm to the government; and (4) that an injunction was in the public interest. *Reaching Souls Int'l, Inc. v. Sebelius*, No. 5:13-cv-1092-D, 2013 WL 6804259, at *8 (W.D. Okla. Dec. 20, 2013).

RFRA permits the federal government to "substantially burden a person's exercise of religion only 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."[4] 42 U.S.C. § 2000bb-1(b).

In applying RFRA, courts engage in a four-step process. First, a court must "identify the religious belief" at issue. *Hobby Lobby*, 723 F.3d at 1140. Second, it

[4] This claim was raised at A52-60 and ruled on at A564-79.

must "determine whether this belief is sincere." *Id*. Third, a court must determine "whether the government places substantial pressure on the religious believer" to violate that belief. *Id*. Finally, if there is substantial pressure, the government action must survive strict scrutiny—*i.e.*, the government must prove that forcing the religious believer to violate her own conscience is "'the least restrictive means of advancing a compelling interest.'" *Id*. at 1143 (citation omitted); 42 U.S.C. § 2000bb-1(b).

The government did not challenge the sincerity or religiosity of Appellees' religious belief that they cannot comply with the Mandate by providing coverage or executing the Form. A571, A574. And the government conceded to the district court that its strict scrutiny argument was foreclosed by this Court's precedent. A241. Thus, the only remaining question was whether the Mandate "places substantial pressure" on Appellees to make them comply with the Mandate by providing coverage or executing the Form. *Hobby Lobby*, 723 F.3d at 1140.

A. The Mandate Imposes a Substantial Burden on Appellees' Religious Exercise in Violation of RFRA.

The Mandate threatens Appellees with enormous penalties unless they cease their religious exercise. Under controlling precedent, that is a textbook substantial burden, because the government is using the threat of punishment to force Appellees Reaching Souls and Truett-McConnell to give up their religious exercise

of offering a health benefit plan to their employees while refusing to either pay for abortifacients or sign the government's Form.

There is a test for determining whether a law imposes a substantial burden on a religious exercise, which this Court has explained on at least three recent occasions. *See Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014); *Hobby Lobby*, 723 F.3d at 1138; *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010). Each time, the Court described the test in fewer than 100 words:

> [A] burden on a religious exercise rises to the level of being "substantial" when (at the very least) the government (1) requires the plaintiff to participate in an activity prohibited by a sincerely held religious belief, (2) prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief, or (3) places considerable pressure on the plaintiff to violate a sincerely held religious belief—for example, by presenting an illusory or Hobson's choice where the only realistically possible course of action available to the plaintiff trenches on sincere religious exercise.

Yellowbear, 741 F.3d at 55 (citing *Abdulhaseeb*, 600 F.3d at 1315).

Under this rubric, and under substantially similar facts, the *Hobby Lobby*, *Newland*, and *Armstrong* courts concluded that the ACA's abortifacient mandate violated RFRA, because it substantially pressured the plaintiffs to violate their sincere religious beliefs against facilitating access to abortion-inducing drugs and devices, without satisfying strict scrutiny. *See Hobby Lobby*, 723 F.3d at 1146-47; *Newland*, 542 F. App'x at 710; *Armstrong v. Sebelius*, 531 F. App'x 938 (10th Cir. 2013).

Yet rather than apply these controlling precedents—under which the Mandate easily qualifies as a substantial burden—the government instead offers a 14-page, five-part discourse on substantial burden that does not mention the controlling test, propose any alternative, or even rely on a single case from this Circuit. Br.12-25. That lengthy obfuscation is both irrelevant and wrong on its own terms.

1. Appellees are Engaged in Sincere Religious Exercise Protected by RFRA.

RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief,'" 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A), and abstaining from certain activities for religious reasons qualifies as "religious exercise," just as much as abstaining from work on certain days. *See Hobby Lobby*, 723 F.3d at 1140 *; see also Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); 42 U.S.C. § 2000bb(b)(1).

Appellees' religious beliefs are similar to the religious beliefs asserted in *Hobby Lobby*, where the plaintiffs believed that human life begins when sperm fertilizes an egg and that it was "immoral for them to facilitate any act that causes the death of a human embryo." *Hobby Lobby*, 723 F.3d at 1122. The *Hobby Lobby* plaintiffs also objected to "'participating in, providing access to, paying for, training others to engage in, or otherwise supporting' the devices and drugs" at issue. *Id*. at 1140.

Similarly, Appellees share the core convictions of the Southern Baptist Convention regarding the sanctity of life and believe that it would compromise their shared religious faith to intentionally facilitate the provision of abortifacient drugs and related services. *See* A168, A178, A190. Paying for abortifacients; executing legal agreements that will trigger coverage of abortifacients; designating another party to provide abortifacients; making certifications that create a duty for TPAs to provide abortifacients; creating financial incentives for TPAs to provide abortifacients; and/or having to provide administrative information and support to TPAs resulting in the provision of abortifacients, would likewise impinge their religious beliefs. A162-64, A169-71, A179, A182-83, A191, A194-96. Signing the Form and/or providing it to a TPA violates Appellees' religious beliefs by making them complicit in the government's scheme to provide abortifacients, preventing their public witness of and advocacy for protecting human life from conception to natural death, and leading others astray. A263-A314, A396-99 ¶¶ 7-10, A427-28 ¶¶ 7-9, A435-36 ¶¶ 7-9, A163 ¶¶ 20-21, A179 ¶ 10, A191 ¶ 11. Simply put, as a matter of religious faith, Appellees may not participate in any way in the government's program to provide access to these services.

2. The Mandate Imposes a Substantial Burden on Appellees Because It Forces Them to Violate Their Religious Beliefs or Face Massive Penalties.

Because the sincerity of this religious exercise is undisputed, A571, A574, the only question for this Court is whether the district court abused its discretion in finding the threat of massive penalties for continuing the exercise constituted a "substantial burden." There can be no serious question that it does, because the Mandate:

(1) "requires [Appellees] to participate in an activity prohibited by a sincerely held religious belief" (i.e., triggering and providing contraceptive coverage either directly or indirectly by signing and/or delivering the Form, A162-64, A169-71, A179, A182-83, A191, A194-96, A396-398, A426-29, A434-37);

(2) "prevents [Appellees] from participating in an activity motivated by a sincerely held religious belief" (i.e., continuing their shared religious exercise of providing a health plan and benefits consistent with their Baptist faith that do not include access to contraceptives, A168, A178, A190); and

(3) "places considerable pressure on [Appellees] to violate a sincerely held religious belief" (here, by exposing Appellees to massive financial consequences unless they cease their religious exercise, A166-67, A169, A180, A192).

Yellowbear, 741 F.3d at 55. To date, twenty-four decided cases have raised similar claims of substantial burden by non-profit religious organizations. In virtually all of those cases—twenty-two out of twenty-four non-profit cases, including each of the seven other cases involving church plans—courts have granted preliminary

relief so that the religious organization would be able to litigate the case to conclusion without accruing massive penalties for its religious exercise.[5]

[5] **Church Plan Cases:** *Little Sisters of the Poor v. Sebelius*, No. 13–cv–2611, 2013 WL 6839900 (D. Colo. Dec. 27, 2013), *injunction pending appeal granted*, 134 S.Ct. 1022, 187L.Ed.2d 867 (2014); *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13–1441, 2013 WL 6729515 (D.D.C. Dec. 20, 2013), *injunction pending appeal granted*, No. 13–5371 (D.C. Cir. Dec. 31, 2013); *Mich. Catholic Conf. v. Sebelius*, No. 1:13–CV–1247, 2013 WL 6838707 (W.D. Mich. Dec. 27, 2013), *injunction pending appeal granted*, No. 13–2723 (6th Cir. Dec. 31, 2013); *Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-709, 2014 WL 31652 (E.D. Tex. Jan. 2, 2014) (permanent injunction); *E. Texas Baptist Univ. v. Sebelius*, No. 12-cv-3009, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013) (permanent injunction); *Southern Nazarene University* v. *Sebelius*, No. 5:13-cv-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013) (preliminary injunction); *Reaching Souls*, 2013 WL 6804259 (same); *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12 CIV. 2542 BMC, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013) (same).

Other Non-Profit Cases: *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13–1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013), *injunction pending appeal granted*, No. 13–5371 (D.C. Cir. Dec. 31, 2013); *Catholic Diocese of Nashville v. Sebelius*, No. 3:13–1303, 2013 WL 6834375 (M.D. Tenn. Dec. 26, 2013), *injunction pending appeal granted*, No. 13–6640 (6th Cir. Dec. 31, 2013); *Dobson v. Sebelius*, No. 13-CV-03326-REB-CBS, 2014 WL 1571967 (D. Colo. Apr. 17, 2014) (preliminary injunction); *Fellowship of Catholic University Students v. Sebelius*, No. 1:13–cv–03263 (D. Colo. April 23, 2014) (unopposed preliminary injunction); *Roman Catholic Archdiocese of Atlanta v. Sebelius*, No. 1:12-CV-03489-WSD, 2014 WL 1256373 (N.D. Ga. Mar. 26, 2014) (preliminary injunction granted); *Ave Maria Foundation v. Sebelius*, No. 2:13-cv-15198, 2014 WL 117425 (E.D. Mich. Jan. 13, 2014) (preliminary injunction); *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-00314 (N.D. Tex. Dec. 31, 2013) (same); *Sharpe Holdings, Inc. v. United States Dep't of Health & Human Srvs.*, No. 2:12-cv-92, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013) (same); *Grace Schools v. Sebelius*, No. 3:12-CV-459, 2013 WL 6842772 (N.D. Ind. Dec. 27, 2013) (same); *Diocese of Fort Wayne-S. Bend, Inc. v. Sebelius*, No. 1:12-cv-159, 2013 WL 6843012 (N.D. Ind. Dec. 27, 2013) (same); *Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 6835094 (W.D. Pa. Dec. 23 2013) (same); *Legatus v. Sebelius*, No. 2:12-cv-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013) (same); *Persico v. Sebelius*, No. 2:13-cv-00303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013) (same); *Zubik v. Sebelius*, No. 2:13-cv-01459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013) (same). *But see Univ. of Notre Dame v. Sebelius*, No. 13-3853 (7th Cir. Feb. 22, 2013) (denying

Government action substantially burdens a religious belief when it does any one of the following: (i) "requires participation in an activity prohibited by a sincerely held religious belief," (ii) "prevents participation in conduct motivated by a sincerely held religious belief," or (iii) "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief." *Hobby Lobby*, 723 F.3d at 1138.

First, the Mandate expressly requires Appellees Reaching Souls and Truett-McConnell to participate directly in the government's scheme by either providing coverage for contraceptive abortifacients themselves or designating a TPA for the purpose of providing such coverage. 78 Fed. Reg. at 39879. Failure to do so will result in enormous fines to employers, and severe financial and religious harms to GuideStone. A167-68. Second, all Appellees currently cooperate in their religious exercise of providing health benefits consistent with their religious faith. Yet the Mandate prevents that continued religious exercise on threat of the penalties described above. Third, the Mandate's threatened fines and other harms create enormous pressure on Appellees to comply with the Mandate's requirements. Thus the Mandate imposes more than "substantial pressure . . . to engage in

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injunction); *Diocese of Cheyenne v. Sebelius*, No. 2:14-cv-00021 (D. Wy. May 13, 2014) (same).

conduct contrary to a sincerely held religious belief." *Hobby Lobby*, 723 F.3d at 1138.

Not surprisingly, in *Hobby Lobby*, the Tenth Circuit found that the Mandate imposed a substantial burden on religious exercise by "demand[ing]," on pain of onerous penalties, "that [plaintiffs] enable access to contraceptives that [they] deem morally problematic." *Hobby Lobby*, 2013 WL 3216103, at *21. The same is true here.

Nor can there be any serious doubt about whether the fines are of sufficient magnitude to constitute a substantial burden. The substantial burden test requires that the Court focus on "the *intensity of the coercion* applied by the government to act contrary to [religious] beliefs." *Hobby Lobby*, 723 F.3d at 1137 (emphasis in original). As a matter of both logic and precedent, millions of dollars in penalties as the price for continuing a religious exercise constitutes a substantial burden. *Hobby Lobby*, 723 F.3d at 1140 (holding, as to the same penalty provisions, that "it is difficult to characterize the pressure as anything but substantial").

The government also suggests that the Mandate is not a burden on Appellees because they could avoid it by just terminating their health plan and its benefits for their employees. Br.18 n.6. But while the government may be fine with that, Appellees are not: they believe they have a religious obligation to care for the employees who join in their ministry, and they cannot throw those people off their

health plans without violating that obligation and harming their ministry. A164, A168, A178-81, A190-93, A429, A437. And terminating coverage would obviously burden the exercise of GuideStone's religious ministry. A164, A168, A400-01. This argument *does* show, though, that the government has no compelling interest in forcing Appellees to execute the Form—apparently the government would be fine if people obtained contraceptive coverage on the exchanges instead of through Appellees.

The Mandate is a substantial burden in another way as well. As the government acknowledged during oral argument in *Hobby Lobby*, a ban on kosher slaughter could be challenged by an observant Jew who was no longer able to purchase religiously-compliant meat products.[6] *See also Craig v. Boren*, 429 U.S. 190 (1976) (allowing beer vendors to raise the constitutional claims of potential male customers); *Kowalski v. Tesmer*, 543 U.S. 125, 134-35 (2004) (Thomas, J., concurring) (collecting examples of constitutional challenges brought by sellers on behalf of potential customers).

The way that the Mandate burdens Appellees is analogous: before the Mandate, religious non-profits like Truett-McConnell and Reaching Souls were free to

[6] Oral Arg. Trans. at 79:14-16, *Sebelius v. Hobby Lobby*, No. 13-354 (U.S. argued March 25, 2014) (General Verrilli acknowledging that, if a state enacted an animal-rights law that effectively banned kosher or halal slaughter, "in that circumstance, you would have . . . an ability for customers to bring suit.").

contract with religious benefits providers like GuideStone to obtain conscience-compliant health plans that excluded abortion-causing contraceptives, and in this case they request a court order allowing them to continue to do so. *See, e.g.*, A162-65 (describing the ways that the Mandate blocks GuideStone's "ministry assignment" of providing conscience-compliant health benefits to likeminded organizations); A178 (describing Reaching Souls' desire to continue to receive conscience-compliant health benefits through GuideStone); A190-91 (Truett-McConnell; same). Fully-exempt religious employers (i.e., churches) remain free to obtain health coverage for their employees through GuideStone today, and even major for-profit employers with grandfathered plans that reflect their conscience may continue to provide such coverage indefinitely. But if the government has its way, Truett-McConnell, Reaching Souls, and hundreds of likeminded organizations will lose their right to obtain conscience-compliant health benefits from GuideStone or another provider. Thus, in this way as well, the Mandate is a substantial burden on both the religious non-profits that seek to purchase such health benefits and on GuideStone, which wishes to continue to provide them.

3. The Government's Characterization of the "Accommodation" is Contrary to Federal Law and Irrelevant to Substantial Burden Analysis.

The government claims that Appellees wrongly "collapse the provision of contraceptive coverage by third parties with their own decision not to provide such

coverage." Br.16-17. If any abortifacients are provided, the government claims they will be provided "independently" by third parties "due to an obligation imposed by the government or the availability of reimbursement by the government." *Id* at 17. Since Appellees "need only complete a form" and give it to their TPAs, *id.* at 6, the government claims Appellees are not substantially burdened by the government forcing them to violate their religious beliefs.

But the government's characterization of the accommodation is wrong. As the government conceded before other courts and in the Federal Register, executing a Form is *the* trigger to obligate, authorize, direct, and incentivize others to provide contraceptives. Without an executed Form, a TPA has no legal or statutory right to provide abortifacients under the GuideStone Plan or to receive reimbursements. And even if the government were right about the Form, the Mandate still imposes a substantial burden because Appellees have an undisputed religious objection to signing the Form, and the government promises massive punishment unless they give up that religious exercise.

a. The Form Obligates, Authorizes, Directs, and Incentivizes Others to Provide Abortifacient Coverage.

The government repeatedly describes the relationship between the Form's execution and the provision of abortifacient coverage as if it were a mere matter of timing—the drugs flow "after" execution and delivery of the Form. *See, e.g.*, Br.14 (third parties may provide coverage "[a]fter the employer plaintiffs" sign the

Form); *id.* at 16. This careful phrasing cannot hide that signing and delivering the Form are essential steps in the government's scheme because they create legal authority, obligations, and incentives for others to provide coverage. Simply put, without those steps, there could be no coverage.

If the Form were not central to delivering abortifacients, it is difficult to fathom why the government would still be litigating this case. Why fight to make Appellees sign a meaningless form? The government's actions are particularly telling in light of the opt-out mechanism fashioned by the Supreme Court in *Little Sisters of the Poor v. Sebelius*, which would allow Appellees to simply inform the government of their religious objection, without signing a Form. *See Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 134 S. Ct. 1022, 187 L. Ed. 2d 867 (2014). If the government merely needed Appellees to "certify that they are entitled to the religious exception," Br.26, surely it would accept the notification it received when this lawsuit was filed, or it would accept a similar form of notice as authorized by the Supreme Court in *Little Sisters*.

The government's failure to accept such alternative means both undermines its claimed compelling interest and confirms that the Form actually does function to authorize, direct, obligate, and incentivize others to provide coverage. The government has repeatedly acknowledged those effects in the Federal Register. For example, employers are required to sign the Form to designate their TPA as the

"plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39879; 26 C.F.R. 54.9815-2713A. Receipt of the Form triggers the TPA's legal obligation to make "separate payments for contraceptive services directly for plan participants and beneficiaries." *Id.* at 39875-76; *see* 45 C.F.R. 147.131(c)(2)(i)(B); 26 C.F.R. 54.9815-2713A(b)(2). The government explains that the purpose of forcing an employer to designate the TPA in this manner is that it "ensures that there is a party with legal authority" to make abortifacient payments. 78 Fed. Reg. at 39880. The executed Form is also the only mechanism through which the TPA can seek federal reimbursement and bonus payments for voluntarily providing abortifacient services to participants in the GuideStone Plan. 45 C.F.R. 156.50 (d)(2)(ii).

Indeed, the government has conceded the role of its Form. For example, the government acknowledged that signing the Form creates the TPA's legal duty to deliver the drugs, stating that the TPA's "duty" to "become a plan administrator" and provide the mandated coverage "only arises…by virtue of the fact that they receive the self-certification form from the employer." *See* Transcript of Motions Hearing at 13, Dkt. 54, *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441 (D.D.C. Nov. 22, 2013). Likewise, the government conceded below that it is the signing and delivery of the Form that triggers the TPA's eligibility for federal

incentive payments.[7] These concessions eviscerate any claim that the government simply wants some way to know who is claiming an exemption.

b. Without the Form's Execution and Delivery, There is No Coverage.

The government continues to advance the false argument that, after Appellees Reaching Souls and Truett-McConnell execute and deliver the Form, federal law "independently" requires the provision of coverage. *See, e.g.*, Br.16-21. However, any third-party provision of abortifacient coverage via Appellees' plan directly depends on Appellees Reaching Souls and Truett-McConnell signing and delivering this very particular authorization Form. Far from being "independent" of Appellees' plan, the coverage would flow *only* to beneficiaries of that plan, *only* so long as they remain on the plan, and would be the legal obligation of the TPA *only* because it provides services in connection with Appellees' plan—and all this is true *only* because Appellees were forced to execute and deliver the Form. As the government disclosed elsewhere, the coverage is actually part of Appellees' plan. *See* Transcript of Motions Hearing at 18, Dkt. 54, *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441 (D.D.C. Nov. 22, 2013) (admitting that "technically, the [coverage] is part of [the religious objector's] plan"); *see also id.*

[7] *See* A534 (Counsel for the government: "I will concede that the TPA . . . if they receive the certification, they are eligible for reimbursement. *They would not otherwise be eligible*.") (emphasis added).

at 16-17 (admitting that, upon execution, "services become available to the employees by virtue of their participation in the religious [objector's] plan"). Thus, by executing the Form, Appellees would be giving the government and their TPAs authority that neither had before: *authority to use Appellees' plan to provide abortifacients*. And this authority comes with obligations and incentives that would not otherwise exist.[8]

Forcing Appellees to give such authorization also makes a mockery of the government's mantra that they need not "contract, arrange, pay, or refer" for abortifacient coverage. *See, e.g.*, Br.20. The Form itself announces that it "is an instrument under which the plan is operated," A284, A356, thereby amending the terms of the parties' agreement to include products they have always excluded. Being forced by the government (a) to amend Appellees' plan to provide for the coverage of abortifacients, (b) to create what the government calls "legal authority" to provide the coverage in connection with that plan, and (c) then to deliver the Form to and coordinate with the party who is supposed to provide the

[8] This is why the government's conscientious objector analogy, Br.18, is not just wrong, but proves Appellees' point. A conscientious objector only opts himself out. While the government may then *choose* to draft someone else, or someone else may *choose* to enlist, both were always able to do so regardless of the objector's opt-out. For the government's analogy to even approach accuracy, a conscientious objector would be forced to personally designate a specific person to take his place (someone otherwise unable to enlist and the government otherwise unable to draft), authorize both the government to draft the person *and* the person to enlist, create obligations for the person to enlist, and trigger financial incentives for the person to enlist.

coverage so it *can* provide that coverage is surely an obligation to "contract," "arrange," and "refer" for coverage.

Finally, even if the government were actually correct that the abortifacient coverage would only be provided based on "independent" actions of third parties, this Court has already held that this cannot justify pressuring a religious objector to take actions violating his faith. *See Hobby Lobby*, 723 F.3d at 1137 (rejecting the government's argument that "one does not have a RFRA claim if the act of alleged government coercion somehow depends on the independent actions of third parties" as "fundamentally flawed" because it improperly focuses on the "theological merit of the belief in question rather than the *intensity of the coercion* applied by the government").

c. The GuideStone Plan's Status as a Church Plan Does Not Eliminate the Burden.

The government next argues that Appellees should execute and deliver the Form because they have associated with GuideStone, a religious benefits provider who "will not be obligated to provide contraceptive coverage." Br.16-17. According to the government, it lacks ERISA enforcement authority to force GuideStone to comply with the legal obligations set forth in 29 C.F.R. 2510.3–16 and 26 C.F.R. 54.9815–2713A, and, therefore, it can coerce Appellees Reaching Souls and Truett-McConnell to sign the Forms creating those obligations.

This argument is flawed for several reasons. First, the government cites no authority for the novel proposition that it can force Appellees to act contrary to their religious beliefs because they should just rely on their co-religionists to act in accordance with their shared religious beliefs. Appellees cannot be forced to outsource their religious principles to GuideStone or anyone else (and indeed Reaching Souls and Truett-McConnell specifically objected to even placing GuideStone in such a position, A38-41, A178-79, A190-91, A427-30, A435-38).

Second, although the government claims that the Internal Revenue Code "confers no authority separately to regulate [TPAs]," Br.16, that claim is directly contradicted by the regulations at issue in this case, under which the Treasury purports to regulate TPAs using its authority under the Internal Revenue Code. 26 C.F.R. 54.9815–2713A(b)(1)(ii)(B) & (2); 78 Fed. Reg. at 39892 ("The Department of Treasury regulations are adopted pursuant to the authority contained in sections 7805 and 9833 of the Code.").

Third, the government's claimed inability to make the Form actionable is something the government deems *temporary*—a limitation on what the government can do with the Form "at this time," with the express statement that the government is still working on a solution. A222. The government nowhere backs away from this characterization. Nor does it address the concern that the Form may

provide Reaching Souls' and Truett-McConnell's employees with a contractual right to receive abortifacients under the GuideStone Plan.

Fourth, the government offers no substantive response to Appellees' refusal to sign and deliver the Form to one of GuideStone's TPAs, Highmark, Inc. ("Highmark"). Highmark has already informed GuideStone that it intends to offer abortifacient coverage to qualified employees and beneficiaries of all GuideStone Plan employers from whom it receives the Form. Furthermore, it will communicate to those employees and their daughters as young as ten years of age that abortifacients are available to them through the GuideStone Plan. A317. Highmark's position is a matter of immediate and deep concern to Appellees. *Id.* The government dismisses Appellees' fears, claiming that it cannot be responsible for Highmark's "independent and voluntary choice to provide contraceptives." Br.17 n.5. However, the government completely ignores the fact that without the Form, Highmark could never make that choice.

d. Appellees' Religious Objections Are Undisputed.

Despite the parties' disagreements over the legal significance of the Form, the most important fact is undisputed: Appellees sincerely believe, as a religious matter, that they cannot participate in the accommodation. While religious beliefs "need not be acceptable, logical, consistent, or comprehensible to others in order to merit" legal protection, *Thomas*, 450 U.S. at 714, the religious objection here is

manifestly reasonable in light of the government's statements both in the Federal Register and in open court. But ultimately the district court's "only task [was] to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." *Hobby Lobby*, 723 F.3d at 1137; *see also id.* at 1142 (the question is not "whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity").

This Court has acknowledged the broad based religious concerns arising from abortion, abortifacients, and complicity in sin. *See Hobby Lobby*, 723 F.3d at 1140 n.15 ("The assertion that life begins at conception is familiar in modern religious discourse . . . . Moral culpability for enabling a third party's supposedly immoral act is likewise familiar."). Other federal courts have also acknowledged these concerns, and have granted injunctions in all seven decided cases involving church plan participants like Appellees. *See supra* n.5. In this case, the district court held that the government's accommodation scheme imposed a substantial burden on a church plan and its participants because "[r]egardless whether the self-certification form actually results in the provision of . . . contraceptive coverage or services, Plaintiffs believe that the acts of executing the form and providing it to a TPA convey support for the accommodation program and its goal of carrying out ACA's contraceptive mandate." A576-77. Other courts have reached similar

conclusions. *See, e.g., E. Texas Baptist Univ.*, 2013 WL 6838893, at *20 ("[t]he mandate and accommodation will compel [plaintiffs] to engage in an affirmative act and that they find this act—their own act—to be religiously offensive. That act is completing and providing to their issuer or TPA the self-certification forms."); *see also Roman Catholic Archdiocese of New York*, 2013 WL 6579764, at *7 ("This alleged spiritual complicity is independent of whether the scheme actually succeeds at providing contraceptive coverage. . . . Therefore, regardless of the effect on plaintiffs' TPAs, the regulations still require plaintiffs to take actions they believe are contrary to their religion.") (emphasis added) (rejecting standing challenge).

These courts correctly accepted the religious organizations' *religious* judgment that signing and/or delivering the Form made them morally and spiritually "complicit" in the government's scheme. The government's argument about the effect of the Form is not only incorrect but irrelevant to the substantial burden analysis.

4. The Government's Third-Party-Harm Argument is Both Unpersuasive and Foreclosed by RFRA and *Hobby Lobby*.

Unwilling and unable to address this Court's substantial burden case law, the government argues that RFRA should not be read to protect a religious exercise that would impose a "burden on third parties." Br.21.

This is a strained argument. Appellees' employees remain free to obtain abortifacients. The only question in this case is whether Appellees must participate in providing those abortifacients. And if, as the government asserts, signing the Form will not result in the provision of abortifacient coverage, it is unclear how *not* signing the Form will deprive anyone of anything.

In any case, both Congress and this Court have clearly rejected the government's attempt to limit RFRA to some religious exercises and not others. In RFRA, Congress did not limit its protection only to those religious exercises that do not impose burdens on others. To the contrary, RFRA broadly protects "any exercise of religion." The statute itself cites cases in which the religious exercise arguably *did* impose burdens on third parties. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 229-31 (1972). Those burdens can be addressed under the strict scrutiny portion of the test, just as they were in *Sherbert* and *Yoder*; they do not provide a justification for ignoring the statute altogether. Furthermore, even if Congress had left any daylight on this issue, *Hobby Lobby* resolves the question because the Court there applied RFRA in the context of the contraceptive mandate, despite the government's claims of third party burden on employees. 723 F.3d at 1144-45. Having lost that argument in *Hobby Lobby*, the government cannot resuscitate it here.

Nor can the government bolster this argument by its repeated reliance on *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014). The Seventh Circuit has expressly instructed that "*everything* we say in this opinion about the merits of Notre Dame's claim . . . is necessarily tentative, and *should not be considered a forecast of the ultimate resolution of this still so young litigation*." *Id.* at 522 (emphasis added). That opinion—which does not even control in the *Notre Dame* case—certainly does not control here, where the facts are much more akin to those in the twenty-two other decided HHS Mandate cases brought by non-profits which have resulted in preliminary or permanent injunctions.

Notre Dame is distinguishable in several ways. First, unlike Notre Dame—and like the twenty-one other HHS Mandate cases in which the religious organizations have prevailed—neither Truett-McConnell nor Reaching Souls has signed the Form. *See supra* at 18; n.5. The fact that Notre Dame had signed the form played a significant role in the Seventh Circuit's analysis, *Notre Dame*, 743 F.3d at 552, and the government itself argued that signing the form provided a "sharp contrast" between *Notre Dame* and cases like this one. Response in Opposition by Appellees at 5, Dkt. 46, *Univ. of Notre Dame v. Sebelius*, No. 13-3853 (7th Cir. Feb. 4, 2014).

Furthermore, in *Notre Dame*, the court made its decision on an evidentiary record that was "virtually a blank." *Notre Dame*, 743 F.3d at 552. For example, because the record did not include evidence about Notre Dame's relationship with

its TPA, the court expressed doubt about whether the Form really "authorize[d]" Notre Dame's TPA to go beyond its existing contract and become a "plan fiduciary"—in other words, whether the Form meaningfully changed the existing relationship between Notre Dame and its TPA. *Id.* at 556. Similarly, the court speculated that, perhaps under its existing contracts, Notre Dame could simply "disable" its TPA "from providing medical services, including contraceptive services, simply by ceasing to do business with them." *Id*.

In this case, however, the record is *not* blank. Appellees submitted a declaration from GuideStone's vice president stating that (1) GuideStone's contracts with its TPAs currently cover claims administration and certain other services (A160); (2) the Form would designate GuideStone's TPAs as "plan administrator[s] with fiduciary duties" (A171); and that (3) signing and delivering a Form would "establish a new, direct contractual relationship" between GuideStone's TPAs and individual employers like Truett-McConnell and Reaching Souls where one did not exist before (A170).

The record regarding GuideStone's ability to avoid the Mandate by "simply . . . ceasing to do business with" its TPA is similarly clear. *Notre Dame*, 743 F.3d at 555. During the preliminary injunction hearing below, counsel for the government asserted that neither GuideStone nor its plan participants can say to their TPA "something like, Don't do this or we're going to fire you," or otherwise "threaten[]

them" with ending their contract. A550-51. And as the district court observed, "[e]vidence was presented by Plaintiffs, without effective response by Defendants, that the largest GuideStone TPA, Highmark Inc. ("Highmark"), *will* provide the objected-to contraceptives upon receipt of the self-certification form." A576 n.8 (emphasis added). Thus, on the record in this case, it is clear that neither GuideStone nor its non-exempt participants may avoid the Mandate by "simply . . . ceasing to do business with" GuideStone's TPA. *Notre Dame*, 743 F.3d at 555.[9]

The government's repeated reliance on *Notre Dame*, in a "not similar" case, can neither overcome this Court's binding precedents nor outweigh the twenty-two non-profit Mandate cases that have resulted in injunctions. *See supra* n.5. The same result is appropriate here.

5. The Government Does Not Need Appellees' Form to Know They Object.

Finally, the government argues that its ability to accommodate religious objectors "depends on its ability to ask that religious objectors who do not belong to a pre-defined class (such as exempt organizations under the Internal Revenue Code) certify that they are entitled to the religious exception." Br.26.

[9] A final distinction between this case and *Notre Dame* is that unlike Notre Dame, Truett-McConnell and Reaching Souls limit their hiring to those who share their own faith. *See infra* at 52.

The government's claim that it needs a way to know who is exempt is belied by the fact that (a) no similar form is required of grandfathered plans, which are also exempt from the Mandate, (b) no similar form is required of "religious employers," which are also exempt from the Mandate, and (c) the Form is not even designed to be submitted to the government, but to be given to the third parties.

To the extent the government merely needs a way to know who has a religious objection, the Supreme Court fashioned relief that would be perfectly adequate for the same purpose here. *See supra* at 34. The government's continued and adamant insistence that Appellees execute the Form or pay massive fines confirms that the government's goals extend beyond simply knowing that Appellees object.

B. The Mandate Cannot Satisfy Strict Scrutiny.

Nor can the government satisfy strict scrutiny. As the Court found in *Hobby Lobby*, the government's asserted interests in promoting "public health" and "gender equality" are not compelling with regard to this mandate. *Hobby Lobby*, 723 F.3d at 1143-44. The interests are both too "broadly formulated" as a matter of law, and undermined as a matter of fact "because the contraceptive-coverage requirement presently does not apply to tens of millions of people. . . ." *Id*. The mandate likewise fails the least restrictive means requirement because "[t]he government does not articulate why accommodating such a limited request

fundamentally frustrates its goals." *Id.* at 1144. As the government conceded below, those conclusions are binding here. *See* A241.

For the first time on appeal, the government introduces an entirely new argument. It claims that strict scrutiny is satisfied by the government's need to achieve policy goals and create various classes of accommodation. Br.26-27. This argument was not raised below and is therefore waived. *See, e.g.*, *Tele-Commc'ns, Inc. v. C.I.R.*, 104 F.3d 1229, 1233 (10th Cir. 1997) ("In order to preserve the integrity of the appellate structure, we should not be considered a 'second-shot' forum, a forum where secondary, back-up theories may be mounted for the first time."). Even if this argument were not foreclosed by waiver, it would be foreclosed by fact and law.

This new argument reiterates the government's error regarding the legal effects of the Form. *See supra* at 14-17. Moreover, under strict scrutiny, the government must prove "that *no alternative forms of regulation would combat such abuses without infringing First Amendment rights*. . . ." *United States v. Hardman*, 297 F.3d 1116, 1130 (10th Cir. 2002) (quoting *Sherbert*, 374 U.S. at 407) (emphasis in original). The government cannot avoid this requirement by formulating a single alternative, then asserting that everyone must follow it because any deviation "would impair the government's operations." Br.27. This turns the least restrictive means test on its head: "the claimant's rejection of alternatives the *government*

offers doesn't address the question whether *his* suggested alternatives suffice to achieve the government's asserted compelling interest." *Yellowbear*, 741 F.3d at 63. Appellees have suggested multiple less restrictive alternatives.[10] *See* A143-44. The government failed to counter any of them. It cannot survive strict scrutiny. *See, e.g.*, *Hardman*, 297 F.3d at 1130; *Newland*, 881 F. Supp. 2d at 129; *see also Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) (narrow tailoring requires "serious, good faith consideration of workable . . . alternatives").

II. A PRELIMINARY INJUNCTION IS ALSO JUSTIFIED BECAUSE THE MANDATE VIOLATES THE FIRST AMENDMENT'S RELIGION CLAUSES.

The government's dogged insistence that Appellees Reaching Souls and Truett-McConnell and other non-exempt employers in the GuideStone Plan sign the Form or pay the penalties is also illegal under the Free Exercise and Establishment

[10] There are innumerable ways that the government can, and does, distribute contraceptives without the coerced involvement of Appellees. *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013). The government has publicly acknowledged that "contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support." A143. These services are widely available because the federal government has constructed an extensive funding network designed to increase contraceptive access, education, and use, including requested spending of almost $300 million in FY 2013 to provide contraceptives directly through Title X funding. A144. In addition, the government could: provide individual subsidies, reimbursements, tax credits or tax deductions; empower other *willing* actors to deliver the drugs and to sponsor education about them; or use their own healthcare exchanges to offer coverage they believe is needed.

Clauses of the First Amendment.[11] While the government has exempted other religious objectors from the Mandate (primarily churches and their "integrated auxiliaries"), it has refused to exempt Appellees Reaching Souls and Truett-McConnell and similar members of the GuideStone Plan, even though they are engaged in the exact same religious exercise, seek the exact same relief, *and in some cases use the exact same GuideStone Plan*[12] as the exempted religious organizations. To put the matter bluntly: if Appellees Reaching Souls and Truett-McConnell simply handed their organizations to a particular Southern Baptist congregation, to be funded and controlled directly by that congregation, the government would exempt them entirely as "integrated auxiliary[ies]," without requiring them to sign, deliver, or file any form of any kind. *See* 78 Fed. Reg. at 39874; 45 C.F.R. 147.131(a); 26 C.F.R. 1.6033-2(h). But because Appellees instead operate in a way that allows them to cooperate with a broader array of Southern Baptist and other evangelical churches and ministries, they face millions of dollars in penalties.

[11] These claims were raised at A145-47, A301-305, but the district court did not need to address them because it granted a preliminary injunction under RFRA. Appellees raised additional claims under the Free Exercise Clause (and other laws) that were not part of the preliminary injunction motion, and are not part of this appeal.

[12] *See* A281 (The GuideStone Plan encompasses both exempt religious non-profit entities and non-exempt religious non-profit entities.).

This type of discrimination among religious organizations is impermissible under the Free Exercise and Establishment Clauses, which prohibit the government from making such "explicit and deliberate distinctions between different religious organizations." *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982). By preferring certain church-run organizations to other types of religious organizations, the Mandate inappropriately "interfer[es] with an internal . . . decision that affects the faith and mission" of a religious organization, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012), namely whether a religious mission is best achieved by ceding control to centralized church authorities. Doing so also requires "discrimination… [among religious institutions] expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations[.]" *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (applying *Larson* to invalidate distinction between "sectarian" and "pervasively sectarian" organizations). Such discrimination is forbidden by the Religion Clauses.

The discrimination among religious organizations in this case is even less defensible than the program invalidated in *Larson*. Rather than creating its own criteria for the religious employer exemption, HHS borrowed the strict rules that the IRS uses for the unrelated purpose of determining which religious organizations are exempt from reporting their income. Only religious organizations

that are institutional churches or are controlled by an institutional church may qualify for this narrow IRS exemption. *See* 26 C.F.R. § 1.6033-2. And under the IRS' rules, an exempt religious organization must not "normally receive[] more than 50 percent of its support" from a non-church sources—a qualification that closely parallels the criteria condemned in *Larson*. *Compare* 26 C.F.R. § 1.6033-2 (h)(2)-(4) *with Larson*, 456 U.S. at 230 (law "impos[ed] certain registration and reporting requirements upon only those religious organizations that solicit more than fifty percent of their funds from nonmembers").

These rules dramatically disadvantage organizations like Truett-McConnell and Reaching Souls, which share the exact same religious beliefs and seek to engage in the exact same religious exercise as thousands of exempt churches. For religious and historical reasons, evangelical Christian organizations like Truett-McConnell and Reaching Souls are less likely to have the kinds of close financial and administrative ties to a particular church that the IRS reporting rules require.[13] The IRS's strict rules for income reporting are completely unjustified as a limitation on

[13] Since at least the nineteenth century, evangelicals in America have favored non-denominational organizations because of their ability to foster cooperation between members of different churches that share common religious convictions. *See, e.g.*, Michael S. Hamilton, *Evangelical Entrepreneurs: the Parachurch Phenomenon*, CHRISTIAN HISTORY (Oct. 1, 2006), *available at* http://www.christianitytoday.com/ch/2006/issue92/6.33.html; *see also* George Marsden, *The Evangelical Denomination, in Evangelicalism and Modern America* vii, xiv-xv (George Marsden ed., 1984).

the exercise of religious liberty, as Defendants seek to use them here. By structuring the exemption in this way, the Mandate engages in "discrimination . . . expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations[.]" *Weaver*, 534 F.3d at 1259 (applying *Larson* to invalidate distinction between "sectarian" and "pervasively sectarian" organizations). This is forbidden by the Religion Clauses.

The government does not deny that it has engaged in this type of discrimination. Indeed, the final regulations explicitly depend on the government's assumptions about the likely religious beliefs of people who work for religious organizations like Appellees:

> Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan.

78 Fed. Reg. at 39874. The final regulations simply claim that such discrimination is permitted because (a) the government concedes that its interest is *not* implicated by employers who limit their hiring to their co-religionists, and (b) the government assumed that religious non-profits like Truett-McConnell and Reaching Souls do not so limit their hiring. *See id*.

In fact, the evidence is to the contrary. Both Truett-McConnell and Reaching Souls only hires employees that share their religious beliefs. A177-78, A189-90.

Such arrangements are so commonplace among religious non-profit organizations that Congress created an express exemption for them in Title VII. *See* 42 U.S.C. § 2000e-1(a). And in parallel litigation, the government has conceded that there is "no evidence" to support Defendants' speculation that employees of religious organizations like Truett-McConnell and Reaching Souls "are more likely not to object to the use of contraceptives."[14]

The government's discrimination among religious institutions favors religious traditions that exercise their beliefs primarily through individual "houses of worship," "integrated auxiliaries," or "the exclusively religious activities of any religious orders," 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013), and disfavors religious traditions that, like the Southern Baptists and other evangelical Protestants, encourage the creation of religious institutions that cooperate with a broad base of likeminded believers. But just as a law may not privilege a denomination with "well-established churches" while disadvantaging "churches which are new and lacking in a constituency," *Larson*, 456 U.S. at 246 n.23, or provide special treatment "solely for 'pervasively sectarian' schools . . . [and thus] discriminat[e] between kinds of religious schools," *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002), a law cannot prefer denominations that exercise religion

[14] A361 (Dkt. 51-1 at 34:9-24, *Zubik v. Sebelius*, No. 2:13-cv-01459 (W.D. Pa. Nov. 21, 2013) (Deposition Transcript of Gary M. Cohen, Defendants' Rule 30(b)(6)).

principally through "houses of worship[] and religious orders," 78 Fed. Reg. at 8461, while disfavoring those whose faith "move[s] [its adherents] to engage in" religious ministries that join hands with likeminded believers across individual church lines. *Weaver*, 534 F.3d at 1259. Such preferences have been "consistently and firmly" rejected. *Larson*, 456 U.S. at 246; *see also Korte*, 735 F.3d at 681 (rejecting "the government's argument [that] . . . [r]eligious exercise is protected in . . . the house of worship but not beyond" because many "[r]eligious people do not practice their faith in that compartmentalized way").

None of this is permissible. The government is prohibited by the First Amendment from selectively handing out religious exemptions based on the government's views of which openly religious organizations are "religious enough."

III. THE MANDATE VIOLATES THE FIRST AMENDMENT'S FREE SPEECH CLAUSE.

The First Amendment protects Appellees' rights to be free from governmentally compelled speech or silence. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."). The Mandate violates both rights.[15]

[15] These claims were raised at A148 but not addressed by the district court.

A. The Mandate Compels Appellees to Speak Against Their Will, and in a Way that Contradicts Their Beliefs.

The Mandate's proposed accommodation requires Appellees Reaching Souls and Truett-McConnell to make statements designed to trigger payments for the use of abortion-inducing drugs and devices, and for "education and counseling" about using such products. A148, A522-25; 26 C.F.R. 54.9815-2713A(b)(2). This compels Appellees to engage in speech they wish to avoid: speech furthering a message and activities that contradict their public witness to their religious faith. A148, A522-25. And the government cannot "force[] an individual . . . to be an instrument for fostering public adherence to an ideological point of view" that is "repugnant to [her] moral [and] religious . . . beliefs." *Wooley v. Maynard*, 430 U.S. 705, 707-08, 715 (1977).

It is irrelevant that the government assumes that, since GuideStone will not act on the speech and the government argues that it cannot (currently) use its ERISA enforcement authority to force them to, there will be no practical effect of the compelled speech. Being compelled to "utter what is not in [one's] mind" is itself the harm, regardless of whether that utterance triggers other actions. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 634 (1943). When West Virginia forced a school boy to salute the flag, that salute did not trigger any legal authorization, financial incentive, or legal obligation. *Id.* at 627-29. When New Hampshire forced its citizens to bear its message on their license plates, nothing "practical" happened

as result. *Wooley*, 430 U.S. at 715; *accord Cressman v. Thompson*, 719 F.3d 1139, 1152 (10th Cir. 2013). Yet the Court still rejected the states' "inva[sion of] the sphere of intellect and spirit" as violating "the purpose of the First Amendment." *Barnette*, 319 U.S. at 642; *accord Frudden v. Pilling*, --F.3d--, 2014 WL 575957 (9th Cir. Feb. 14, 2014) (protecting school children from being compelled to wear a public school's "Tomorrow's Leaders" message).

Further, the government bears the burden of demonstrating why it may massively penalize Appellees Reaching Souls and Truett-McConnell for declining to speak through the government's Form. If the government is "not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike [it]," *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000), it certainly cannot compel speech *for no purpose at all*. Yet the gravamen of the government's argument is that the speech it is compelling Appellees to utter is essentially meaningless. By definition, the government can have no *compelling* interest in requiring Appellees to engage in meaningless speech.

Nor does it matter that Appellees can tell others that the words the government forces them to utter are "words without belief" or are a "gesture barren of meaning." *Barnette*, 319 U.S. at 633. It was no answer in *Wooley* that "plaintiffs could have 'place[d] on their bumper a conspicuous bumper sticker explaining in

no uncertain terms that they do not profess [the message they were forced to speak] and that they violently disagree with the connotations of that'" message. *Frudden*, 2014 WL 575957, at *5 (quoting *Wooley*, 430 U.S. at 722 (Rehnquist, J., dissenting)). Government may not force citizens to lie or to speak out of both sides of their mouths. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2331 (2013) (rejecting forced speech requirement, even for recipients of government funds, because it would render grantees able to express contrary beliefs "only at the price of evident hypocrisy"). This is particularly true where, as here, Appellees' faith and pro-life witness instructs them not to mislead others by taking public action that apparently condones abortion. A148.

Finally, it is likewise irrelevant that the government might believe that the speech it compels here is "minimal" and "non-ideological." The Appellees strongly disagree with that characterization, but even if it was true, speakers have the "right to tailor speech" to avoid "minimal" statements, even when the undesired statement is allegedly "factual." *Nat'l Ass'n of Mfrs. v. SEC*, ---F.3d--- , 2014 WL 1408274, at *9 (D.C. Cir. April 14, 2014). Moreover, "[t]he right against compelled speech is not, and cannot be, restricted to ideological messages." *Id.* at *9 (internal citation omitted); *accord Cressman*, 719 F.3d at 1152 ("[I]deological speech is not the only form of forbidden compelled speech.").

B. The Mandate Compels Appellees to be Silent on Specific Topics to Specific Audiences.

The Mandate also expressly prohibits Appellees from engaging in speech with a particular content and viewpoint: they are barred by federal law from talking to their TPAs and instructing them not to provide abortion-inducing drugs and devices, or from saying they will terminate their relationship with them and find a different TPA. *See* A148, A288, A476-77; 26 C.F.R. 54.9815-2713A(b)(iii) (Appellees "must not, directly or indirectly, seek to influence the [TPA's] decision to make any such arrangements"); A550-51 (Counsel for the government stating, in oral argument in this case, that church plan participants cannot take action "that would cause the TPA to . . . forego providing this coverage when they otherwise would have," and cannot say "something like, Don't do this or we're going to fire you," or otherwise "threaten[] them" with ending their contract). This is a "presumptively invalid, content-based restriction on [Appellees'] right to speak." *Archdiocese of Atlanta*, 2014 WL 1256373, at *29.

It is no answer to say, as the government did below, that Appellees may tell everyone *but* their TPAs that they do not want their TPA to provide the coverage. A ban on "speech tailored to a particular audience . . . cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience." *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) ("Effective speech has . . . a speaker and an audience. A restriction on either . . . is a restriction on speech").

Each violation—compelled speech and compelled silence—triggers strict scrutiny, *TBS, Inc. v. FCC*, 512 U.S. 622, 642 (1994), which the Mandate fails for the reasons discussed above.[16]

IV. THE REMAINING PRELIMINARY INJUNCTION FACTORS.

The district court also did not abuse its discretion in finding in favor of Appellees on the remaining preliminary injunction factors—irreparable injury, balance of harms, and the public interest. A578. Because the government did not even address the district court's findings on these factors in its opening brief, they are waived. *See, e.g.*, *Shell Oil Co. v. CO2 Comm., Inc*., 589 F.3d 1105, 1110 (10th Cir. 2009).

CONCLUSION

Appellees respectfully ask the Court to affirm the preliminary injunction entered by the district court.

[16] Further, even if the Mandate's speech requirements were "unrelated to the content of speech," they would still be "subject to an intermediate level of scrutiny," which they would fail due to the same infirmities that cause them to fail strict scrutiny. *TBS*, 512 U.S. at 642. Having repeatedly argued that its form has no effect, the government cannot possibly have substantial interest, or even a rational interest, in compelling Appellees to sign it.

REQUEST FOR ORAL ARGUMENT

Appellees request oral argument in order to clarify the issues in this appeal and respond to questions presented by this appeal. Appellees submit that oral argument is necessary because this appeal presents issues of exceptional importance currently pending before this and several other circuits.

Respectfully submitted this 19th day of May 2014.

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CERTIFICATE OF SERVICE

I certify that on May 19, 2014, I caused the foregoing to be served electronically via the Court's electronic filing system on the following parties who are registered in the system:

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CERTIFICATES OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **13,892** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 10th Cir. R. 32, and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using **Microsoft Office Word 2007** in **Times New Roman 13- and 14-point font**.

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

a. all required privacy redactions have been made;

b. the hard copies that have been submitted to the Clerk's Office are *exact* copies of the ECF filing; and

c. the ECF submission was scanned for viruses with the most recent version of Symantec Endpoint Protection (last updated April 17, 2014) and, according to the program, is free of viruses.

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Dated: May 19, 2014

ADDENDUM

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EBSA FORM 700-- CERTIFICATION
(To be used for plan years beginning on or after January 1, 2014)

This form is to be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131.

Please fill out this form completely. This form must be completed by each eligible organization by the first day of the first plan year beginning on or after January 1, 2014, with respect to which the accommodation is to apply, and be made available for examination upon request. This form must be maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify that, on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a nonprofit entity; and the organization holds itself out as a religious organization.

Note: An organization that offers coverage through the same group health plan as a religious employer (as defined in 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), may certify that it holds itself out as a religious organization.

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____
Signature of the individual listed above

_____
Date

The organization or its plan must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

(1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

This certification is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210-0150. Each organizations that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing is required to complete this self-certification from pursuant to 26 CFR 54.9815-2713A(a)(4) in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email ebsa.opr@dol.gov and reference the OMB Control Number 1210-0150.