IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TRIJICON, INC., a Michigan Corporation; STEPHEN G. BINDON; MICHAEL BINDON, MARK BINDON, SHARON LYCOS, TIMOTHY BINDON, AND BETHANNE FALKOWSKI; Plaintiffs, v. KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; THOMAS PEREZ, in HIS official capacity as Secretary of the United States Department of Labor; JACOB LEW, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES DEPARTMENT OF THE TREASURY; Defendants.	Civil Action No. 1:13-CV-01207-EGS Oral Argument Requested

MOTION FOR PRELIMINARY INJUNCTION AND
MEMORANDUM OF LAW IN SUPPORT

Pursuant to Fed. R. Civ. P. 65 and LCvR 65.1, the above named Plaintiffs hereby move for a preliminary injunction for the reasons set forth below in the memorandum of law. Plaintiffs' counsel conferred with Defendants' counsel on August 6, 2013, concerning this motion. Defendants' counsel indicated Defendants are willing to consider not opposing the motion so long as Plaintiffs are willing to agree to stay the proceedings pending the D.C. Circuit Court of Appeals final disposition of the appeal in *Gilardi v. Sebellius*, No. 13-5069. Plaintiffs have indicated a willingness to do so. But Defendants' counsel is unable to give a definitive

answer at this time and cannot provide a date certain by which the Defendants will provide a final answer. Defendants' Counsel indicated that Defendants will advise the Court of its intent to oppose or not oppose this motion as soon as possible.

Accordingly, because Plaintiffs urgently need relief from this Court—they will be forced to include abortion-inducing items in their health insurance plan in violation of their religious beliefs starting September 1, 2013—and because the Defendants cannot yet provide a definitive answer on whether it will not oppose this motion, Plaintiffs respectfully request a hearing on this motion be set on or before August 28, 2013, pursuant to LCvR 65.1(d). Further, Plaintiffs respectfully request a decision on this motion the same day or no later than August 30, 2013.

Plaintiffs would welcome an opportunity to present oral argument at the hearing on this motion, but would also forgo that opportunity if the Court determines that it can rule based solely on the motion papers.

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MEMORANDUM OF LAW

Plaintiffs—Trijicon, Inc. and its six sibling and devout Christian owners (collectively, hereinafter, "Trijicon")—seek a preliminary injunction against Defendants' enforcement of a portion of the preventive services coverage provision of the Patient Protection and Affordable Care Act (the "ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010) and related implementing regulations (the "Mandate"). Trijicon and its owners have deeply held religious beliefs that life begins at conception/fertilization. These beliefs cause them to object to covering items in their health plan that they believe to cause early abortion. Defendants, however, are mandating that Trijicon violate its and its owners' beliefs by covering such items in next year's employee health insurance plan which begins on September 1, 2013.

An injunction in this case is warranted. Indeed, Defendants have already been the subject of a preliminary injunction against this mandate in both the U.S. Court of Appeals for the D.C. Circuit, *Gilardi v. U.S. Dep't of Health and Human Servs.*, No. 13-5069 (D.C. Cir. Mar. 29, 2013), and this Court, *Tyndale House Publ'rs v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012); *Johnson Welded Prods., Inc. v. Sebelius*, No. 1:13-cv-00609-ESH (D.D.C. May 24, 2013).

Numerous other courts of appeals and district courts have likewise granted injunctions to similarly-situated employers who are raising substantially the same challenges to the HHS Mandate as Trijicon does here.

Granting Injunction Pending Appeal:

- *Annex Med., Inc. v. Sebelius*
  2013 WL 1276025 (8th Cir. Feb. 1, 2013)
- *Grote v. Sebelius*
  708 F.3d 850 (7th Cir. Jan. 30, 2013)
- *Korte v. Sebelius*
  2012 WL 6757353 (7th Cir. Dec. 28, 2012)
- *O'Brien v. U.S. HHS*
  No. 12-3357 (8th Cir. Nov. 28, 2012)

Granting Preliminary Injunction:

- *Beckwith Electric Co., Inc. v. Sebelius*
  2013 WL 3297498 (M.D. Fla. June 25, 2013)
- *Monaghan v. Sebelius*
  2013 WL 1014026 (E.D. Mich. Mar. 14, 2013)
- *Am. Pulverizer Co. v. U.S. HHS*
  2012 WL 6951316 (W.D. Mo. Dec. 20, 2012)
- *Geneva Coll. v. Sebelius*
  2013 WL 1703871 (W.D. Pa. Apr. 19, 2013)

- *Legatus v. Sebelius*
  901 F. Supp. 2d 980 (E.D. Mich. 2012)
- *Newland v. Sebelius*
  881 F. Supp. 2d 1287 (D. Colo. 2012)
- *Triune Health Grp., Inc. v. U.S. HHS*
  No. 1:12-cv-6756, ECF Doc. 50 (N.D. Ill. Jan. 3, 2013)

Granting Unopposed Motion for Preliminary Injunction:

- *Hartenbower v. U.S. HHS*
  No. 1:13-cv-2253, ECF Doc. 16 (N.D. Ill. Apr. 18, 2013)
- *Am. Mfg. Co. v. Sebelius*
  No. 0:13-cv-295, ECF Doc. 11 (D. Minn. Apr. 2, 2013)
- *Bick Holdings, Inc. v. U.S. HHS*
  No. 4:13-cv-462, ECF Doc. 19 (E.D. Mo. Apr. 1, 2013)
- *Tonn & Blank Constr., LLC v. Sebelius*
  No. 1:12-cv-00325, Doc. 43 (N.D. Ind. Apr. 1, 2013)
- *Lindsay v. U.S. HHS*
  No. 1:13-cv-01210, ECF Docs. 20-21 (N.D. Ill. Mar. 20, 2013)
- *Sioux Chief Mfg. Co., Inc. v. Sebelius*
  No. 4:13-cv-036, ECF Doc. 9 (W.D. Mo. Feb. 28, 2013)

Granting Temporary Restraining Order:

- *Sharpe Holdings, Inc. v. U.S. HHS*
  2012 WL 6738489 (E.D. Mo. Dec. 31, 2012)

See also Hobby Lobby Stores, Inc. v. Sebelius, 2013 WL 3216103 (10th Cir. June 27, 2013) (en banc) (holding that Hobby Lobby "established a likelihood of success that their rights under [RFRA] are substantially burdened by the contraceptive-mandate coverage requirement" and "irreparable harm," and remanding to district court to address "the remaining two preliminary injunction factors").

Defendants' mandate of insurance coverage subjects Trijicon to draconian penalties, including lawsuits by Defendant Secretary of Labor as well as fines and penalties potentially accruing in the millions. Forcing Trijicon to choose between its faith and such penalties is a blatant violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. (RFRA), the First and Fifth Amendments to the United States Constitution, and the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*. Defendants cannot satisfy the strict scrutiny required under RFRA and these laws. Defendants' interests are both improperly "broadly formulated" and they "cannot be compelling because the [Mandate] presently does not apply to tens of millions of people," *Hobby Lobby*, 2013 WL 3216103 at *23. Yet Defendants refuse to exempt

Trijicon. The government could pursue, and already does pursue, the less restrictive means of directly delivering the drug items at issue here. *Id.* at *24.

Without an injunction, Plaintiffs will imminently be forced to include abortion-inducing items in their health insurance plan in violation of their religious beliefs, thereby suffering irreparable harm to their constitutional and statutory rights to freely exercise their religion.

FACTUAL BACKGROUND

As is set forth in Plaintiffs' Verified Complaint (which is evidentiary support for this motion), Plaintiff Trijicon, Inc. is a leader in the industry of firearm aiming systems. Verified Complaint ("Compl.") ¶¶ 23-27 (Doc. # 1). Plaintiffs Stephen Bindon, Michael Bindon, Mark Bindon, Sharon Lycos, Timothy Bindon, and BethAnne Falkowski are all siblings and the company's sole shareholders. Compl. ¶¶ 6, 29. Stephen Bindon is the company's president and owns 62% of the voting shares in the company. *Id*. ¶¶ 6, 8, 30. Trijicon has 257 full-time employees. *Id*. ¶ 43.

Glyn Bindon, the six shareholders' father, founded Trijicon in 1981, and tragically passed in 2003. *Id*. ¶¶ 24, 28-29. Glyn Bindon was a Christian. His religious convictions, which he imparted to his children, guided his formation and management of Trijicon. *Id*. ¶ 31. The Bindon children picked up their father's mantle, seeking to follow their Christian convictions in their daily lives, including how they operate and manage Trijicon. *Id*. ¶ 32. The Bindons sincerely believe they owe a duty to God to operate Trijicon in a manner that is consistent with their religious beliefs, and that their Christian faith requires them to follow biblical teachings on morality and ethics in their management of the company. *Id*. ¶¶ 33-34.

Trijicon's and its owners' religious beliefs are reflected throughout the company in myriad ways. *Id*. ¶¶ 35-41. Trijicon has five company values, one of which is "Morality," which is defined as follows: "We believe that America is great when its people are good. This goodness has been based on biblical standards throughout our history and we will strive to follow these morals." *Id*. ¶ 35. Trijicon provides a 24/7 Chaplain as a voluntary, company benefit for all employees. *Id*. ¶¶ 36-37. Trijicon also annually donates 10% of its profits, via

shareholder vote, to evangelical Christian ministries. Common recipients include Focus on the Family, Bethany Christian Services (a Christian adoption agency that provides pregnant mothers a life-affirming option to abortion), and many pro-life ministries and events. *Id.* ¶ 38. Glyn Bindon started the practice of etching Bible references on its products over 30 years ago, a practice which continues to this day (except for products made exclusively for the military). *Id.* ¶¶ 39-40. Trijicon also funds and is involved in prayer breakfasts at trade shows it attends. *Id.* ¶ 41. These breakfasts serve the purpose of gathering like-minded representatives of Christian-run businesses within the industry, so that they can pray together and discuss the importance of operating their businesses consistent with their religious convictions. *Id.*

Trijicon and its owners also hold the sincere religious belief that life begins at conception/fertilization, and that "any method that functions to prevent or disrupt implantation of a fertilized human embryo is morally wrong and results in the wrongful taking of a human life." *Id.* ¶ 46. Accordingly, for many years Trijicon has instructed its health insurance provider to not include coverage for the voluntary termination of pregnancies in its health insurance plan for employees. *Id.* ¶¶ 1, 48. Pursuant to this instruction, Trijicon's current plan excludes coverage for "voluntary termination of pregnancy." *Id.* ¶ 47. Trijicon believed that this exclusion covered abortifacient items like Plan B, ella, and others. *Id.* ¶ 50. In July 2013, however, it learned this exclusion did not include these abortifacients because some insurance carriers treat such items as contraceptives, which Trijicon's plan generally covers. *Id.* ¶ 50. Until that time, Trijicon was unaware that these abortifacient items were being covered by their plan and believed they were not. *Id.* Trijicon immediately voiced its religious objection and requested that its health insurance plan commencing on September 1, 2013 not include these items. *Id.* Trijicon's insurance carrier responded that it was required to comply with the HHS Mandate and that Trijicon's insurance plan commencing September 1, 2013 would include the abortion-inducing items to which the Plaintiffs religiously object. *Id.* ¶ 52. Plaintiffs then immediately sought legal advice regarding its options to seek an injunction against the Mandate, and this suit followed. *Id.* ¶ 53.

Defendants are mandating that Trijicon violate its sincerely held religious beliefs by covering abortifacient items, and education and counseling in support of the same, in its insurance plan that starts on September 1, 2013. The ACA requires health plans to include coverage of preventive health services with no cost-sharing to patients, but does not define what is included in those services. 42 U.S.C. § 300gg-13(a)(4). Defendants issued regulations ordering HHS's Health Resources and Services Administration (HRSA) to decide what would be mandated as women's preventive care. 75 Fed. Reg. 41726–60 (July 19, 2010). HRSA issued such guidelines in July 2011, mandating coverage of "All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA, "Women's Preventive Services," *available at* http://www.hrsa.gov/womensguidelines/ .

Thereafter, Defendants issued an "interim final rule" endorsing HRSA's guidelines as applied to plan years beginning after August 1, 2012, and granting "additional discretion" to HRSA to exempt from this requirement what it defined as "religious employers." 76 Fed. Reg. 46621–26 (Aug. 3, 2011). To be a religious employer under Defendants' definition, which changed throughout the course of several years of federal regulations, an entity must be "a church, an integrated auxiliary of a church, a convention or association of churches, or . . . an exclusively religious activity of a religious order, under Internal Revenue Code 6033(a)(1) and (a)(3)(A)." Compl. ¶ 83; 78 Fed. Reg. 39,870 (July 2, 2013). Trijicon does not qualify for this narrowly-defined exemption. *Id*. ¶ 84.

Defendants finalized this Mandate in February 2012. 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012). Defendants likewise used their unfettered discretion on at least three occasions to issue rules that allow many religious organizations to avoid government enforcement of the Mandate for an extra year.[1] But all three versions of those rules explicitly excluded Trijicon from this

[1] *See* Center for Consumer Information and Insurance Oversight and Centers for Medicare & Medicaid Services, "Guidance on the Temporary Enforcement Safe Harbor for Certain Employers . . ." June 28, 2013, available at http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventive-services-guidance-6-28-2013.pdf (last visited Aug. 6, 2013).

"safe harbor" because they only apply to non-profit entities. *Id.* And Defendants used their discretion to create even more accommodations for some religious entities, but not for Trijicon because it is for-profit. 78 Fed. Reg. 3986 (July 2, 2013).

Defendants have now mandated that Trijicon violate its deeply held religious beliefs by immediately providing coverage of abortifacients (and education and counseling in favor of the same) into its employee health plan. To do this would violate Trijicon's conscience. Compl. ¶¶ 70-71. The Mandate triggers a variety of harsh penalties against Trijicon to require it to violate its religious beliefs. *Id*. ¶¶ 74-80. Section 1563 of the ACA incorporates the preventive care requirement into the Internal Revenue Code as well as ERISA. See "Conforming Amendments," Pub. L. 111-148, §1563(e)–(f). Thereunder, Department of Labor Defendants are authorized to sue Trijicon if it omits the objectionable mandated coverage, and those suits could specifically force Trijicon to violate its beliefs by providing coverage for the abortifacient items to which they religiously object. 29 U.S.C. § 1132. The ACA also triggers penalties through the Treasury Department Defendants of approximately $100 per covered person *per day* on Trijicon if it continues providing its employees with generous health insurance coverage but omits abortifacient items. 26 U.S.C. § 4980D. Furthermore, the law imposes a $2,000 per employee per year penalty on Trijicon if it were to injure its employees by dropping health insurance altogether. 26 U.S.C. § 4980H.

This Court is Trijicon's only recourse to protect it and its owners' religious freedom in relation to the Mandate. Compl. ¶¶ 5, 129. Trijicon has no adequate remedy at law. *Id*. ¶ 130. It faces the imminent and irreparable violation of its federal constitutional and statutory rights to freely exercise its religion, the immediate threat of the Mandate's penalties, and endangerment of its employees' health plan, unless this Court orders preliminary injunctive relief as soon as possible.

ARGUMENT

In considering whether to grant a preliminary injunction, the Court balances "(1) the movant's showing of a substantial likelihood of success on the merits, (2) irreparable harm to the

movant, (3) substantial harm to the non-movant, and (4) public interest." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009). As explained below, Trijicon meets these requirements and is therefore entitled to a preliminary injunction. Critically, as noted *supra*, the D.C. Circuit Court of Appeals, this Court, and numerous other courts of appeals and district courts have issued preliminary injunctions against the Defendants and this Mandate on behalf of for-profit entities run by religious believers, like Trijicon.

I. TRIJICON IS LIKELY TO SUCCEED ON THE MERITS.[2]

A. The Mandate violates the Religious Freedom Restoration Act.

Congress passed RFRA to subject government burdens on religious exercise to "the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963 and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b)(1); *see generally Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 431 (2006) (describing origin and intent of RFRA, 42 U.S.C. § 2000bb *et seq.*). Under RFRA, the federal government may not "substantially burden" a person's exercise of religion unless the government "'demonstrates that application of the burden to the person' represents the least restrictive means of advancing a compelling interest." *O Centro*, 546 U.S. at 423 (quoting 42 U.S.C. § 2000bb-1(b)); *see also Kaemmerling v. Lappin*, 553 F.3d 669, 677–79 (D.C. Cir. 2008) (discussing RFRA).[3] Once a plaintiff demonstrates a substantial burden on his religious exercise, RFRA requires that the compelling interest test be satisfied not generically, but with respect to "the particular claimant." *O Centro*, 546 U.S. at 430–31.[4]

[2] Due to page limits, Plaintiffs have not briefed their Establishment Clause, Free Speech, Due Process, and Administrative Procedures Act claims herein. These rights were also violated and Plaintiffs will include these claims as the case proceeds.

[3] "[T]he portion [of RFRA] applicable to the federal government…survived the Supreme Court's decision striking down the statute as applied to the States." *Henderson v. Kennedy*, 265 F.3d 1072, 1073 (D.C. Cir. 2001) (discussing *City of Boerne v. Flores*, 521 U.S. 507 (1997)). RFRA applies "to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3(a) (2000).

[4] The government's burden to satisfy strict scrutiny under RFRA is the same at the preliminary injunction stage as at trial. *See O Centro*, 546 U.S. at 429-30 (citing *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)).

1. Trijicon's desire to abstain from providing abortion-inducing drugs in employee coverage qualifies as "religious exercise" under RFRA.

RFRA broadly defines "religious exercise" to "include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" 42 U.S.C. § 2000bb-2(4), *as amended by* 42 U.S.C. § 2000cc-5(7)(A). A plaintiff's "claimed beliefs 'must be sincere and the practice[] at issue must be of a religious nature.'" *Kaemmerling*, 553 F.3d at 678 (quoting *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002)).

To *refrain* from morally objectionable activity is part of the exercise of religion. Both the Supreme Court and the D.C. Circuit have recognized that the "exercise of religion" encompasses a belief that one must avoid participation in certain acts. *See, e.g.*, *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (explaining under the Free Exercise Clause that "the 'exercise of religion' often involves not only belief and profession but the performance of (*or abstention from*) physical acts"); *Kaemmerling*, 553 F.3d at 678 (reasoning that "religious exercise" under RFRA embraces "action *or forbearance*") (emphases added). Thus, a person exercises religion by *avoiding* work on certain days (*see Sherbert*, 374 U.S. at 399), or by *refraining* from sending children over a certain age to school (*see Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972)). *See* 42 U.S.C. § 2000bb(b)(1) (incorporating *Sherbert* and *Yoder* in RFRA). Similarly, a person's religious convictions may compel her to *refrain* from facilitating prohibited conduct by others. *See, e.g.*, *Thomas v. Review Bd.*, 450 U.S. 707, 714–16 (1981) (recognizing religious exercise in refusing to "produc[e] or directly aid[] in the manufacture of items used in warfare").

As explained above, Trijicon's religious beliefs direct it to not only respect embryonic human life, but also to refrain from providing and covering methods that could cause what they believe to be early abortions (as well as late ones). To offer such coverage through its employee insurance policy would violate Trijicon's faith. *See* Compl. ¶¶ 1, 3, 70-71, 132. Accordingly, Trijicon's desire to abstain from doing what the Mandate requires qualifies as "religious exercise" within the meaning of RFRA.

a. Trijicon's religious owners can exercise religion under RFRA.

Trijicon's shares are owned solely by six children of the company's founder, Glyn Bindon. Compl. ¶¶ 6, 29-30. The sibling owners, like their father, seek to operate and manage the company in accordance with their religious convictions. *Id*. ¶¶ 31-41. The sibling owners are in accord that the Mandate's requirement that Trijicon's health insurance plan cover abortifacient items violates their sincere religious beliefs. *Id*. ¶¶ 46-47, 70-71. Each of the sibling owners is a Plaintiff in this litigation, and each is asserting his or her right to be free from the substantial burden the Mandate imposes on their religious exercise under RFRA.

In *Korte*, the Seventh Circuit rejected the government's argument that the Mandate did not implicate company owners' rights under RFRA "at all" because the Mandate applied to the company, not its owners. 2012 WL 6757353, at *3. The Court noted that the owners "are also plaintiffs," that "they own nearly 88% of" the company, and that the company is a "family-run business" that is "manage[d] . . . in accordance with [the owners'] religious beliefs." *Id*. The Court thus held that the Mandate's requirement that the company cover abortifacients would require the owners "to violate *their religious beliefs* to operate the company in compliance with it." *Id*. (emphasis added). The same is true of the Plaintiff owners here, and they too may assert their own rights under RFRA. *See also Beckwith*, 2013 WL 3297498, at *11 ("When an individual is acting through an incorporeal form, whether secular or religious, nonprofit or for-profit, incorporated or partnership, the individual does not shed his right to exercise religion merely because of the 'corporate identity' he assumed").

Moreover, this Court has held that a corporation can assert the free exercise rights of its owners. In *Tyndale*, this Court held that "when the beliefs of a closely held corporation and its owners are inseparable, the corporation should be deemed the alter-ego of its owners for religious purposes." 904 F. Supp. 2d at 117. Under such circumstances, which as noted *supra* are present here in relation to Trijicon, "courts must 'consider the rights of the owners as the basis for the [f]ree [e]xercise claim' brought by the corporation." *Id*. (citation omitted).

Numerous other courts have ruled that for-profit corporations can assert the free exercise rights of their owners in lawsuits against the Mandate under circumstances indistinguishable from this case. *See Beckwith*, 2013 WL 3297498, at *12-13 (closely-held for-profit company operated based on the religious values of the majority shareholder could assert the free exercise rights of its owner); *Monaghan*, 2013 WL 1014026, at *6 (closely held for-profit property management company run pursuant to sole shareholder's and owner's religious beliefs "may assert an RFRA claim on [its owner's] behalf"); *Legatus*, 901 F. Supp. 2d at 988 (for-profit outdoor power equipment company that was "founded as a family business and remains a closely held family corporation" may "assert the free exercise rights of its president" in relation to the Mandate).

These cases are not breaking new ground. They are consistent with several other cases that have generally recognized that a corporation can assert religious beliefs on behalf of its owners when the government requires the corporation to do things in violation of the owners' religious beliefs. This is because a business is an extension of the moral activities of its owners and operators. Both *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119–20 & n.9 (9th Cir. 2009), and *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988), affirm that the owners of a for-profit and even "secular" corporation had their religious beliefs burdened by regulation of that corporation, and that the corporation could sue on behalf of its owners to protect those beliefs. *See also Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194 (2d Cir. 2012) (entertaining free exercise challenge by kosher butcher corporation and its owners); *McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985) (hearing free exercise challenge by incorporated sports club and its owners).

b. Trijicon exercises religious beliefs.

In several lawsuits against this Mandate, the government has argued that a for-profit entity is categorically incapable of exercising religion. Several courts have now rejected this claim. *See, e.g., Hobby Lobby*, 2013 WL 3216103, at *9 ("We hold as a matter of statutory interpretation that Congress did not exclude for-profit corporations from RFRA's protections.

Such corporations can be 'persons' exercising religion for purposes of the statute"); *Beckwith Electric Co.*, 2013 WL 3297498, at *6-8 (holding that "a corporation is a 'person' under the First Amendment and the RFRA" and thus can exercise religion for the purposes of both). Like Hobby Lobby, Trijicon, Inc., is "not publicly traded," is a "closely held family business[]," has owners that "adhere[] to Christian standards" who "have made business decisions according to those standards" and who are "unanimous in their belief that the contraceptive-coverage requirement violates the religious values they attempt to follow in operating" the company. *Hobby Lobby*, 2013 WL 3216103, at *17. Accordingly, Trijicon, like Hobby Lobby, qualifies as a "person" capable of exercising religion under RFRA.

The government's position that for-profits cannot exercise religion is flawed on a number of levels. First, the "free exercise of religion" in RFRA, and in the First Amendment that RFRA explicitly seeks to enhance, has always been recognized as including the exercise of religion in all areas of life including in business and "profitable" enterprise. There is simply no "business exception" to RFRA or to the First Amendment. RFRA protects "any" exercise of religion. 42 U.S.C. § 2000bb-2(4); 42 U.S.C. § 2000cc-5(7)(A); *see also United States v. Philadelphia Yearly Meeting of the Religious Soc'y of Friends*, 322 F. Supp. 2d 603 (E.D. Pa. 2004) (Quaker Church's refusal to levy its employee's wages was an exercise of religion under RFRA). The government's proposal that a business corporation has no capability to exercise religion is "conclusory" and "unsupported." *McClure*, 370 N.W.2d at 850. Both *Stormans*, 586 F.3d at 1119–20 & n.9, and *Townley*, 859 F.2d at 620 n.15, recognized that a for-profit and even "secular" corporation could assert free exercise claims. *See Commack*, 680 F.3d at 210 (considering free exercise claims of a kosher butcher corporation).

The government's premise seems to be that one cannot exercise religion while engaging in business. But *Tyndale*, in which this Court vindicated the *free exercise rights* of a *for-profit* publishing company, clearly stands for the opposite. 901 F. Supp. 2d at 114, 117. And judicially, the context of free exercise has usually involved the pursuit of financial gain. In *Sherbert*, 374 U.S. at 399, an employee's religious beliefs were burdened by not receiving

unemployment benefits; likewise in *Thomas*, 450 U.S. at 709. In *United States v. Lee*, 455 U.S. 252, 257 (1982), the Court held an employer's religious beliefs were sufficiently burdened by paying taxes for workers so as to require the government to justify its burden. In *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999), an employee's bid to continue his employment was burdened by discriminatory grooming rules. Many other cases have recognized that business corporations can exercise religion. *See, e.g., Jasniowski v. Rushing*, 678 N.E.2d 743, 749 (Ill. App. Dist. 1, 1997) (for-profit corporation may assert free exercise claim), *vacated*, 685 N.E.2d 622 (Ill. 1997). *Morr-Fitz, Inc. et al. v. Blagojevich*, No. 2005-CH-000495, slip op. at 6–7, 2011 WL 1338081 (Ill. Cir. Ct. 7th, Apr. 5, 2011) (ruling in favor of the free exercise rights of three pharmacy corporations and their owners); *Roberts v. Bradfield*, 12 App. D.C. 453, 464 (D.C. Cir. 1898) (recognizing that the right of "free exercise of religion" inheres in "an ordinary private corporation"). *See also Commack Self-Service Kosher Meats, Inc. v. Hooker*, 800 F. Supp. 2d 405 (E.D.N.Y. 2011) (analyzing free exercise claims without regard to profit motive); *Maruani v. AER Services, Inc.*, 2006 WL 2666302 (D. Minn. 2006) (analyzing religious First Amendment claims by a for-profit business). A court analyzing a free exercise claim does not ask whether the claimant is the right category of person; it asks "whether [the challenged statute] abridges [rights] that the First Amendment was meant to protect." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

Congress has rejected the government's restrictive view in many ways. The ACA itself lets employers and "facilit[ies]" assert religious beliefs for or against "provid[ing] coverage for" abortions generally, without requiring them to be non-profits.[5] 42 U.S.C. § 18023. Congress has repeatedly authorized similar objections, including to contraceptive insurance coverage.[6] These

[5] One out of every five community hospitals is for-profit. American Hospital Association, http://www.aha.org/research/rc/stat-studies/fast-facts.shtml (last visited August 6, 2013).

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

protections cannot be reconciled with the government's view that anything connected with commerce excludes religion.

Second, the government has tended to confuse the protection of "any" "exercise of religion" under RFRA, with narrower categories such as "religious employer" in Title VII employment discrimination. See 42 U.S.C. § 2000e–1(a). This argument cannot help the government in this case, for two reasons. Initially, the text Congress used in RFRA did not limit its protections to a "religious corporation, association, or society" as stated in its previously enacted statute of Title VII. Congress instead protected the "exercise of religion," period, by anyone. To read a "religious employer" limit into RFRA would violate the text of the statute. "Where the words of a later statute differ from those of a previous one *on the same or related subject*, the Congress *must have* intended them to have a different meaning." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444 (D.C. Cir. 1988); *cf. Norinsberg v. U.S. Dept. of Agric.*, 162 F.3d 1194, 1200 (D.C. Cir. 1998) ("Congress' different wording from past indicates intent that new word has different meaning"; citation omitted).

In addition, to the extent that the government might argue RFRA only protects religious exercise by "persons," and that persons do not include corporations, this argument contradicts the statute and clear Supreme Court precedent. RFRA does not define the term "person." *See* 42 U.S.C. §2000bb-1(a). The Dictionary Act, however, declares that "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the word[] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. "We could end the matter here since the plain language of the text encompasses 'corporations . . . .'" *Hobby Lobby*, 2013 WL 3216103 at *9. There is no text, context, or history in RFRA exempting businesses or corporations from its protection. The government has conceded in all cases against this Mandate that non-profit corporations, including but not limited to churches, exercise religion. Necessarily, then, it is not the corporate form or separate legal status that causes the government to exclude the possibility of religious exercise.

Precedent likewise demonstrates that "First Amendment protection extends to corporations," and that the exercise of a First Amendment right "does not lose First Amendment protection simply because its source is a corporation." *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 342 (2010). As the Seventh Circuit held in the context of a for-profit corporation's challenge to the Mandate, "that the [individual plaintiffs] operate their business in the corporate form is not dispositive of their [RFRA] claim." *Korte*, 2012 WL 6757353, at * 3 (citing *Citizens United*). *See also Beckwith*, 2013 WL 3297498, at * 8 (citing *Citizens United* for the proposition that "the text of the First Amendment does not provide any reason to distinguish between a 'natural person' and a corporation for political speech purposes," and that "[l]ikewise, there is nothing to suggest that the right to exercise religion was intended to treat any form of the 'corporate personhood[]' . . . any differently than it treats individuals"). Indeed, the lead plaintiff in *O Centro* itself was an entity rather than a natural person, and the Supreme Court vindicated free exercise rights on behalf of *Church of the Lukumi Babalu Aye, **Inc.** v. City of Hialeah*, 508 U.S. 520 (1993) (emphasis added). "[I]t is well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell v. Dept. of Social Services*, 436 U.S. 658, 687 (1978). "That corporations are in law, for civil purposes, deemed persons is unquestionable." *United States v. Amedy*, 24 U.S. 392, 11 Wheat. 392 (1826). "[C]orporations possess Fourteenth Amendment rights . . . through the doctrine of incorporation, [of] the free exercise of religion." *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295 (11th Cir. 2006). It must be presumed that when Congress passed RFRA to build on the First Amendment's protection of free exercise of religion, it was aware of the centuries-old judicial interpretation that corporations are "persons" with constitutional rights. *See Lindahl v. Office of Personnel Management*, 470 U.S. 768 (1985) ("Congress is presumed to be aware of an administrative or judicial interpretation . . . ." (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8 (1975))). If for-profit corporations can have no First Amendment "purpose," this would overturn the Supreme Court's vindication of

First Amendment rights of for-profit companies such as the New York Times. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

A company's exercise of religion is no different substantively than its pursuit of any other value or belief. Many companies prioritize values other than (and sometimes higher than) profit: for Ben & Jerry's, "Progressive values lead the way"; Starbuck's supports establishing a right to same-sex marriage; and Whole Foods champions sustainable agriculture.[7] It is simply false that ordinary corporations may only pursue profit and not other values such as religion. And if the government were to concede that corporations can pursue not-profitable values *as long as they are not religious*, that position would be not only theoretically unjustified, it would impose unconstitutional viewpoint discrimination. *See, e.g., Good News Club v. Milford Central School*, 533 U.S. 98, 107–12 (2001) (finding viewpoint discrimination where certain activities are permitted but not if pursued from a religious perspective).

2. The Mandate substantially burdens Trijicon's and its owners' religious exercise.

The Mandate's burden on Trijicon's and its owners' exercise of religious beliefs is substantial. The government "substantially burdens" religious exercise when it puts "'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Kaemmerling*, 553 F.3d at 678 (quoting *Thomas*, 450 U.S. at 718).

Critically, this Court, in *Tyndale*, found that the Mandate imposes a substantial burden under RFRA:

> The contraceptive coverage mandate . . . places the plaintiffs in the untenable position of choosing either to violate their religious beliefs by providing coverage of the contraceptives at issue or to subject their business to the continual risk of the imposition of enormous penalties for its noncompliance. . . . [S]uch a Hobson's choice for the plaintiffs amply shows that the contraceptive coverage mandate substantially burdens the plaintiffs' religious exercise.

[7] *See, e.g.*, Ben & Jerry's "Activism," *available at* http://www.benjerry.com/activism (last visited August 6, 2013) ; David Zimmerman, "Starbucks CEO to anti marriage equality investors, 'buy shares in another company," Boston.com (Mar. 22, 2013), available at http://www.boston.com/lifestyle/blogs/bostonspirit/2013/03/starbucks_ceo_to_anti_marriage.html (last August 6, 2013); Whole Foods "Caring About Our Communities & Our Environment," available at http://www.wholefoodsmarket.com/mission-values/core-values/caring-about-our-communities-our-environment (last visited August 6, 2013).

904 F. Supp. 2d at 122. This holding controls here.

Several federal courts of appeals have also ruled that the Mandate imposes a "substantial" burden. In *Korte*, the Seventh Circuit rejected the government's claim that the Mandate's "burden on religious exercise is minimal and attenuated." 2013 WL 6757353, at *3. Instead, the court explained that the "religious liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services." *Id*. at *3. Critically, the court held that the plaintiffs "established a reasonable likelihood of success on their claim that the contraception mandate imposes a substantial burden on their religious exercise." *Id*. at *4.

In *Hobby Lobby*, the Tenth Circuit observed that a government act imposes a substantial burden when, *inter alia*, it "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief." 2013 WL 3216103, at *18 (citation omitted). The court then explained that the Mandate required Hobby Lobby to choose among three options: (1) "compromise their religious beliefs" by offering an insurance plan that provided coverage for contraceptive and abortifacient items in violation of their religious beliefs; (2) offer an insurance plan that did not provide the mandated contraceptive coverage and be fined $100 per employee, per day the plan does not provide the coverage; or (3) drop health insurance benefits for employees and be fined $2,000 per employee, per year and put themselves at a competitive disadvantage in their efforts to retain and recruit employees. 2013 WL 3216103, at *20-21. The court held "it is difficult to characterize the pressure [imposed by the Mandate] as anything but substantial," and found that Hobby Lobby had "established a substantial burden as a matter of law." *Id*. at *21. Several district courts have reached the same conclusion. *See Beckwith*, 2013 WL3297498, at *14-16; *Monaghan*, 2013 WL 1014026, at *6-9; *Legatus*, 901 F. Supp. 2d at 990-91; *American Pulverizer Co.*, 2013 WL 6951316, at *3; *Geneva College*, 2013 WL 1703871, at *6-8; *Sharpe Holdings Inc.*, 2012 WL 6738489, at *4-5.

This Court, and these many other courts, are plainly correct that the Mandate imposes a substantial burden, and it does here as well. The Mandate directly and imminently orders Trijicon to provide coverage for abortifacient items in its employee health insurance plan in violation of its religious beliefs. Compl. ¶¶ 5, 70-71. If Trijicon fails to comply with this Mandate, it faces a penalty of $100 per day per covered person, as well as the prospect of lawsuits by the Defendant Secretary of Labor and by its own plan participants. 26 U.S.C. § 4980D(a), (b) (financial penalties); 29 U.S.C. § 1132(a) (providing for civil enforcement actions by the Secretary of Labor, as well as by plan participants). Alternatively, if Trijicon ceased offering employee insurance altogether, this would not only harm its 257 employees by suddenly robbing them of their valued health insurance, but it would subject it to an annual assessment of $2,000 per employee, 26 U.S.C. § 4980H, and severely harm Trijicon's ability to retain and attract qualified employees. Compl. ¶ 76. These mandates violate Trijicon's religious beliefs and integrity, and subject it to competitive disadvantages. Compl. ¶¶ 69-76.

To call the Mandate's burdens "substantial" is an understatement. Indeed, the Supreme Court has struck down religious burdens far less injurious. For instance, *Sherbert* involved a plaintiff who was not required to work on the Sabbath, but was merely denied unemployment benefits for refusing such work, and the Court deemed this an "unmistakable" substantial pressure on the plaintiff to abandon that observance. *Sherbert*, 374 U.S. at 404 (reasoning that the law "force[d] [plaintiff] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand," and that "the pressure on her to forego that practice is unmistakable"); *see also Thomas*, 450 U.S. at 717–18 (finding burden on religious exercise "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith. . . thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs"). *Sherbert* and *Thomas* therefore declared even "indirect" pressure to be a substantial burden. *See Thomas*, 450 U.S. at 718 (explaining "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial").

With "direct" pressure, the Supreme Court has been even more exacting. For instance, *Yoder* struck down a fine on Amish parents for not sending their children to high school. *See, e.g.*, *Yoder*, 406 U.S. at 208 (observing that the parents were "fined the sum of $5 each"). The Court reasoned that "[t]he [law's] impact" on religious practice was "not only severe, but inescapable, for the . . . law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218. This exactly describes the Mandate on its face: it "affirmatively compels" Trijicon, under threat of severe consequences—lawsuits by the Defendants, fines, regulatory penalties, a prohibition on providing employee health benefits, competitive disadvantage—"to perform acts undeniably at odds with the fundamental tenets of their religious beliefs." *Yoder*, 406 U.S. at 218. Trijicon could avoid this steep price, of course, by abandoning its religious convictions against participating in activities it believes destructive of nascent human life. But it is black letter law that "[a] substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs[.]'" *Kaemmerling*, 553 F.3d at 678 (quoting *Thomas*, 450 U.S. at 718); *see also Lee*, 455 U.S. at 254 ($27,000 penalty).

Defendants themselves have acted as if they understand this kind of burden. The Mandate contains an exemption for certain churches and religious orders, in order to "take[] into account the effect on the religious beliefs of certain religious employers." 76 Fed. Reg. at 46623. And both Defendant Sebelius and President Obama have publicly recognized that the Mandate burdens religious believers. In her January 20, 2012 announcement previewing the one-year safe harbor, Secretary Sebelius stated that the extension "strikes the appropriate balance between respecting religious freedom and increasing access to important preventative services."[8] Likewise, in his February 10, 2012 press conference, President Obama acknowledged that religious liberty is "at stake here" because some institutions "have a religious objection to

[8] The Secretary's statement regarding the one-year extension can be found at: http://www.hhs.gov/news/press/2012pres/01/20120120a html (last visited August 6, 2013).

directly providing insurance that covers contraceptive services."[9] The President explained that this religious liberty interest is why "we originally exempted all churches from this requirement." Finally, the basic premise of the Defendants' most recent rule-making on the Mandate is to explore alternate insurance arrangements that would avoid burdening religious organizations' consciences. *See* 77 Fed. Reg. 16501, 16503; 78 Fed. Reg. 39869. These statements candidly acknowledge that coercing religious objectors substantially burdens their religious exercise.[10]

The government often argues that individual family owners are not substantially burdened by a mandate that would devastate their family company. This is incorrect. The Bindons face an unavoidable substantial burden. They exclusively own, direct, and operate Trijicon. The Mandate necessarily "force[s]" and "pressures" the Bindons, for three reasons. First, there is no one who can implement the mandate other than the Bindons. Coercing the company to do something necessarily coerces its sole holding family owners and operators. Second, the only way in which this mandate is *not* a command on the Bindons is if the court imagines that the Bindons have the "choice" of *abandoning their family business* or subjecting it to ruin. But this "choice" is the very definition of being forced to choose between "forfeiting benefits, on the one hand, and abandoning one of the precepts of [her] religion in order to accept [benefits], on the other hand." *Sherbert*, 374 U.S. at 404. Forcing the Bindons to choose between their religion or running a family business is a heavy burden.

In *Sherbert* and *Thomas*, where employees refused to work certain jobs and were denied unemployment benefits, the Court *rejected* the argument that no substantial burden existed

[9] A transcript of the President's remarks is available at http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care (last visited August 6, 2012).

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

simply because "no criminal sanctions directly compel appellant to work a six-day week," and "the Indiana law does not *compel* a violation of conscience." 374 U.S. at 403; 450 U.S. at 717. Therefore the government here cannot simply declare that it does not impose a requirement on the Bindons by name. Likewise, Trijicon's corporate status does not somehow insulate the Bindons from the Mandate's harm. The Bindons are substantially burdened when they must operate their business in violation of their beliefs, regardless of the corporate form they use. And limited liability, which corporate form provides, is itself a "benefit[] otherwise generally available," which the Mandate forces the Bindons to forego in exchange for their religious beliefs. That, too, is a substantial burden under *Sherbert*. *U.S. v. Lee* held that a government mandate on a business constituted a substantial burden on religious exercise. 455 U.S. at 257. The same is true for the unbearable burden that the Bindons face under this Mandate.

The government's "heads I win, tails you lose" position against both Trijicon's and the Bindons' claims is a refusal to recognize a burden on families who earn a living through business. This view would hobble religious believers from being able to earn a living for their families by running a modern business. Imposing the "choice" between following one's beliefs or abandoning one's family business constitutes "substantial pressure" on the Bindons "to substantially modify [their] behavior and to violate [their] beliefs." In *Thomas*, when "the employee was put to a choice between fidelity to religious belief or cessation of work[,] the coercive impact" constituted a substantial burden. 450 U.S. at 717. The same is true for business owners. Declaring that the Bindons are "free" to abandon their livelihood does not undermine their substantial burden, it proves it.

3. The Mandate cannot satisfy strict scrutiny.

Defendants cannot establish that their coercion of Trijicon is "in furtherance of a compelling governmental interest." This Court already ruled in *Tyndale* that the Defendants lack

a compelling interest to justify coercing closely-held companies and their owners to provide coverage for abortifacients to which they religiously object. 901 F. Supp. 2d at 125-29. This Court identified at least two, independent reasons why the government lacked a compelling interest. First, "considering the myriad of exemptions to the contraceptive coverage mandate already granted by the government, the defendants have not shown a compelling interest in requiring the plaintiffs to provide the specific contraceptives to which they object." *Id*. at 129. Second, the government lacked "*any* proof that mandatory insurance coverage for the specific contraceptives to which the *plaintiffs* object—Plan B, ella, and intrauterine devices" furthered its claimed interests, or that granting plaintiffs an exemption would undermine them. *Id*. at 126-27. These same holdings doom any attempt by Defendants here to claim that compelling governmental interests justify their coercion of Trijicon.

Indeed, RFRA, with "the strict scrutiny test it adopted," *O Centro*, 546 U.S. at 430, imposes "the most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 534. A compelling interest is an interest of "the highest order," *Lukumi*, 508 U.S. at 546, and is implicated only by "the gravest abuses, endangering paramount interests," *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Defendants cannot propose such a generalized interest "in the abstract," but must show a compelling interest "in the circumstances of this case" by looking at the particular "aspect" of the interest as "addressed by the law at issue." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000); *O Centro*, 546 U.S. at 430–32 (RFRA's test can only be satisfied "through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened"); *see also Lukumi*, 508 U.S. at 546 (rejecting the assertion that protecting public health was a compelling interest "in the context of these ordinances"). The government must "specifically identify an 'actual problem' in need of solving" and show that coercing Trijicon is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011); *see also Hobby Lobby*, 2013 WL 3216103 at *22 (inquiring whether governmental interests would be adversely affected by granting the

exemption "specifically requested by Hobby Lobby"); *Tyndale House Publishers*, 904 F. Supp. 2d at 125 (asking whether applying "the contraceptive coverage mandate *to the plaintiffs* further[ed]" a compelling interest).

If Defendants' "evidence is not compelling," they fail their burden. *Brown*, 131 S. Ct. at 2739; *see also O Centro*, 546 U.S. at 423 (recognizing the government must establish the burden placed on religious exercise is "the least restrictive means of advancing a compelling interest"). To be compelling, the government's evidence must show not merely a correlation but a "caus[al]" nexus between their Mandate and the grave interest it supposedly serves. *Brown*, 131 S. Ct. at 2739. The government "bears the risk of uncertainty . . . ambiguous proof will not suffice." *Id.*

As this Court's decision in *Tyndale* clearly indicates, Defendants' interest in coercing Trijicon to provide coverage of abortifacients is not compelling. In other cases, the government has attempted to identify two interests—women's health and equality by reducing unintended pregnancy—as justifying the Mandate under RFRA. But these interests are generic and abstract. *See Tyndale*, 904 F. Supp. 2d at 127 ("[I]nvok[ing] … the general characteristics of contraceptives as promoting public health or … equal[] access to health care 'cannot carry the day.'" (quoting *O Centro*, 546 U.S. at 432)). In *O Centro*, the Court held evidence showing that Schedule I controlled substances were "extremely dangerous" to be insufficient because that "categorical" support could not meet the government's RFRA burden to consider the "particular" exception requested. *Id.* at 432.

The simple fact is that even if abortifacient drugs are assumed to provide health and equality to women, Defendants have not shown a compelling interest to deliver those benefits by means of coercing Trijicon itself. *See, e.g.*, *Hobby Lobby*, 2013 WL 3216103, at *23 (rejecting the sufficiency of the government's "'broadly formulated interests'" because it offered "'almost no justification for not granting specific exemptions to particular religious claimants'" (quoting *O Centro*, 546 U.S. at 431)). As discussed below, the government already delivers and subsidizes abortifacients to women and could do so here as well without forcing Trijicon to do it.

It is also notable at the outset that Trijicon only objects to abortifacient "emergency contraception" and IUDs. Compl. ¶ 3. Whatever interests Defendants claim in the generic need to provide women with contraception, they have no evidence to insist that a plan providing most contraception and sterilization still triggers a compelling interest to coerce the remainder. *See Tyndale*, 904 F. Supp. 2d at 127 (noting the lack of evidence that Plan B, ella, and IUDs—as opposed to other forms of contraception plaintiffs do provide—were necessary to further the government's asserted interests). *See also Beckwith*, 2013 WL 3297498, at *17 (citing a lack of proof that provision of "emergency contraceptive (in addition to the contraceptives to which plaintiffs do not object) would result in fewer unintended pregnancies, an increase propensity to seek prenatal care, or a lower frequency of risky behavior endangering unborn babies").

a. Defendants cannot identify a compelling interest.

The most striking obstacle to Defendants' assertion of a compelling interest is that the government itself has voluntarily omitted tens of millions of women from the Mandate. *Tyndale*, 904 F. Supp. 2d at 128 (finding "[t]he existence of these exemptions significantly undermines defendant's interest in applying the contraceptive coverage mandate to the plaintiffs"); *Newland*, 881 F. Supp. 2d at 1291 (noting that "[t]his gap in the preventative care coverage mandate is significant"). This massive exclusion is being offered by the government for secular reasons. But Defendants still refuse to exempt Trijicon. *See Hobby Lobby*, 2013 WL 3216103, at *23 (concluding that if the "exemption in *O Centro*, which applied to 'hundreds of thousands of Native Americans' was enough to undermine the government's compelling interest argument …, the exemption for the millions of individuals here must dictate a similar result" (quoting *O Centro*, 546 U.S. at 433)).

The Mandate does not apply to thousands of plans that are "grandfathered" under the ACA. See 76 Fed. Reg. at 46623 & n.4; *see also Geneva Coll*, 2013 WL 1703871, at *10 ("[T]he mere fact that defendants granted such a broad exemption in the first place severely undermines the legitimacy of defendants' claim of a compelling interest."). Also, the Mandate does not apply to members of a "recognized religious sect or division" that conscientiously

objects to acceptance of public or private insurance funds. 26 U.S.C. §§ 5000A(d)(2)(a)(i) and (ii); *see also Geneva Coll.*, 2013 WL 1703871, at *10. And the Mandate exempts from its requirements "religious employers" defined as churches or religious orders, 78 Fed. Reg. 39869; *see also Geneva Coll.*, 2013 WL 1703871, at *10; as well as colleges run by religious institutions, 78 Fed. Reg. 39869; *see also Hobby Lobby*, 2013 WL 3216103, at *23. The federal government has also decided that employers that employ fewer than fifty employees, s*ee Geneva Coll.*, 2013 WL 1703871, at *10, suffer fewer penalties for not complying with the Mandate.

Recently the government placed yet another few hundred thousand women outside the Mandate's scope. The government has unilaterally decided (in apparent contradiction to the text of the Affordable Care Act) to delay employer reporting requirements under 26 U.S.C. § 4980H. While this does not delay the Mandate applicable to Trijicon, it does show another glaring way in which the government is choosing not to give women the benefits of the Mandate. The Congressional Budget Office estimates that as a direct result of the delay of employer reporting requirements: 1 million people will lose employer-based health insurance in 2014; almost half of those people will go uninsured altogether; and the government's one year cost is over $10 billion.[11] Thus the government is content to allow hundreds of thousands of additional women to not receive Mandated abortifacient and contraception coverage *at all* in 2014 because they will be uninsured. It leaves hundreds of thousands more women not receiving that coverage from their *employers*, showing that the Mandate here can be achieved through means other than coercing the employer. And the government is spending $10 billion on this single delay, but claims it cannot tolerate paying a much smaller amount for Mandated abortifacient and contraceptive coverage itself, merely for the women who want it and whose employers are exempt under RFRA, rather than coercing those religiously objecting employers.

[11] Sarah Kliff, "Obamacare mandate delay costs $12 billion, cuts insurance coverage," *Wash. Post*, July 30, 2013, *available at* http://www.washingtonpost.com/blogs/wonkblog/ wp/2013/07/30/obamacare-mandate-delay-costs-12-billion-cuts-insurance-coverage/ (last visited Aug. 5, 2013).

These many and far-reaching exemptions simply cannot coexist with a compelling interest against Trijicon. *See Monaghan*, 2013 WL 1014026, at *10 ("The Government's compelling interest is … called into question by the number of exemptions currently in existence."). "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 520. Defendants cannot claim a "grave" or "paramount" interest to impose the Mandate on Trijicon or other religious objectors while allowing the identical "appreciable damage" to tens of millions of women. *See Tyndale*, 904 F. Supp. 2d at 128 (rejecting the contention that the government's generally applicable interests "can preclude any consideration of a similar exception for a similarly-situated plaintiff" when the Mandate is "so woefully underinclusive as to render belief in [its] purpose a challenge to the credulous" (quotation omitted)). No compelling interest exists when the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Lukumi*, 508 U.S. at 546–47; *see also Hobby Lobby*, 2013 WL 3216103, at *23 (recognizing current exemptions "leave unprotected all women who work for exempted business entities"). The exemptions to the Mandate "fatally undermine[] the Government's broader contention that [its law] will be 'necessarily . . . undercut'" if Trijicon is exempted too. *O Centro*, 546 U.S. at 434; *see also Geneva College*, 2013 WL 1703871, at *10 ("The tens of millions of individuals who remain unaffected by the [M]andate's requirements contradict any notion that the government's interests are as compelling as defendants argue.").

Defendants' immense grandfathering exemption has nothing to do with a determination that those tens of millions of women do not need contraceptive coverage, whereas Trijicon's employees somehow do. *See Newland*, 881 F. Supp. 2d at 1298 ("[T]his massive exemption completely undermines any compelling interest in applying the … [M]andate to Plaintiffs."). The exemption was instead a purely political maneuver to garner votes for the ACA by letting

"President Obama promise that Americans who like their health plan can keep it."[12] The grandfathering rule is in no way temporary. There is no sunset on grandfathering status in the ACA or its regulations. Instead, a plan can keep grandfathered status in perpetuity, even if it raises fixed-cost employee contributions and, for several items, even if the increases exceed medical inflation plus 15% every year. *Newland*, 881 F. Supp. 2d at 1297 n.11 ("[H]ealth plans may retain their grandfathered status indefinitely."). The government repeatedly calls it a "right" for a plan to maintain grandfathered status. See 75 Fed. Reg. 34538, at 34540, 34558, 34562, & 34566.

Notably, grandfathered plans *are* subject to a variety of mandates under the ACA: no lifetime limits on coverage; extension of dependent coverage to age 26; no exclusions for children with pre-existing conditions; and others.[13] But Congress deemed the Mandate in this case *not important enough* to impose it on grandfathered plans. Defendants therefore contradict the text of the ACA when they take a litigation position, contrary to Congress, that the Mandate of abortifacient coverage is an interest "of the highest order." *See also Hobby* Lobby, 2013 WL 3216103, at *24 (acknowledging Congress' "basic purpose" in passing RFRA was "accommodating religion"); *Newland*, 881 F. Supp. 2d at 1298 n.14 (rejecting government arguments against an exemption for plaintiffs as inconsistent with RFRA's very purpose)

The flaw of Defendants' supposed compelling interest is even more fatal here because Trijicon is a large employer of approximately 260 employees, and according to Defendants, "[m]ost of the 133 million Americans with employer-sponsored health insurance through large employers will maintain the coverage they have today."[14] In other words, Defendants have voluntarily excluded most Americans situated alongside the employees of Trijicon. They cannot demonstrate they have a paramount interest to force Trijicon to comply in violation of its beliefs.

[12] HHS, "U.S. Departments of Health and Human Services, Labor, and Treasury Issue Regulation on "Grandfathered" Health Plans under the Affordable Care Act," *available at* http://www.hhs.gov/news/press/2010pres/06/20100614e html (last visited Aug. 6, 2013).
[13] HHS, *supra* note 12.
[14] HHS, *supra* note 12.

Defendants are completely content to leave tens of millions of women without "health and equality" flowing from this Mandate. Yet they would insist those same interests can pass the most demanding test known to constitutional law. They cannot. If the government can toss aside such a massive group of employees for political expediency, their "interest" in mandating cost-free birth control coverage cannot possibly be "paramount" or "grave" enough to justify coercing Trijicon to violate its and its owners' religious beliefs. *See O Centro*, 546 U.S. at 434 ("Nothing about the unique political status of the [exempted peoples] makes their members immune from the health risks the Government asserts").

b. The government cannot meet its evidentiary burden.

The government also fails the compelling interest test because its "evidence is not compelling." *Brown v. Entm't Merchs.*, 131 S. Ct. at 2739. It points only to generic interests, marginal benefits, correlation not causation, and uncertain methodology. The Institute of Medicine Report on which the Mandate is based ("2011 IOM"),[15] does not demonstrate the government's conclusions. At best, its studies argue for a generic health benefit from contraception. But the Mandate's evidence must be tailored to the effect of exempting Trijicon, not to generic health interests. *O Centro*, 546 U.S. at 430–31.

In *Tyndale*, this court found that there was "no specific finding that the government *must* ensure that Plan B, ella, and intrauterine devices, as opposed to other forms of contraception, be covered under the plaintiffs' health plan in order to further the government's compelling interest." 904 F. Supp. 2d at 127. "Given that the plaintiffs object to providing a very specific subset of contraceptive drugs and devices, while consenting to provide many others, it is not clear, and the defendants have not made it clear, how the government's compelling interests . . . are furthered by requiring the provision of the contraceptives at issue." *Id.* In other words, the government failed to satisfy its evidentiary burden to show that the few specific abortifacients to which Tyndale objected were necessary to the government's compelling interest.

[15] Inst. of Med., *Clinical Preventive Services for Women:Closing the Gaps* (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited August 6, 2013).

Like Tyndale, Trijicon is willing to provide nearly all "contraception," just not abortifacients. And in the time since the *Tyndale* decision, the government has not offered any additional studies or evidence sufficient to demonstrate a compelling interest to coerce that small margin of contraception when the rest is provided. Defendants "bear the risk of uncertainty," *Brown*, 131 S. Ct. at 2739. "The [g]overnment's mere invocation of the general characteristics of contraceptives as promoting public health or of their provision as equalizing access to health care cannot carry the day." *Tyndale*, 904 F. Supp. 2d at 127 (quoting *O Centro*, 546 U.S. at 432). Speculation and generalizations will not suffice.

The government must show that the Mandate actually serves the right women, with the right problems, and solves those problems. It must "specifically identify an 'actual problem' in need of solving" and show that coercing Trijicon is "actually necessary to the solution." *Brown*, 131 S. Ct. at 2738. The government's evidentiary failures compound upon one another, for three overarching reasons.

First, the government presents no evidence that the Mandate will do what it says the Mandate will do. The government proposes that women's health will be benefitted by a reduction in unintended pregnancy, so that alleged health consequences will decrease. And it proposes that women's equality will be benefitted by a reduction in unintended pregnancy to the extent it harms women's status in the workplace. Both interests require the Mandate to reduce unintended pregnancy.[16] But the government provides no evidence that this Mandate or any mandate actually does that: reduces unintended pregnancy. This evidentiary vacuum is all the more striking since the government acknowledges that 28 states have passed similar coverage mandates. Yet the government does not offer one single study showing that any of those mandates reduced unintended pregnancy, or were even correlated with such a reduction.

The second problem is the generic quality of the government's evidence. Instead of

[16] It is outside any government claim in this case to pursue a reduction in *intended* pregnancy. The government has no business pushing a woman to avoid pregnancy when she chooses it, and it certainly has no compelling interest in doing so by coercing religious objectors.

showing that the Mandate will actually solve a problem, all the government does is urge a connection between contraception generally and a reduction in unintended pregnancy.[17] On its face this fails to show that a coverage mandate achieves that goal. There are many consequent steps between showing contraception reduces unintended pregnancy and showing this Mandate will do the same. Evidence doesn't show that if women aren't using contraception, cost is the problem. In the 2011 Institute of Medicine Report,[18] the government's own sources show that: 89% of women avoiding pregnancy are already practicing contraception;[19] among the other 11%, lack of access is not a statistically significant reason why they do not contracept;[20] even among the most at-risk populations, cost is not the reason those women do not contracept.[21] The IOM references some studies that show "preventive services," not contraception specifically, are avoided by some women due to cost. The actual study[22] specifies that it means only "blood pressure, cholesterol, cervical cancer, colon cancer (for ages 50 to 64) and breast cancer (for ages 50 to 64) screens." This is typical of the government's use of evidence: a failure to "specifically identify" the compelling need and how the Mandate serves that need.[23] *Brown*, 131 S. Ct. at

[17] Alvare, Helen M., No Compelling Interest: The 'Birth Control' Mandate and Religious Freedom (May 31, 2013). Villanova Law Review, Vol. 58, No. 3, pp. 379-436, 2013; George Mason Law & Economics Research Paper No. 13-35. Available at SSRN: http://ssrn.com/abstract=2272821 (last visited August 6, 2013).

[18] Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited August 6, 2013) (link to Read Free OpenBook).

[19] The Guttmacher Institute, "Facts on Contraceptive Use in the United States (August 2013)," *available at* http://www.guttmacher.org/pubs/fb_contr_use.html (last visited August 6, 2013).

[20] Mosher WD and Jones J, "Use of contraception in the United States: 1982–2008," Vital and Health Statistics, 2010, Series 23, No. 29, at 14 and Table E, *available at* http://www.cdc.gov/NCHS/data/series/sr_23/sr23_029.pdf (last visited August 6, 2013).

[21] R. Jones, J. Darroch and S.K. Henshaw "Contraceptive Use Among U.S. Women Having Abortions," *Perspectives on Sexual and Reproductive Health* 34 (Nov/Dec 2002): 294–303 (*Perspectives* is a publication of the Guttmacher Institute). The Centers for Disease Control recently released a study showing that even among those most at risk for unintended pregnancy, only 13% cite cost as a reason for not using contraception. CDC, "Prepregnancy Contraceptive Use Among Teens with Unintended Pregnancies Resulting in Live Births — Pregnancy Risk Assessment Monitoring System (PRAMS), 2004–2008," Morbidity and Mortality Weekly Report 61(02);25-29 (Jan. 20, 2012), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6102a1.htm (last visited August 6, 2013).

[22] "Robertson and Collins, 2011," at pages 8–9. see IOM at 151; available at http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2011/May/1502_Robertson_women_at_risk_reform_brief_v3.pdf (last visited August 6, 2013).

[23] A study cited at 2011 IOM pp. 109 does not show that cost leads to non-use of contraception generally, but relates only to women who switch from one contraception method to another.

2738. The ACA erases most of the preventive services gap—maybe all of it—by mandating coverage of all other preventive services in 42 U.S.C. § 300gg-13. Trijicon is not seeking an exemption for any of those things, including for most contraception. The government offers no evidence that any gap will remain at Trijicon, much less that there will be a compelling gap.

Evidence also fails to show that, for the small percentage of women who do cite contraceptive cost as a factor, the Mandate serves those specific women. The IOM identifies the at-risk class of women who suffer "unintended pregnancy" as being primarily young, unmarried, undereducated and low income. 2011 IOM at 102. By definition this Mandate covers women who have employer-based health insurance. For at-risk women, the government, along with states, already fund a multitude of programs that already give free contraception to women even above the poverty line. An at-risk class of women who already receive free contraception cannot form an evidentiary basis to coerce Trijicon.

The government's third fatal problem is that "[n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology." *Brown v. Entm't Merchs.*, 131 S. Ct. at 2739 (quotation marks omitted). The IOM admits that evidence on this issue is merely correlative, at best, and in many ways is uncertain. Which pregnancies are "unintended"? How can a scientific study identify them? Are situations like premature birth, or domestic violence, actually caused by whether the woman mentally intended to become pregnant? Or is the Mandate a hammer looking for a nail? To these questions the IOM admits that for negative outcomes from unintended pregnancy, "research is limited." 2011 IOM at 103. The IOM therefore cites its own 1995 report, which similarly emphasizes the fundamental flaws in determining which pregnancies are "unintended," and "whether the effect is caused by or merely associated with unwanted pregnancy."[24] The 2011 IOM Report relies on several studies that admit the non-causal character of their evidence.

[24] Institute of Medicine, *The Best Intentions* (1995) ("1995 IOM"), available at http://books nap.edu/openbook.php?record_id=4903&page=64 (last visited August 6, 2013).

The study by Gipson[25] (cited at 2011 IOM at 103) summarizes these flaws:

- "Assessing the relationship between pregnancy intention and its potential health consequences is fraught with a number of measurement and analytical concerns."
- "[B]oth health outcomes and pregnancy intentions may be jointly determined by a single, often unobserved factor."
- "[A]lthough longitudinal data may provide some inferences about the observed associations, causality is difficult if not impossible to show."
- "In light of the paucity of studies . . . and their limitations in terms of establishing causality, the existing research should only be considered to be suggestive of such an impact."
- "The existing evidence on the impact of unintended pregnancy on child and parental health outcomes is mixed and is limited by an insufficient number of studies for some outcomes and by the aforementioned measurement and analytical concerns."

The 1995 IOM likewise admits that no causal link exists for its alleged factors.[26] *Brown v. Entertainment Merchants* categorically excludes mere "associative" evidence from supporting a compelling interest. In that case California attempted to regulate violent video games, and put forth scientific studies showing a correlation between youth violence and the use of such games. 131 S. Ct. at 2739. But even that direct scientific record was "not compelling" because it lacked "a direct causal link" and amounted to "ambiguous proof." *Id.* at 2738–41. Defendants "bear the risk of uncertainty" under strict scrutiny when none of its studies show a causal link between the alleged problem and its proposed solution. *Id*.

If it is "difficult if not impossible to show" causation between unintended pregnancy and adverse health effects, it is even more impossible to show causation between those effects and a RFRA exemption, for a single company, to a Mandate that does not guarantee changes in

[25] Jessica D. Gipson et al., *The Effects of Unintended Pregnancy on Infant, Child, and Parental Health: A Review of the Literature*, 39 Stud. Fam. Plan. 18, 19–20, 29 (2008).

[26] *Id.* at 68–71, 73, 75 (delay in seeking care is "no longer statistically significant" for women who have a support network; health problems such as smoking, drinking, domestic violence and depression drop when controlled for other factors, studies "provide little systematic assessment" for their connection with unintended pregnancy, and those studies merely "suggest" association not causation; low birth weight and prematurity are merely "associated" with not caused by unintended pregnancy, and several studies show no such association in the U.S).

behavior that will lead to a significant reduction in unintended pregnancy. At each step the government's allegedly "compelling" problem reduces to a smaller and more speculative margin. But "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

c. Defendants cannot show the Mandate is the least restrictive means of furthering their interests.

The Mandate is not "the least restrictive means of furthering" the government's alleged interests. 42 U.S.C. 2000bb-1. If a less restrictive alternative would serve the government's purposes, "the legislature must use that alternative." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). "[A] court should not assume a plausible, less restrictive alternative would be ineffective." *Id.* at 824. If the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983); *see also Johnson v. City of Cincinnati*, 310 F.3d 484, 503 (6th Cir. 2002) ("[I]f there are other, reasonable ways to achieve those goals . . . , [the Government] may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'"; quoting *Dunn v. Blumstein*, 405 U.S. 330, 343 (1971)). "[W]ithout some affirmative evidence that there is no less severe alternative," the Mandate cannot survive RFRA's requirements. *Johnson*, 310 F.3d at 505.

The government receives no deference on this question. The Supreme Court recently emphasized this in *Fisher v. University of Texas*, 133 S. Ct. 2411 (June 24, 2013). There the Court reversed a Fifth Circuit ruling that gave too much deference to the government under strict scrutiny. "[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, *before* turning to racial classifications, that available, workable race-neutral alternatives do not suffice." *Id.* at 2420 (emphasis added). Not only did the Court confirm that the government must show it engaged in "consideration" of alternatives, but consideration alone "is not sufficient . . . . : The reviewing court must ultimately be satisfied that no workable . . . alternatives would produce the . . . benefits." *Id.* at 2414. Reiterating that the question is not merely one of

government choice, the Court emphasized "it is for the courts, not for [the government], to ensure that the means chosen to accomplish the government's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Id.* at 2420 (citation and internal quotes omitted). Courts must "examine with care, and not defer to" even a "good faith consideration of workable . . .alternatives." *Id.* (citation and internal quotes omitted).

There are numerous "plausible, less restrictive alternative" ways the government could achieve its goals. The government is actually already involved in such measures by providing contraception and contraceptive subsidies on a massive scale.[27] At the outset, in the least restrictive means test the question must be asked, a means *of doing what*? As discussed above, the IOM admits that low income women are the class of women at risk of unintended pregnancy. But those women are already receiving free contraception and abortifacients from the government. So those programs are already a least restrictive means. The government's evidence does not show that more than a "marginal percentage point" fall outside the class of women who are already being served by an alternate means. *Brown*, 131 S. Ct. at 2741 n.9.

In addition to the evidence failing to prove that the Mandate itself (not contraception) prevented demonstrable grave harm among middle or high-income women who could not afford abortifacients, there is nothing stopping the federal government from giving abortifacients to those women, instead of forcing Trijicon to do it. The same programs the government uses for low-income women could be used for other women who allegedly also need free abortifacients. Income thresholds on Medicaid provision of contraceptive coverage could be raised for people covered by exempted health plans. Note that the question is not whether the government could

[27] The government has admitted that it provides or subsidizes contraception in the following programs: Family Planning grants in 42 U.S.C. § 300, *et seq.*; the Teenage Pregnancy Prevention Program, Public Law 112-74 (125 Stat 786, 1080); the Healthy Start Program, 42 U.S.C. § 254c-8; the Maternal, Infant, and Early Childhood Home Visiting Program, 42 U.S.C. § 711; Maternal and Child Health Block Grants, 42 U.S.C. § 703; 42 U.S.C. § 247b-12; Title XIX of the Social Security Act, 42 U.S.C. § 1396, *et seq.*; the Indian Health Service, 25 U.S.C. § 13, 42 U.S.C. § 2001(a), & 25 U.S.C. § 1601, *et seq.*; Health center grants, 42 U.S.C. § 254b(e), (g), (h), & (i); the NIH Clinical Center, 42 U.S.C. § 248; the Personal Responsibility Education Program, 42 U.S.C. § 713; and the Unaccompanied Alien Children Program, 8 U.S.C. § 1232(b)(1). *See also Facts on Publicly Funded Contraceptive Services in the United States* (Guttmacher Inst. July 2013) (citations omitted), *available at* http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited August 6, 2013).

afford to give free contraception to everyone, just whether it could provide it for people falling under a RFRA exemption. It is not clear that many such groups exist in the grand scheme of things. The government claims that 89% of health plans already provide contraceptive coverage. The government provides no evidence to suggest that RFRA objectors to the Mandate would flood the system of a less restrictive alternative. And given that the government claims allegedly catastrophic public health consequences from RFRA exemptions, providing contraception to objecting entities' plan participants would likely be "cost-neutral."

To the extent the government asserts that HHS currently has no existing legal authority to extend free contraception among RFRA objectors, that is not the question. The question is whether the *federal government*—Congress and the President—could do so with alternate legislation or regulations. Moreover, Defendant Departments have already shown themselves to be less than rigorous about following the letter of the law as they implement the ACA.[28]

Less restrictive means can and do require the government to incur some expense. The Supreme Court required less restrictive alternatives even at the government expense in *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988). There, North Carolina sought to curb fraud by requiring professional fundraisers to disclose during solicitations how much of the donation would go to them. *Id.* at 786. Applying strict scrutiny, the Supreme Court declared that the state's interest could be achieved by publishing the same disclosures itself online, and by prosecuting fraud. *Id.* at 799–800. Although these alternatives would be costly, less directly effective, and a restructuring of the governmental scheme, strict scrutiny demanded they be prioritized. *See id.* Here, the government cannot avoid its duty to pursue less restrictive means based on the idea that it might involve some expense or administrative burden. "The lesson" of RFRA's pedigree of caselaw "is that the government

[28] *See, e.g.*, Treasury Department Guidance, July 2, 2013 (delaying enforcement of requirement that large employers drop health insurance coverage altogether, despite the Affordable Care Act's command that the requirement "shall apply to months beginning after December 31, 2013"), *available at* http://www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner-.aspx (last visited August 6, 2013).

must show something more compelling than saving money."[29] RFRA requires the Mandate to be the "least restrictive means," not the least restrictive means the government chooses, nor the least expensive. 42 U.S.C. § 2000bb-1.

Several other courts have recognized the obvious option of the government providing contraception itself instead of coercing objectors. In *Newland*, 881 F. Supp. 2d at 1299, the court said, "'[T]he government already provides free contraception to women.' . . . Defendants have failed to adduce facts establishing that government provision of contraception services will necessarily entail logistical and administrative obstacles defeating the ultimate purpose of providing no cost preventive health care coverage to women." *See also Monaghan*, 2013 WL 1014026 at *11 (noting that applying the Mandate to plaintiffs was not the least restrictive means in light of the existing programs under which the government pays for contraceptive services). Judge Kovachevich, though not reaching a decision on this question, noted that "[c]ertainly forcing private employers to violate their religious beliefs in order to supply emergency contraceptives to their employees is more restrictive than finding a way to increase the efficacy of an already established program [Title X] that has a reported revenue stream of $1.3 billion." *Beckwith*, 2013 WL 3297498, at *18 n.16.

Viable alternatives could take many forms. As mentioned, the government could allow people to be covered under Medicaid for abortifacients if they are in a RFRA objector's plan. The government could create its own "abortifacients insurance" plan covering the few items to which Trijicon objects, and then allow free enrollment in that plan for whomever the government seeks to cover. The government could directly compensate providers of abortifacients. Or it could offer tax credits or deductions for abortifacient purchases. The government could reimburse citizens who pay to use contraceptives. Or it might impose a mandate on the abortifacient manufacturing industry to give its items away for free. Coercing third parties to provide the items is hardly far-fetched, since the Defendants just enacted a rule doing exactly

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

that to cover religious objectors, even when those third party administrators were not themselves insurance companies. 78 Fed. Reg 39,870. The government has failed its burden to rebut any of these alternatives other than to complain about cost or administrative burdens, which under *Riley* are not dispositive.

Another least restrictive alternative could be for the government to help women who are covered by a plan such as Trijicon's plan to enroll in the new "exchanges," either for health insurance or just for contraception insurance, without applying a penalty to Trijicon. This would provide the women with the Mandated items without coercing Trijicon. Recently the government demonstrated the vialibity of such an alternative. As noted above, the government has voluntarily incurred additional costs of $10 billion for 2014 alone by delaying the employer reporting requirements under 26 U.S.C. § 4980H. That change will on the one hand *deprive* hundreds of thousands of women of the Mandate since they will be uninsured. This undermines the government's alleged compelling interest behind the Mandate. But for hundreds of thousands of additional women it will deprive them of *employer* insurance for 2014 and they will obtain insurance elsewhere. This shows that the government can deliver the Mandate to women through other means besides coercing an employer, and that it is willing to spend massive amounts of money to do so—far more than it would need to spend to provide alternatives while giving an exemption to Trijicon.

Finally, in addition to failing to rebut any of these alternatives, the government also fails to meet its burden because it has not actually considered using a less restrictive means to achieve their goal. "[T]he government cannot meet its burden to prove least restrictive means unless it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Gartrell v. Ashcroft*, 191 F. Supp. 2d 23, 39 (D.D.C. 2002). *See also Washington v. Klem*, 497 F.3d 272, 284 (3rd Cir. 2007) ("[T]he Supreme Court has suggested that the Government must consider and reject other means before it can conclude that the policy chosen is the least restrictive means."); *Couch v. Jabe*, 679 F.3d 197, 203 (4th Cir. 2012); *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *Spratt v. Rhode Island Dep't of*

Corr., 482 F.3d 33, 41 (1st Cir. 2007); *Murphy v. Missouri Dep't of Corr.*, 372 F.3d 979, 989 (8th Cir. 2004). A mere "comparison with other means" does not satisfy this requirement. *Klem*, 497 F.3d at 284. But the government never even considered alternatives less restrictive to religious rights.

Violating First Amendment rights "must be a last—not first—resort." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002). Because "there is no hint that the Government even considered these or any other alternatives," *id.*, and because those alternatives amply serve the government's interests, Trijicon is entitled to an exemption under RFRA.

B. The Mandate violates the Free Exercise Clause.

"It is beyond question that associations—not just individuals—have Free Exercise rights." *Hobby Lobby Stores, Inc.*, 2013 WL 3216103, at *13. And laws like the Mandate violate those rights when they are not "neutral and generally applicable." *Lukumi*, 508 U.S. 20 at 545 (citing *Smith*, 494 U.S. at 880; *see also, e.g.*, *Kaemmerling*, 553 F.3d at 677 (discussing *Smith*). The mandate is therefore subject to strict scrutiny, *Lukumi*, 508 U.S. at 546, which as discussed above, it cannot meet.[30]

The mandate is subject to strict scrutiny under the Free Exercise Clause because it is not generally applicable. A law is not generally applicable if it regulates religiously-motivated conduct, yet leaves unregulated similar secular conduct. *See, e.g.*, *Lukumi*, 508 U.S. at 544–45. As explained above, the Mandate here exempts tens of millions of women on a variety of grounds, including "most" large employers like Trijicon, but refuses to exempt Trijicon based on its religious objections. In *Sharpe Holdings*, the court found that "the ACA mandate is not generally applicable because it does not apply to grandfathered health plans, religious employers,

[30] Neutrality and general applicability overlap and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531; *see also id.* (noting that "[n]eutrality and general applicability are interrelated"); *id.* at 557 (Scalia, J., concurring) (observing that the concepts "substantially overlap"). Still, each merits separate analysis, and "strict scrutiny will be triggered" if the law at issue "fails to meet *either* requirement." *Rader v. Johnston*, 924 F. Supp. 1540, 1551 (D. Neb. 1996) (emphasis supplied) (citing *Lukumi*, 508 U.S. at 531-33, 544-46).

or employers with fewer than fifty employees." 2012 WL 6738489, at *6. After concluding that the Mandate's exemptions "clearly prefer secular purposes over religious purposes and some religious purposes over other religious purposes," the court held that "[b]urdens cannot be selectively imposed only on conduct motivated by religious belief." *Id*. "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id*. (quoting *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872, 884, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)). *See also Fraternal Order of Police*, 170 F.3d at 366 (Alito, J.) (holding that a medical exemption to the department's no beard policy "raises concern because it indicates that the [police department] has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not"); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 210–11, 214 (3d Cir. 2004) (Alito, J.) (rule against religious bear-keeping violated Free Exercise Clause due to categorical exemptions for zoos and circuses); *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1035 (9th Cir. 2009) (Noonan, J., concurring) (campaign finance requirements were not generally applicable where they included categorical exemptions for newspapers and media, but not for churches); *Mitchell Cnty. v. Zimmerman*, 810 N.W.2d 1, 16 (Iowa 2012) (categorical exemptions for secular conduct allowed Mennonite farmers to use steel-wheeled tractors on county roads).

The religious exemption from the Mandate is also not generally applicable because the ACA itself awards Defendants unlimited discretion to shape its scope. Defendants "*may* establish exemptions," 45 C.F.R. § 147.130 (emphasis added), and pursuant to 42 U.S.C. § 300gg-13, Defendants' discretion to craft its exemptions is unlimited. 76 Fed. Reg. at 46623 (asserting that § 300gg-13 grants HHS/HRSA "authority to develop comprehensive guidelines" under which Defendants believe "it is appropriate that HRSA, in issuing these Guidelines, takes into account the effect on the religious beliefs of certain religious employers"). Using their unfettered assessments, Defendants continue to change their exemptions and accommodations.

This is evidenced by two different versions of a "safe harbor" they issued *in addition to* the religious exemption itself, and the fact that in recent rulemaking, yet another category of non-profit religious entities subject to different treatment than the Mandate was created, 78 Fed. Reg. 39869. This built-in discretion means that Defendants have broad discretion to create exemptions based on an "individualized … assessment of the reasons for the relevant conduct," a feature that deprives the mandate of general applicability and subjects it to strict scrutiny. *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884).

Additionally, the Mandate is not neutral on its face because it explicitly discriminates among religious organizations on a religious basis. It thus fails the most basic requirement of facial neutrality. *See, e.g.*, *Lukumi*, 508 U.S. at 533 (explaining that "the minimum requirement of neutrality is that a law not discriminate on its face"). Indeed, the Mandate is a more patent violation of neutrality than the ordinances unanimously struck down in *Lukumi*. That case involved ostensibly neutral animal cruelty laws structured to target religiously-motivated practices only. By contrast, on its face the religious employer exemption to the Mandate divides religious objectors into favored and disfavored classes, forgetting *Lukumi*'s warning that "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Lukumi*, 508 U.S. at 533 (emphasis added).

II. TRIJICON WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY RELIEF.

Granting preliminary injunctive relief is necessary to prevent Trijicon from suffering harm that is irreparable and imminent. *See, e.g., CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) (noting that "'[t]he basis of injunctive relief in the federal courts has always been irreparable harm'") (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974)); *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985) (explaining that "[t]he injury complained of [must be] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm").

Trijicon is forced to choose between violating its religious beliefs by providing abortifacients and the other objectionable services or facing the penalties for not providing the required coverage. This true moral dilemma is the exact type of injury that the Court in *Geneva College v. Sebelius* found to be irreparable harm in a closely-held company's successful challenge to the Mandate. "[P]laintiffs will be irreparably harmed if they are forced either to forgo providing coverage or to violate their sincerely held religious beliefs by contracting for and including the objected to services in the health care insurance that they provide to themselves, their employees, and their families." *Geneva Coll.*, 2013 WL 1703871, at *12.

Furthermore, application of the Mandate to Trijicon will violate its rights under the First Amendment and RFRA. It is settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *accord Nat'l Treasuries Employees Union v. United States*, 927 F.2d 1253, 1254 (D.C. Cir. 1991) (Thomas, J.). Deprivation of rights secured by RFRA—which affords even greater protection to religious freedom than the Free Exercise Clause—also constitutes irreparable harm. *See, e.g., Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (noting that "courts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA"); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (explaining under RFRA that "although the plaintiff's free exercise claim is statutory rather than constitutional, the denial of the plaintiff's right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily"); *W. Presbyterian Church v. Bd. of Zoning Adjustment of Dist. of Columbia*, 849 F. Supp. 77, 79 (D.D.C. 1994) (granting a preliminary injunction against a zoning ordinance prohibiting a church's feeding of the homeless based on likely violations of the First Amendment and RFRA). The District Court in Colorado reached the same conclusion in the *Newland* case. *See Newland*, 881 F. Supp. 2d at 1294 (noting "it is well-established that the potential violation of Plaintiffs' constitutional and RFRA rights threatens irreparable harm") (citation omitted).

III. THE BALANCE OF EQUITIES TIPS IN TRIJICON'S FAVOR.

Here, the balance of equities overwhelmingly favors Trijicon. Granting preliminary injunctive relief will merely prevent Defendants from enforcing the Mandate against one religious family and their company. Defendants have already exempted a number of churches and non-profit corporate entities from the Mandate. Even more notably, Defendants have granted what nearly amounts to its own voluntary "injunction" by granting delayed enforcement of the Mandate against a broad array of religious organizations until their first plan years start after January 2014. HHS Bulletin, *supra* note 1.

Indeed, in *Geneva College*, the court found that the fact that the Defendants "have already granted significant exemptions to the mandate," "continue to exempt others for limited periods of time pursuant to the non-enforcement safe harbor provision," and "have acquiesced to the imposition of injunctive relief" in other cases involving similarly-situated individuals and entities negated the Defendants' claim of harm. 2013 WL 1703871, at *12; see also *Johnson Welded Prods.*, No. 1:13-cv-00609-ESH (D.D.C. May 24, 2013). "In light of the exemptions granted, and defendants' position with respect to injunctive relief in other cases, this factor weighs strongly in favor of granting the requested relief." 2013 WL 1703871, at *12.

Omission of Trijicon from such "safe harbors," accommodations, or voluntary injuctive relief is arbitrary and unwarranted in the first place. Defendants cannot show that applying the Mandate to *one* additional entity such as Trijicon would "substantially injure" others' interests.

Balanced against this *de minimis* injury to Defendants is the real and immediate threat to Trijicon's and its owners' integrity of religious belief. Trijicon faces the imminent prospect of penalties that Defendants obstinately declare they intend to apply. In sum, any minimal harm in not applying the Mandate against one additional entity, in light of Defendants' willingness to not enforce it against thousands of others, "pales in comparison to the possible infringement upon Plaintiffs' constitutional and statutory rights." *Newland*, 881 F. Supp. 2d at 1295.

IV. AN INJUNCTION IS IN THE PUBLIC INTEREST.

Finally, a preliminary injunction will serve the public interest by protecting Trijicon's First Amendment and RFRA rights. The public can have no interest in enforcement of a regulation that coerces a company and its owners to violate their own faith. *See id*. (finding "'there is a strong public interest in the free exercise of religion even where that interest may conflict with [another statutory scheme]'") (quoting *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), aff'd and remanded, *O Centro*, 546 U.S. 418); *Geneva College*, 2013 WL 1703871, at *12 (holding that "[t]here is a strong public interest in protecting fundamental First Amendment rights").

Furthermore, any interest of Defendants in uniform application of the Mandate "is … undermined by the creation of exemptions for certain religious organizations and employers with grandfathered health insurance plans and a temporary enforcement safe harbor for non-profit organizations." *Newland*, 881 F. Supp. 2d at 1295.

CONCLUSION

Trijicon asks the Court to enter a preliminary injunction against the HHS mandate in accordance with its accompanying motion and proposed order.

Respectfully submitted this 7th day of August, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2013, a copy of the foregoing Motion for Preliminary Injunction and Memorandum of Law in Support was filed with the Clerk of Court using the CM/ECF system. I also certify that the foregoing will be served, along with a copy of the Summons and Complaint, via a private process server and Certified US Mail upon:

KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES
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JACOB LEW, in his official capacity as Secretary, United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

UNITED STATES DEPARTMENT OF THE TREASURY
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THOMAS E. PEREZ, in his official capacity as Secretary, United States Department of Labor
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UNITED STATES DEPARTMENT OF LABOR
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