IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

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

Plaintiffs,

v.

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

Defendants.

Case No. 5:12-cv-01000-HE

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs—the Green family, Hobby Lobby Stores and Mardel—seek preliminary injunctive relief against a federal mandate that will force them, in two months, either to violate their faith by covering abortion drugs or to pay millions in fines. In response, Defendants deny Plaintiffs have any rights at all. Because Plaintiffs engage in "secular" business, Defendants say they cannot exercise religion, by definition.

This comes as a surprise to the Green family, who openly run their businesses in line with their Christian faith. That faith is reflected in everything Hobby Lobby does—in its management and its store music, in what it sells and what it does not sell, in its chaplains and its Sunday closings, and its full-page ads proclaiming the Gospel of Jesus Christ every Christmas and Easter. By any definition, these actions are exercises of religion.

So, when Defendants call Hobby Lobby "secular" and thus incapable of exercising religion, they are wrong on the facts. They are also wrong on the law. The government cannot label people or organizations as "secular" or "religious," and grant or withhold freedom accordingly. The law simply protects the exercise of religion—whether the Greens practice it in their church, in their home, or in running their businesses.

Defendants ask this Court to be the first ever to adopt their narrow view of where, when, and how American citizens may exercise religion. That view is supported neither by precedent nor common sense. Millions of Americans have gone into business to make a living, not to forfeit their faith. When the government compels them to violate that faith, the law does not leave them without a remedy.

ARGUMENT

I. A PRELIMINARY INJUNCTION WILL PRESERVE THE STATUS QUO

Plaintiffs meet either Circuit standard for preliminary relief. Dkt. 6 at 6-7. Because an injunction would maintain the status quo, however, Plaintiffs may show likelihood-of-success simply by raising issue "so serious, substantial, difficult, and doubtful as to make [them] ripe for litigation and deserving of more deliberate investigation." *Ro-Da Drilling Co.* v. *Siegal*, 552 F.3d 1203, 1208 & n.3 (10th Cir. 2009). Defendants say this modified standard does not apply, Opp. 11-12, but they are wrong.

Contrary to Defendants' argument, Opp. 13, Plaintiffs do not seek to change the status quo. Plaintiffs' insurance excludes the drugs and devices at issue, and Plaintiffs remain and have always been free to exclude them without incurring massive fines. VC ¶ 54-55.[1] That state of affairs will continue unless the mandate takes effect against them on January 1, 2013. Plaintiffs, not Defendants, are seeking to preserve the status quo.

Nor are the injunction standards changed because Defendants say the mandate is "in the public interest." Opp. 39-40. Defendants have exempted over 100 million plans from covering all mandated contraceptives and allowed delays to millions of others. Dkt. 6 at 12. The public interest does not simultaneously permit these gaping holes in coverage, yet force Plaintiffs to violate their religion by covering a few abortion-causing drugs.

[1] Even during the earlier period when Plaintiffs inadvertently covered two of the drugs, the drugs were not entirely employer-subsidized, as the mandate requires. Also, Plaintiffs have never covered the mandated abortion-causing IUDs. VC ¶¶ 54, 108.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR RFRA CLAIM.

Plaintiffs—the Green family and the businesses they founded, own, and operate—are likely to succeed under RFRA. They exercise religion by avoiding participation in abortion, an act forbidden by their faith. VC ¶¶ 7, 53. The mandate makes them engage in that very activity by providing free insurance for abortion-inducing drugs. That alone is a substantial burden. *See Abdulhaseeb* v. *Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010) ("substantial burden" exists where law "requires participation in an activity prohibited by a sincerely held religious belief"). The mandate compounds that burden by threatening Plaintiffs with multi-million dollar fines if they do not comply. *See id.* ("substantial burden" also exists if law "places pressure on an adherent … to engage in conduct contrary to a sincerely held religious belief"). These are substantial burdens by any measure. *See, e.g., Wisconsin* v. *Yoder*, 406 U.S. 205, 208, 218 (1972) (finding a five dollar fine substantially burdened religious abstention). Defendants must justify those burdens under strict scrutiny, and they cannot. *See infra* Part II.D.

Defendants would avoid the substantial burden question altogether by inventing distinctions unknown to the law, unsupported by precedent, and barred by Supreme Court jurisprudence. First, Defendants say the Green family cannot exercise religion while operating a "secular" business. Opp. 17-20. Second, Defendants assert that a commercial business by definition can never engage in religious exercise. Opp. 13. Third, Defendants say that compelling someone to insure products they believe to be immoral should be felt as a "de minimis" burden because they already pay salaries or taxes that could be used to purchase the same products. Opp. 20-21.

A. The Green family exercises religion in operating their businesses.

Defendants devote their opposition to arguing that "secular" businesses cannot exercise religion. While Defendants are wrong about this, *see infra* Part I.B, they miss the point that the Green family members (who sue as owners, officers and trustees of Hobby Lobby and Mardel) *themselves* exercise religion while operating their businesses. Settled law allows business proprietors to assert religious exercise rights. The cases do not even mention Defendants' baseless arguments that the "corporate form" divorces an owner's conscience from his business or that "secular" business activities are incompatible with an owner's right to exercise religion.

The Supreme Court has at least twice allowed commercial proprietors to assert religious exercise claims against regulations impacting their businesses. *United States v. Lee*, 455 U.S. 252, 256-57 (1982), recognized that an Amish employer could object on religious grounds to paying his share of social security taxes. Similarly, *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961), allowed Jewish merchants to challenge a Sunday closing law because it "operate[d] so as to make the practice of their religious beliefs more expensive." Neither case doubted that the plaintiffs had properly asserted a burden on religious exercise.[2] The plaintiffs lost their claims *only* because the government proved the challenged laws were narrowly tailored. *Lee*, 455 U.S. at 257-60; *Braunfeld*,

[2] *Lee* also rejected the argument that the taxes did not threaten Amish religious practice because "[i]t is not within 'the judicial function and judicial competence,' … to determine whether [plaintiff] or the Government has the proper interpretation of the Amish faith." 455 U.S. at 256-57 (quoting *Thomas* v. *Review Bd.*, 450 U.S. 707, 716 (1981)).

366 U.S. at 607-09. But *Lee* and *Braunfeld* foreclose Defendants' argument that commercial proprietors cannot bring a religious exercise claim.

Two Ninth Circuit decisions also squarely rebut Defendants. In *Storman's, Inc.* v. *Selecky*, 586 F.3d 1109, 1120-21 (9th Cir. 2009), the Ninth Circuit treated as settled the proposition that "a corporation has standing to assert the free exercise rights of its owners," and so "decline[d] to decide whether a for-profit corporation can assert its own rights under the Free Exercise Clause." Thus, a pharmacy could assert its owners' religious exercise rights against a law forcing them to stock abortion drugs. The precedent *Storman's* relied on, *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619-20 (9th Cir. 1988), similarly held that a mining company "has standing to assert [its owners'] Free Exercise rights."

Defendants fail to distinguish these decisions. *See* Opp. 21 n.16. While admitting that "*Storman's* held that a particular corporation had standing to raise the rights of its owner," they say "[t]his case does not present that standing question, as the Greens themselves are also plaintiffs here." *Id.* That makes little sense. Both *Storman's* and *Townley* mean that Hobby Lobby and Mardel may assert the Greens' rights. The fact that the Greens have also sued as individuals only strengthens their claims.[3]

[3] Defendants admit that, in *Townley*, the Ninth Circuit "allowed Townley (the company) to assert the rights of its owners," but they say the court "did not find that Title VII imposed a substantial burden on the owners' religious exercise." *Id.* That is inaccurate. The *Townley* plaintiffs believed they were religiously obligated to make employees attend devotional services. The court ruled that requiring plaintiffs to excuse objecting employees under Title VII met strict scrutiny. Only in that context did the court observe that the "impact" on plaintiffs' beliefs of ending mandatory devotional services would not be "unreasonable and extreme." *Id.* at 620. In any event, *Townley* squarely

Against this, Defendants raise irrelevancies—*i.e.*, that the Greens have chosen to act through the corporate form, and that Defendants deem their businesses "secular." But the plaintiffs in *Lee*, *Braunfeld*, *Storman's* and *Townley* had each entered into commercial businesses that involved "secular" activities—carpentry (*Lee*),[4] retail clothing and home furnishings (*Braunfeld*), pharmacy (*Storman's*), and mining (*Townley*). The *Storman's* and *Townley* plaintiffs ran incorporated businesses, *Storman's*, 586 F.3d at 1116; *Townley*, 859 F.2d at 611; the *Lee* plaintiff had "branched out from farming to employing others in his carpenter work," *Lee* v. *United States*, 497 F.Supp. 180, 183 (W.D. Pa. 1980); and the *Braunfeld* plaintiffs were "merchants in Philadelphia who engage[d] in the retail sale of clothing and home furnishings," *Braunfeld*, 366 U.S. at 601. None of these decisions suggested that the nature of plaintiffs' products, nor the form of their businesses,[5] disqualified them from exercising religion.

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recognized that the corporation was "the instrument through and by which Mr. and Mrs. Townley express their religious beliefs." *Id.* at 619.

[4] Defendants mischaracterize *Lee* by suggesting that the Court found the social security employer tax was not a substantial burden on Amish religious practice. Opp. 16-17. The Court found the opposite. *Lee*, 455 U.S. at 257. It merely held that the government showed the tax system could admit of no further exemptions. *Id.* at 259-60.

[5] *Storman's* and *Townley* directly refute Defendants' unfounded claim that the "corporate form" divorces the Greens' consciences from their business pursuits. *Storman's*, 586 F.3d at 1120-21; *Townley*, 859 F.2d at 619-20; *see also* CHARLES ALAN WRIGHT ET AL., 13A FEDERAL PRACTICE AND PROCEDURE 3D § 3531.9.5 & n.75.5 (2011) (explaining, "in some circumstances it may be appropriate to allow a closely held family corporation to represent the interests of its owners") (citing *Storman's*). Furthermore, the Supreme Court has noted no tension whatsoever when a religious corporation and its officers each assert religious exercise rights. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 526 (1993) (assessing claims of a "not-for-profit corporation organized under Florida law" and its "president"); *O Centro Espirita Beneficiente Uniao do Vegetal* v. *Ashcroft*, 389 F.3d 973 (10th Cir. 2004)

Defendants depend on the premise—one of their own creation—that someone engaged in "secular" work cannot exercise religion while doing it. Defendants cite no authority for this theological position. RFRA does not artificially cabin "religious exercise," but defines it 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) (incorporating 42 U.S.C. § 2000cc(7)(A)). The manner in which the Greens operate Hobby Lobby and Mardel easily falls within RFRA's capacious definition.

The Greens sign a Statement of Faith and Trustee Commitment obligating them to "honor God with all that has been entrusted to them," to "use the Green family assets to create, support, and leverage the efforts of Christian ministries," and to "regularly seek to maintain a close intimate walk with the Lord Jesus Christ." VC ¶ 38. They make chaplains available to their employees, VC ¶ 51, give millions from profits to fund ministries, VC ¶ 7, and buy hundreds of full-page ads every Christmas and Easter celebrating the holidays' religious meaning. VC ¶ 47. They monitor merchandise, marketing, and operations to ensure all reflect their beliefs, and they avoid allowing their property to support activities they believe to be immoral. VC ¶¶ 6, 43-44. Most relevant here, they exclude from their self-funded insurance abortion-causing drugs. VC ¶¶ 54-55.

No principle of law forbids the Greens from bringing religious exercise claims against a mandate that forces them to use their businesses as a vehicle for violating their faith.

(en banc) (assessing claims on behalf of a "New Mexico corporation on its own behalf," and its "President," "Vice-President," "Secretary," and "Treasurer"), *affirmed by Gonzales* v. *O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 426 (2006).

B. Hobby Lobby and Mardel also exercise religion.

Defendants' main tack for denying a substantial burden is that, as "secular employers," Hobby Lobby and Mardel are "not entitled to the protections of the Free Exercise Clause or RFRA." Opp. 14. The Court need not reach this question because, as explained above, the Greens can assert their own rights to operate their businesses according to their beliefs. *See supra* Part II.A. But if the Court does reach this question, it should reject Defendants' argument. Nothing in the First Amendment or RFRA categorically forbids a commercial business from exercising religion. To the contrary, longstanding precedent recognizes that corporations have various rights, including free speech, equal protection, due process, and religious exercise. Defendants would categorically exclude all commercial businesses from the protections of the Free Exercise Clause and RFRA. They are mistaken.

It is settled law that corporations may exercise religion. In *Gonzales*, a church suing as "a New Mexico corporation on its own behalf" and that of its members and officers prevailed on a RFRA claim before a unanimous Supreme Court and the en banc Tenth Circuit. *See O Centro Espirita Beneficiente Uniao do Vegetal* v. *Ashcroft*, 389 F.3d 973 (10th Cir. 2004) (en banc), *aff'd by Gonzales* v. *O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006). Similarly, in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 525 (1993), a "not-for-profit corporation organized under

Florida law" prevailed on a free exercise claim before the Supreme Court on its own behalf and that of its "president."[6]

Even commercial corporations, as Defendants admit, exercise "First Amendment freedoms of speech and association." Opp.14. "First Amendment protection extends to corporations," and "political speech does not lost First Amendment protection 'simply because its source is a corporation.'" *Citizens United* v. *FEC*, 130 S. Ct. 876, 899-90 (2010) (collecting cases) (quoting *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 784 (1978)). Moreover, "commercial" corporate activities do not dissolve First Amendment rights. *See New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265-66 (1964) ("[W]e hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, *they do not forfeit that protection because they were published in the form of a paid advertisement*.") (emphasis added).

Defendants offer no reason why a commercial corporation's rights do not include religious exercise. *See, e.g., Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1205-06 (11th Cir. 2006) (reasoning that "corporations possess Fourteenth Amendment rights of equal protection, due process, and, through the doctrine of incorporation, *the free exercise of religion*") (emphasis added) (citing *Bellotti*, 435 U.S. at 780 n. 15; *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936)). Strangely,

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[6] *See also, e.g., EEOC* v. *Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769, 772 (6th Cir. 2010) (defendant "ecclesiastical corporation" asserted free exercise rights against EEOC action), *rev'd by Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 132 S. Ct. 694 (2012); *see also, e.g., Oklevueha Native American Church of Hawaii, Inc.* v. *Holder*, 676 F.3d 829 (9th Cir. 2012) (RFRA); *Midrash Sephardi, Inc.* v. *Town of Surfside*, 367 F.3d 1214 (11th Cir. 2004).

Defendants read cases recognizing internal governance rights of religious organizations to implicitly exclude "secular" organizations from free exercise protection. Opp. 14-15 (citing *Hosanna-Tabor*, 132 S. Ct. at 706; *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)). This is a non sequitur. Cases like *Hosanna-Tabor* and *Kedroff* recognize an *additional* right of churches to govern themselves. *See, e.g.*, *Hosanna-Tabor*, 132 S. Ct. at 704-06. Those cases do not impair the distinct right of persons and organizations to resist government coercion of their religious exercise.

Defendants thus must argue by *ipse dixit* that, "by definition, a secular company does not engage in any 'exercise of religion,' … as required by RFRA." Opp. 13. But they marshal no authority for this categorical proposition. They merely cite Merriam-Webster's definition of "secular," and two circuit cases that do not address the issue at all. Opp. 13-14.[7] The very distinction between "secular" and "religious" corporations is foreign to RFRA, which simply asks whether "a person's exercise of religion" has been substantially burdened. 42 U.S.C. § 2000bb-1. RFRA does not narrow the "persons" it protects.[8]

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[7] *Levitan* v. *Ashcroft*, 281 F.3d 1313 (D.C. Cir. 2002), involved a prisoner's religious exercise rights. *Holy Land Foundation* v. *Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003), declined to address whether a non-profit charitable corporation, defined without any reference to religious purpose, could qualify as a "person" under RFRA, deciding instead that "preventing such a corporation from aiding terrorists does not violate any right contemplated in the Constitution or … RFRA."

[8] *See* 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise … the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.").

As a last resort, Defendants invoke Title VII, claiming that its exemption for certain "religious organizations" from the ban on religious employment discrimination is incompatible with businesses exercising religion. Opp. 15-16; *see* 42 U.S.C. § 2000e-1(a) (exempting "a religious corporation, association, educational institution, or society"). But Title VII actually hurts Defendants' argument because its limitation appears nowhere in RFRA or the Free Exercise Clause. The First Amendment's protections include corporations, *supra* , and RFRA explicitly protects "any" exercise of religion. 42 U.S.C. 2000cc-5(7). Moreover, this year the Supreme Court held unanimously that the First Amendment secures *broader* religious exercise rights than Title VII. *See Hosanna-Tabor*, 132 S. Ct. at 705 (recognizing a "ministerial exception" to anti-discrimination laws that had arisen in the lower courts "[s]ince the passage of Title VII of the Civil Rights Act of 1964"). Defendants offer no authority for the "extraordinary" proposition, *cf.* Opp. 15, that the contours of Title VII's exemption may be read into the First Amendment and RFRA. Indeed, when enacting RFRA, Congress—well aware of the Title VII exemption—specified that any conflict between other federal law and RFRA must be resolved in favor of RFRA. *See* 42 U.S.C. §2000bb-3(a) ("This chapter applies to *all* Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.").[9]

[9] Defendants are also mistaken about the Title VII exemption itself. Under Title VII, profit-making does not categorically exclude religious exercise but rather is one factor among many determining an organization's status as a "religious corporation." *See, e.g.*, *Leboon* v. *Lancaster Jewish Comm. Ctr. Ass'n*, 503 F.3d 217, 226-227 (3d Cir. 2007) (explaining nine-factor Title VII test); *cf. Corp. of Presid. Bp.* v. *Amos*, 483 U.S. 327, 347

With no support for their Title VII argument, Defendants must summon a parade of horribles, warning that Title VII and a "host of laws and regulations would be subject to attack" if businesses may assert religious rights. Opp. at 16. This is alarmism, not argument. In decades (indeed, two centuries) of religious liberty litigation, no court has ever adopted Defendants' bright-line rule that religion and profit shall not mix, and yet the horribles have never paraded. Nor will faithfully applying RFRA undermine Title VII. If a court were asked to address any conflict between the two in some future case (the issue is not presented here), it would simply consider whether Title VII's religious discrimination ban is narrowly tailored to a compelling government interest. *Townley* considered just that question, and upheld Title VII. *See Townley*, 859 F.2d at 619-22.

Ultimately, Defendants can call Hobby Lobby and Mardel "secular" only by ignoring the facts pleaded in the complaint—which Defendants do not dispute—demonstrating that the companies exercise religion in obvious and significant ways. Hobby Lobby's mission—as manifested in its Statement of Purpose, its management documents, and its website[10]—is inspired by a religious faith it exercises openly. Christian music is played in the stores, Christian merchandise is sold on the shelves, and Christian principles keep other products off the shelves (from gruesome Halloween costumes to shot glasses to

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n.6 (1987) (Brennan, J., concurring) (leaving open possibility under Title VII that "some for-profit activities could have a religious character").

[10] *See* VC ¶ 42 (primary purpose is "Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles"; VC ¶ 38 (management trust exists "to honor God with all that has been entrusted" to the Green family); VC ¶ 41 (website proclaims that "[t]he foundation of our business has been, and will continue to be strong values, and honoring the Lord in a manner consistent with Biblical principles"). Mardel is obviously "religious" because it sells devotional Christian books. VC ¶ 37.

risqué greeting cards). VC ¶ 43. The company proclaims the Gospel in full-page advertisements every Christmas and Easter, VC ¶ 47, and closes all stores on Sunday, VC ¶ 45. Plaintiffs have subjugated profit to faith by closing on Sundays, foregoing profits from hauling alcohol, and refusing to allow a liquor store to take over a lease, which cost Plaintiffs "hundreds of thousands of dollars a month." VC ¶ 44. Given these uncontested facts, Defendants cannot label Plaintiffs "secular" and thus unable to exercise religion.

C. Defendants' "attenuation" argument re-writes Plaintiffs' faith.

Alternatively, Defendants argue that the mandate's burden is "too attenuated" because forcing Plaintiffs to offer free abortion-drug coverage allegedly has "no more of an impact on [P]laintiffs' beliefs than the company's payment of salaries to its employees, which those employees can also use to purchase contraceptives." Opp. 21-23. Defendants' only support for this argument is the erroneous analysis in *O'Brien* v. *HHS*, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012). As Judge Kane ruled in *Newland* v. *Sebelius*, however, the argument should be rejected "out of hand" because it requires "impermissible line drawing" foreclosed by Supreme Court precedent. 2012 WL 3069154, *9 (D.Colo., July 27, 2012).[11]

The government may not re-draw the theological lines in religious belief systems. *See, e.g., Employment Div.* v. *Smith*, 494 U.S. 872, 887 (1990) (observing that, "[r]epeatedly … we have warned that courts must not presume to determine the place of a particular

[11] Defendants also mistakenly say *O'Brien* was "the first court" to reach the merits in a mandate case. Opp. at 21. Two months before, Judge Kane flatly rejected Defendants' argument that plaintiffs objecting to contraceptive coverage "routinely contribute to other schemes that violate [their] religious beliefs." *Newland*, 2012 WL 3069154 at *9.

belief in a religion or the plausibility of a religious claim") (and collecting cases); *Lee*, 455 U.S. at 256-57 (rejecting government's argument that "payment of social security taxes will not threaten the integrity of the Amish religious belief or observance" because "[i]t is not within the judicial function and judicial competence … to determine whether appellee or the Government has the proper interpretation of the Amish faith"); *Thomas* v. *Review Bd.*, 450 U.S. 707, 715-16 (1981) (because Jehovah's Witness "drew a line" against munitions work, "it is not for us to say that the line he drew was an unreasonable one"). Instead of inviting the Court to act as "arbiter[] of scriptural interpretation," *Thomas*, 450 U.S. at 716, Defendants must accept Plaintiffs' beliefs as they are.

Yet Defendants attempt to re-write them. They say that the mandate "do[es] not demand that [P]laintiffs alter their behavior in a manner that will directly and inevitably prevent [them] from acting in accordance with their religious beliefs." Opp. 22 (quoting *O'Brien* at *6). This is wrong as a matter of fact: Plaintiffs religiously object—not only to using abortion drugs themselves—but also to providing them to others through their self-funded insurance plan. VC ¶¶ 52-58. Defendants see no moral distinction between providing free coverage for abortion drugs and paying salaries to employees who may buy them, Opp. 23, but Plaintiffs see the matter quite differently. VC ¶¶ 52-58 (discussing religious obligations concerning insurance offerings). Defendants are barred from converting Plaintiffs, or the Court, to their viewpoint. They cannot dispute that the mandate forces Plaintiffs to "perform acts undeniably at odds with the fundamental tenets

of their religious beliefs" and makes them "choose between following the precepts of their religion" and the law. Opp. 22 (quotations omitted).[12]

Nor is it enough that the mandate lets Plaintiffs engage in *other* religious practices like "providing a religious upbringing" for their children, "keeping the Sabbath" or "participating in a religious ritual such as communion." Opp. 22 (quoting *O'Brien* at *6). Neither RFRA nor the First Amendment restricts religious exercise to these activities. *See, e.g.*, 42 U.S.C. § 2000cc(7)(A) (defining "religious exercise" to "include any exercise of religion, whether or not compelled by, or central to, a system of religious belief"); *Smith*, 494 U.S. at 877 (explaining that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts … [such as] abstaining from certain foods or certain modes of transportation"). Although the mandate has not closed Plaintiffs' church or made them open Hobby Lobby on Sunday, it still forces them to do something their faith forbids.

D. Defendants cannot satisfy strict scrutiny.

Defendants must justify the mandate under strict scrutiny. 42 U.S.C. § 2000bb-1(b). Their arguments show they cannot do so. They have not explained why forcing Plaintiffs to offer abortion drugs furthers a compelling interest, nor why they have foregone readily-available and far less restrictive means of increasing access to those drugs.

[12] Defendants' suggestion that the burden is "indirect" because it arises only if employees use abortion drugs is not the law. Opp. 22. The burden is the mandate's fine on Plaintiffs for refusing to violate their beliefs, which is substantial no matter how it is characterized. *See Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963) (pressure to violate religious beliefs and fines against religious exercise both constitute substantial burden). Even were there any valid distinction between direct and indirect burdens, Plaintiffs (unlike in *O'Brien*) are self-insured and must pay for the mandated drugs themselves.

1. Defendants have failed even to articulate a relevant compelling interest that the mandate furthers with respect to Plaintiffs.

The compelling interest test asks the government to go beyond "broadly formulated interests" and instead specify "the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales*, 546 U.S. at 431. Defendants have not even attempted to meet that burden here. They only discuss general interests served by mandating free coverage of "gender-specific preventive services for women," Opp. 25—namely "safeguarding the public health" and "removing the barriers to [women's] economic advancement and political and social integration." *Id.* at 24, 25. These goals are furthered, Defendants say, by promoting women's preventive services generally and also "[i]ncreased access to FDA-approved contraceptives." *Id.* at 24.

The problem is that Plaintiffs have no objection to covering women's preventive services generally, or even to covering most FDA-approved contraceptives. Plaintiffs merely seek an exemption for a handful of drugs and devices that cause abortions. VC ¶ 57. Defendants do not even address why exempting Plaintiffs from covering this small subset of contraceptives endangers their broad interests in women's health and equality.[13] Defendants thus fail to address the crux of the compelling interest test. "Under the more focused inquiry required by RFRA and the compelling interest test, [Defendants'] mere

[13] For instance, Defendants rely on an IOM study and Congressional Record citations addressing only the general benefits of preventive care or family planning, not emergency contraception in particular. *See* Opp. at 24-25; *and see* IOM Rep. at 20 (discussing general benefits of preventive care); *id.* at 103-04 (discussing general dangers of unintended pregnancies); 155 Cong. Rec. S12106-02, S12114 (daily ed. 2009) (discussing preventive care); 155 Cong. Rec. S12265-02, S12271 (discussing family planning).

invocation of the general characteristics" of preventive services or contraception "cannot carry the day." *Gonzales*, 546 U.S. at 432.

Nor do Defendants attempt to show why exempting Plaintiffs from covering abortion-inducing drugs would subvert their interests in health and equality. Defendants simply assert that Plaintiffs' employees would be "at a competitive disadvantage in the workforce due to their inability to decide for themselves if and when to bear children." Opp. 26-27. Yet Plaintiffs do nothing to prevent their employees from deciding "if and when to bear children"; they simply ask not to be required to facilitate one sub-class of contraceptives. Their employees remain free to obtain these drugs, or to use the contraceptive methods already covered by Plaintiffs.

"Mere speculation is not enough to carry [Defendants'] burden." *United States* v. *Hardman*, 297 F.3d 1116, 1130 (10th Cir. 2002); *see also Turner Broad. Sys. Inc.* v. *FCC*, 512 U.S. 624, 664 (1994) (government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way"). Strict scrutiny is a "demanding standard," requiring Defendants to come forward with "hard evidence" of an "actual problem." *Hardman*, 297 F.3d at 1132; *Brown* v. *E.M.A.*, 131 S. Ct. 2729, 2738 (2011). Because the government bears the burden, "ambiguous proof will not suffice." *Id.* at 2739; *see also Hardman*, 297 F.3d at 1132 (noting that "[w]e do not … make rulings on presumptions"). Here Defendants have offered, not *ambiguous* proof, but *no* proof that Plaintiffs' failure to cover abortion-inducing drugs creates any problem, much less a compelling one. *See United States* v. *Playboy Ent'mt Group, Inc.*, 529 U.S. 803, 821-22 (2000) (noting that,

"[w]ithout some sort of field survey, it is impossible to know how widespread the problem in fact is"). Defendants have not carried their burden to show a compelling interest in applying the mandate to Plaintiffs as a matter of law.[14]

2. Defendants have left massive gaps in their "compelling" interests.

Defendants' arguments fail for another reason: they have already exempted *millions* from covering the mandated drugs. "[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 547. Failure to pursue their interests against large swaths of the population undermines the notion that Defendants have a compelling interest in not exempting Plaintiffs. Dkt. 6 at 11-13. This is the same error the government made in *Gonazles*, in which its supposedly "compelling" interest in uniform narcotics laws was undermined by an exemption given to "hundreds of thousands of Native Americans." 546 U.S. at 433. Here, Defendants have granted not one exemption, but many. They exempt not a hundred thousand, but a hundred million. *See* Dkt. 6 at 13.

Defendants vainly attempt to explain away this multitude of exemptions. First, they say grandfathering is irrelevant because it is an "incremental transition" under which most plans will no longer be grandfathered "as time goes on." Opp. 28. This is contradicted by the regulations themselves, which allow plans to remain grandfathered

[14] Consequently, this is not the case to consider whether Defendants have demonstrated a compelling interest in forcing a religious objector to cover all FDA-approved contraceptives. *See Gonzales*, 546 U.S. at 432 (court must "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants").

indefinitely.[15] And even if the government has accurately "projected" that "a majority" of plans, *id.*, will lose grandfather status next year, that would leave over 50 million Americans on grandfathered plans. *See* "Keeping the Health Plan You Have." Grandfathered plans, moreover, need not cover *any* preventive services—not HIV screening, not well-woman exams, not domestic violence counseling. *Id.* The very existence of widespread grandfathering thus undercuts Defendants' interests far more than any exemption for Plaintiffs, who merely ask not to cover certain drugs.[16]

Defendants similarly explain their additional exemptions for small businesses, health care sharing ministries, and religious organizations. Opp. 29-30. None holds water. These exemptions are permanent, the same sort the government decries with respect to Plaintiffs. *See id.* at 28 (grandfathering "is in stark contrast to the *permanent* exemptions … [P]laintiffs seek"). The fact that the penalties or exemption mechanisms may differ does not change the fact that Defendants have not pursued the mandate's supposedly "compelling" interests with respect to plans covering millions of Americans. Dkt. 6 at 12.

Finally, Defendants recycle their slippery slope claim that permitting an exemption here would make the system too difficult to administer. Opp. 31-32. That argument fails

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[15] *See* 45 C.F.R. § 147.140; *see also* Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans, *available at* http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (last visited Oct. 28, 2012) ("Keeping the Health Plan You Have").

[16] Worse, the grandfathering regulations themselves treat the mandate as a lesser-value interest. Congress decided that certain ACA objectives—such as prohibition of lifetime coverage limits and extension of young adults' coverage on their parents' plans—were so important that they would be required even for grandfathered plans. *See* 42 U.S.C. § 18011(a)(4); *see also* "Keeping the Health Plan You Have." Not the mandate, however. *Id.*

in light of the patchwork of exemptions and exclusions already in place. This "classic rejoinder of bureaucrats," moreover, is foreclosed by *Gonzales*:

> The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rule[s] of general applicability." 42 U.S.C. § 2000bb-1(a).

Gonzales, 546 U.S. at 436. Congress thus determined that RFRA "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5). Here, those competing interests demand an exemption for Plaintiffs.

3. Defendants cannot bear their burden on least restrictive means.

Even assuming a compelling interest, the mandate would still fail strict scrutiny because Defendants cannot "'demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.'" *Hardman*, 297 F.3d at 1130 (quoting *Sherbert*, 374 U.S. at 407). "When a plausible, less restrictive alternative is offered … it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy Entm't Group*, 529 U.S. at 816. Plaintiffs proposed multiple less restrictive alternatives. Dkt. 6 at 15-16. Instead of refuting them, Defendants offer bromides about the costs and burdens of a different administrative scheme. Opp. 32-33. But they give no specifics—no numbers, no estimated costs, nothing resembling proof that the suggested alternatives would actually endanger the public health or women's equality. *See, e.g., Hardman*, 297 F.3d at 1132 (least restrictive means requires "hard evidence indicating that the current regulations are narrowly

tailored"). Instead, Defendants insist—without supporting facts—that an exemption is "not 'feasible' or 'plausible.'" Opp. at 33.

The closest to specificity Defendants come is pointing to the brute fact that Congress set up an employer-based health system and Defendants should be entitled to build free contraceptive access into it. Opp. 34-35. But the same Congress also authorized broad grandfathering exemptions that allow employers to avoid many of its regulations, including the mandate. *See* "Keeping the Health Plan You Have." Defendants add that women would be forced to seek separate contraceptive coverage, Opp. 34-35, but the same is true for women employed by small businesses or exempt churches or employers with grandfathered plans. Defendants do not explain why it is feasible to exempt all these groups voluntarily, *see* Opp. 11 n.8, but not Plaintiffs.

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR FREE EXERCISE CLAIM.

Plaintiffs are also likely to succeed under the Free Exercise Clause because the mandate is neither neutral nor generally applicable and thus subject to strict scrutiny, which—for the reasons discussed above, *see* supra Part II.D—it cannot meet.

A. The mandate is not neutral.

The mandate fails the basic standard of neutrality by favoring some religious objectors (formal churches that hire and serve their own members) over all others. Defendants respond that the exemption's lack of neutrality is irrelevant because the burden on Hobby Lobby arises from the mandate, not the exemption. Opp. 36. But regardless of the burden's direct source, the exemption reveals Defendants' discriminatory intent in reserving First Amendment protection only for certain religious

organizations. That attempt to restrict "religious exercise" to the inculcation of religious values by and to one's own members is a gross violation of neutrality.

Defendant's contention that it is legitimately "distinguishing between *organizations* based on their purpose and composition," rather than favoring one religion over another is unavailing. First, even assuming that Defendants distinguish between organizations, they do so on explicitly religious grounds. Second, Defendants are simply wrong to contend that they may engage in religious discrimination between "*organizations*" as opposed to "*religion[s], denomination[s], or sect[s]*." Opp. 36. The cases it cites for that proposition, *see id.* at 36-37, teach that *any* exemption must avoid excessive entanglement to satisfy neutrality. *See, e.g., Walz* v. *Tax Comm'n*, 397 U.S. 664, 674 (1970) ("We must … be sure that the end result … is not an excessive government entanglement with religion."). The religious employers exemption does just the opposite, requiring scrutiny of religious organizations' purposes, hiring practices, and beneficiaries.

B. The mandate is not generally applicable.

The mandate also is not generally applicable. As set forth in Plaintiffs' opening brief, well over 100 million individuals are covered by plans that are categorically exempted from complying with the abortion-drug mandate through the ACA's grandfathering clause, its small business exclusion, the religious employer exemption, and other provisions. Dkt. 6, part I.A.3.a. Defendants explain these glaring gaps away with the circular argument that the mandate is generally applicable because it applies to all group health plans that are not exempted. Opp. 37. Further, they contend that "the existence of 'express exceptions for objectively defined categories of [entities]' does not negate the

regulations' general applicability." *Id*. (quoting *Axson-Flynn* v. *Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004)). These arguments contravene Supreme Court precedent and—despite Defendants' claims—are unsupported by Tenth Circuit precedent.

In *Lukumi*, the Supreme Court explained that a law falls "well below the minimum standard" of general applicability if it is substantially "underinclusive" with respect to its stated ends. 508 U.S. at 543. In other words, a law is not generally applicable if it "fails[s] to prohibit nonreligious conduct that endangers [the government's] interests in a similar or greater degree" than the prohibited religious conduct. *Id.*; *see also* D. Laycock, *The Supreme Court and Religious Liberty*, CATHOLIC LAWYER (Summer 2000), at 4 (noting that the Supreme Court in *Lukumi* "plainly relied on categorical exceptions to show that the rule . . . was not neutral and generally applicable").

Here, the grandfathering clause, religious employer exception, the small business exclusion, and other such provisions all plainly undercut any purported compelling interest in ensuring cost-free access to emergency contraceptives. *See supra* Part I.D.3. Because Defendants have excused compliance with the abortion-drug mandate through these exemptions, it cannot refuse exemptions for religious objectors like Plaintiffs without satisfying strict scrutiny. *Lukumi*, 508 U.S. at 545-46 ("This precise evil is what the requirement of general applicability is designed to prevent.").

Tenth Circuit rulings are not to the contrary. In *Swanson v. Guthrie Independent School District No. I-L*, 135 F.3d 694, 697 (10th Cir. 1998), a homeschooled student challenged a policy requiring full-time public school attendance because "part-time students [could not] be counted for state financial-aid purposes." The court ruled that two

categorical exemptions for "fifth-year seniors and special education students" did not undermine the full-time attendance rule, because the state recognized both categories of students for financial-aid calculations. *Id*. at 701.[17] In *Axson-Flynn*, 356 F.3d at 1298, there were no categorical exemptions at issue, and the court ultimately remanded to determine whether the challenged requirement was a neutral rule of general applicability.[18] In contrast to those cases, Plaintiffs have identified numerous categorical exemptions leaving millions of women without the mandated contraceptive coverage, undermining Defendants' alleged compelling interest.

IV. PLAINTIFFS MEET THE OTHER PRELIMINARY INJUNCTION REQUIREMENTS.

Defendants' arguments on the other injunction factors also fail.

First, contrary to Defendants' assertions, Opp. 38-39, Plaintiffs do have religious exercise rights, and those rights are violated where, as here, Defendants force them to violate their religious beliefs or pay enormous fines. *See supra* Part II. Second, Plaintiffs' suit was timely. *Cf.* Opp. 39. Plaintiffs sued four months (110 days) before the mandate would apply. By then it was evident that none of the compromises or delays discussed by Defendants would help business owners, and also that the ACA would survive judicial

[17] Moreover, the court ruled that the plaintiff had waived her argument that the policy was not generally applicable because it "was not made below or ruled on by the district court." *Id*. at 698.

[18] *Grace United Methodist Church* v. *City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006) rejected "a *per se* rule requiring that any land use regulation which permits any secular exception satisfy a strict scrutiny test to survive a free exercise challenge." Here, by contrast, the exemption discriminates on religious grounds. *See id*. at 651 (indicating that rule is not generally applicable if not motivated by a secular purpose).

review. Suing the federal government—no light undertaking—was Plaintiffs' last resort.[19]

Third, Plaintiffs' earlier inadvertent coverage of two drugs does not undermine their claim of irreparable harm. *Cf.* Opp. 39. Plaintiffs corrected the oversight as soon as it was discovered. VC ¶ 55. Defendants do not argue that this prior error undermines the sincerity of Plaintiffs' beliefs.

Finally, Defendants offer no evidence that the public interest requires forcing Plaintiffs to cover the handful of drugs excluded from their insurance. Opp. 39-40. Defendants have exempted millions of plans from covering all FDA-approved contraceptives. Defendants are thus in no position to say that Plaintiffs' objection to a tiny fraction of those drugs impairs the public interest.

CONCLUSION

Plaintiffs respectfully ask the Court to enter a preliminary injunction against Defendants in accordance with the relief sought in Plaintiffs' Complaint.

[19] Defendants' argument is surprising, given they argued in *Newland* that the same time period (110 days) was too *soon* to claim imminent harm. *See Newland v. Sebelius*, Dkt. 26, at 57 (urging dismissal on July 13, 2012, because plaintiffs had "failed to establish any actual or imminent" injury in part because "the challenged regulations will not apply to Hercules Industries until November 2012").

Respectfully submitted, this 29th day of October, 2012.

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I hereby certify that the foregoing document was filed through the Court's ECF filing system on October 29, 2012, to be electronically served on the following:

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