No. A12-_____

In the Supreme Court of the United States

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

Petitioners,

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,

Respondents.

Application from the United States Tenth Circuit Court of Appeals

EMERGENCY APPLICATION FOR INJUNCTION PENDING APPELLATE REVIEW

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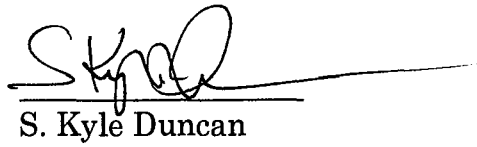
Dated: December 21, 2012

RULE 29.6 STATEMENT

Hobby Lobby Stores, Inc. is a privately-held company that is wholly owned by trusts controlled by the Green family. No publicly-held corporation owns 10% or more of its stock.

Mardel, Inc. is a privately-held company that is wholly owned by trusts controlled by the Green family. No publicly-held corporation owns 10% or more of its stock.

Respectfully submitted,



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To the Honorable Sonia Sotomayor, Associate Justice of the United States and Circuit Justice for the Tenth Circuit:

In just ten days on January 1, 2013, a regulatory mandate (the "HHS mandate") promulgated under the Patient Protection and Affordable Care Act will expose Petitioners to draconian fines unless they abandon their religious convictions and provide insurance coverage for abortion-inducing drugs. A two-judge motions panel of the Tenth Circuit Court of Appeals denied Petitioners interim injunctive relief by (1) unilaterally re-writing Petitioners' undisputed religious beliefs and (2) by deeming the burden on those beliefs—looming fines that could exceed more than a million dollars per day—as "indirect and attenuated." Ex. 1 at 7. That conclusion eviscerates RFRA's broad protection against religious coercion and flies in the face of a half-century of this Court's free exercise jurisprudence. Extraordinary injunctive relief under the All Writs Act is necessary to prevent immediate and irreparable harm to Petitioners during the appellate process, including any further review by this Court.

Petitioners have been driven to seek such extraordinary relief three days before Christmas because the federal government has refused to acknowledge the sincerely held religious beliefs of Petitioners and similarly situated entities, which prohibit them from engaging in conduct—such as providing insurance coverage—that facilitates access to abortion-inducing drugs. The government has already exempted plans covering tens of millions of other Americans from complying with the mandate. It has already crafted permanent exemptions for certain classes of religious objectors, and granted temporary reprieves to many others. Just last week,

a panel of the U.S. Court of Appeals for the D.C. Circuit extracted a "binding commitment" from the Department of Justice "never" to enforce the mandate in its current form against objecting religious colleges. *See Wheaton Coll.* v. *Sebelius*, 12-5273, slip op. (D.C. Cir. Dec. 18, 2012) (per curiam). The government quite obviously has no overriding need to impose this mandate immediately. Yet the same government has offered no relief whatsoever to Petitioners and others like them, not even enough time to litigate the case.

The issues posed by Petitioners' case are already the subject of conflicting decisions by eight federal district and circuit courts,[1] and are also presented by a wider array of pending cases involving religious non-profit organizations.[2] Five

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[1] *Compare Newland* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 3069154 (D. Colo. July 27, 2012); *Legatus* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 5359630 (E.D. Mich Oct. 31, 2012); *Tyndale House Publishers, Inc.* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 5817323 (D.D.C. Nov. 16, 2012); *O'Brien* v. *HHS*, __ F. Supp. 2d __, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012), on appeal, No. 12-3357 (8th Cir.); *Am. Pulverizer Co.* v. *U.S. Dep't of Health and Human Servs.*, 6:12-cv-03459 (W.D. Mo), *with Korte* v. *U.S. Dep't of Health and Human Servs.*, 3:12-cv-01072 (S.D. Ill. Oct. 29, 2012); *Hobby Lobby Stores, Inc., et al.* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 5844972 (W.D. Okla. Nov. 19, 2012), on appeal, No. 12-6294 (10th Cir.) (filed Nov. 19, 2012).

[2] *See Wheaton Coll.* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 3637162 (D.D.C. Aug. 24, 2012) (dismissed), rev'd on consolidated appeal, Nos. 12-5273 and 12-5291 (D.C. Cir. Dec. 18, 2012) (per curiam); *Belmont Abbey Coll.* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 2914417 (D.D.C. July 18, 2012) (dismissed), rev'd on consolidated appeal, Nos. 12-5273 and 12-5291 (D.C. Cir. Dec. 18 2012) (per curiam); *Roman Catholic Archbishop of Wash.* v. *Sebelius*, No. 1:12-cv-815 (D.D.C. filed May 21, 2012); *Priests for Life* v. *Sebelius*, No. 1:12-cv-00753 (E.D.N.Y.); *Roman Catholic Archdiocese of NY* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 6042864 (E.D.N.Y. Dec. 4, 2012); *Geneva Coll.* v. *Sebelius*, No. 2:12-cv-00207 (W.D. Pa.); *Rev. Donald W. Trautman* v. *Sebelius*, No. 1:12-cv-123 (W.D. Pa.); *Most Rev. David A. Zubik* v. *Sebelius*, 2012 WL 5932977 (W.D. Pa. Nov. 27, 2012); *Liberty Univ.* v. *Geithner*, No. 10-2347 (4th Cir.), *on remand from the Supreme Court*, __ S.Ct. __, 2012 WL 5895687 (Nov. 26, 2012); *Louisiana Coll.* v. *Sebelius*, No. 1:12-cv-00463 (W.D. La.); *Roman Catholic Diocese of Dallas* v. *Sebelius*, No. 3:12-cv-1589 (N.D. Tex.); *Roman Catholic Diocese of Fort Worth* v. *Sebelius*, No. 4:12-cv-314 (N.D. Tex.); *Roman Catholic Diocese of Biloxi* v. *Sebelius*, No. 1:12-cv-158 (S.D. Miss.); *The Criswell Coll.* v. *Sebelius*, 3:12-cv-04409 (N.D. Tex.); *East Texas Baptist Univ.* v. *Sebelius*, Case No. 4:12-cv-03009 (S.D. Tex. filed Oct. 9, 2012);

business owners have already received interim relief from the mandate; two, including Petitioners, have been denied the same relief and thus face potentially ruinous daily fines while their appeals go forward. The precise issue presented by this case is rapidly percolating through the Courts of Appeals and will come to this Court soon enough. Not soon enough for Petitioners, however. Without interim relief from the mandate's severe penalties, Petitioners are at grave risk of not being able to complete the appellate process and secure their rights under RFRA.

Only an injunction from this Court can protect Petitioners from irreparable harm—to their religious freedom and to their businesses—while their appeal proceeds. Furthermore, because of the overriding importance of the legal issues presented in this case and because numerous lower courts have already reached conflicting decisions concerning them, Petitioners also ask the Court to grant certiorari before judgment.

Legatus v. *Sebelius*, 2:12-cv-12061 (E.D. Mich.); *Franciscan Univ. of Steubenville* v. *Sebelius*, No. 2:12-cv-440 (S.D. Ohio); *Catholic Diocese of Nashville* v. *Sebelius*, 2012 WL 5879796 (M.D. Tenn. Nov. 21, 2012); *Univ. of Notre Dame* v. *Sebelius*, No. 3:12-cv-00253 (N.D. Ind.); *Diocese of Fort Wayne-South Bend, Inc.* v. *Sebelius*, No. 1:12-cv-159 (N.D. Ind.); *Conlon* v. *Sebelius*, No. 1:12-cv-3932 (N.D. Ill.); *Triune Health Group* v. *Sebelius*, No. 1:12-cv-6756 (N.D. Ill.); *Grace Coll.* v. *Sebelius*, No. 3:12-cv-00459 (N.D. Ind.); *Nebraska ex rel. Bruning* v. *HHS*, __ F. Supp. 2d __, 2012 WL 2913402 (D. Neb. July 17, 2012), on appeal, No. 12-3238 (8th Cir.) (filed Sept. 14, 2012); *Archdiocese of St. Louis* v. *Sebelius*, No. 4:12-cv-924 (E.D. Mo.); *Coll. of the Ozarks* v. *Sebelius*, No. 6:12-cv-03428 (W.D. Mo.); *Annex Med., Inc.* v. *Sebelius*, 0:12-cv-02804 (D. Minn.); *Colorado Christian Univ.* v. *Sebelius*, No. 11-cv-03350 (D. Colo.); *Eternal Word Television Network, Inc.* v. *Sebelius*, No. 2:12-cv-00501 (N.D. Ala.); *Ave Maria Univ.* v. *Sebelius*, No. 2:12-cv-00088 (M.D. Fla.); *The Roman Catholic Archdiocese of Atlanta* v. *Sebelius*, 1:12-cv-03489 (N.D. Ga.); *The Most Reverend Thomas G. Wenski* v. *Sebelius*, 1:12-cv-23820 (S.D. Fla.).

JURISDICTION

Petitioners filed a lawsuit challenging the HHS mandate under the Administrative Procedure Act, the Religious Freedom Restoration Act, and the First Amendment on September 12, 2012 and simultaneously moved for a preliminary injunction. *Hobby Lobby Stores, Inc.* v. *Sebelius*, Case No. 5:12-cv-1000-HE (W.D. Okla.) [Dkt. Nos. 1, 6] (verified compl. attached as Ex. 2). The district court had jurisdiction over Petitioners' lawsuit under 28 U.S.C. sections 1331 and 1361 and had authority to issue an injunction under 28 U.S.C. sections 2201 and 2202 and 42 U.S.C. section 2000bb *et seq.*

The district court denied Petitioners' motion for an injunction on November 19, 2012, and the Petitioners timely filed their appeal to the Tenth Circuit later the same day. Dist. Ct. Order (Ex. 3); Notice of Appeal (Ex. 4). The Tenth Circuit had jurisdiction over this appeal under 28 U.S.C. section 1291(a). Petitioners filed an emergency motion for an injunction pending appeal in the Tenth Circuit the next day (November 20, 2012), which a two-judge motion panel of that court denied with a written order on December 20, 2012 (Ex. 1).

This Court has jurisdiction over this Application under 28 U.S.C. section 1254(1) and has authority to grant the relief that the Petitioners request under the All Writs Act, 28 U.S.C. section 1651.

BACKGROUND AND PROCEDURAL HISTORY

Petitioners—members of the Green family and the two closely-held family businesses they own and operate—are prohibited by their religion from engaging in conduct that facilitates access to abortions, including, as relevant here, providing

insurance coverage for certain drugs and devices that they believe can cause abortions. Accordingly, they do not provide such coverage in their self-funded health insurance plan. A federal government mandate, however, requires them to provide such coverage as of January 1, 2013—less than two weeks away—or be exposed to crippling fines. Petitioners seek emergency relief in this Court to protect them and their businesses from imminent and enormous government pressure to give up their religious exercise.

In 1970, Petitioners David and Barbara Green started a small business making decorative frames in a garage. Verified Compl. ("VC") ¶ 32 (Ex. 2). That simple operation eventually became Hobby Lobby—one of the nation's leading arts and crafts chains, with more than 13,000 employees in over 500 stores nationwide. David and Barbara's children (Petitioners Steve Green, Mart Green, and Darsee Lett) have joined their parents in this endeavor, contributing their own faith and labor to grow Hobby Lobby into what it is today. VC ¶¶ 36, 38. Together, the Greens also own Mardel, a chain of Christian bookstores. VC ¶¶ 18-22, 36-38. For more than forty years, Petitioners have been able to run their businesses in a way consistent with their Christian faith, which requires them to "[h]onor[] the Lord in all [they] do." VC ¶ 42.

From their inception, the two businesses have had express and public religious purposes. For example, Petitioner Hobby Lobby's statement of purpose commits the Greens and the company to "[h]onoring the Lord in all we do by operating the company . . . consistent with Biblical principles." VC ¶ 42. Mardel's business of

selling Christian-themed books is obviously religious. VC ¶ 37. Moreover, each of the Greens has signed a Statement of Faith and Trustee Commitment to conduct the businesses according to their Christian religious beliefs. VC ¶ 38.

The religious purposes of the businesses are manifested through Mardel's and Hobby Lobby's activities in various concrete religious practices. For example, each Christmas and Easter, Hobby Lobby takes out hundreds of full-page ads inviting people to Christ. VC ¶ 47.[3] Both companies monitor their merchandise, marketing, and operations to ensure they reflect Christian values. VC ¶¶ 43-44. Petitioners provide their employees voluntary and cost-free access to chaplains, spiritual counseling, and religiously-themed financial courses. VC ¶ 51. Petitioners close all of their stores on Sundays—at significant financial cost—to give employees a day of rest. VC ¶ 45. They give millions of dollars from their profits to fund missionaries and ministries around the world. VC ¶ 6. And most significantly for purposes of this case, Petitioners' self-funded employee health insurance excludes contraceptive drugs and devices (such as IUDs, RU-486, Plan B, and Ella) that they believe can cause abortion, because of Petitioners' religious beliefs about God's will concerning the value of unborn human life. VC ¶¶ 52, 54-55.

The Greens' religious sincerity and the express religious purposes of Hobby Lobby and Mardel are undisputed, as are the specific religious exercises they undertake to carry out those purposes. Op. 5, 20 (Ex. 2). It is also undisputed that

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[3] This year's latest holiday ad, which invites readers to "call Need Him Ministry at 1-888-NEED-HIM" if they "would like to know Jesus as Lord and Savior," can be found at http://www.hobbylobby.com/assets/pdf/holiday_messages/current_message.pdf.

the Green's religious beliefs prohibit them from facilitating access to abortion-inducing drugs, including, as relevant here, by providing insurance coverage for those drugs. VC ¶¶ 52-54.

In light of this, it is clear that the government, through the mandate, seeks to force the Greens to forgo their religious exercise by requiring them to engage in conduct that their religious beliefs prohibit: providing insurance coverage for abortion-inducing drugs. Op. 10; *see also* 42 U.S.C § 300gg-13(a)(4); 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011); VC ¶¶ 86-96. The government is forcing them to forgo that religious exercise—and refusing to allow them to avoid fines even during the pendency of the lawsuit—despite the fact that Respondents have exempted plans covering tens of millions of Americans, either as formal church plans, 45 C.F.R. § 147.130(a)(1)(iv); VC ¶ 123, "grandfathered" plans that have undergone no significant change since 2010, 42 U.S.C. § 18011(a)(2); VC ¶ 68-70,[4] or plans of certain *nonprofit* corporate religious objectors, 45 C.F.R. § 147.130(a)(1)(iv)(B); VC ¶¶ 82, 123. Indeed, just last week the government made a "binding commitment" to the D.C. Circuit that it would *never* enforce the existing rule against nonprofit corporate religious objectors. *See Wheaton Coll.* v. *Sebelius*, 12-5273, slip op. (D.C. Cir. Dec. 18, 2012) (per curiam).

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[4] Respondents admit that exempt grandfathered plans will cover tens of millions of employees in the coming years. *See* 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 Dec. 21, 2012).

Petitioners, however, have been given no similar protection, even temporarily. Thus, beginning January 1, 2013, *see* 42 U.S.C. § 300gg-13(b); VC ¶¶ 121, 124, 132, they must abandon their religious exercise by providing free coverage for abortion-causing drugs or face government-imposed burdens: punitive fines, regulatory action, and private lawsuits. 26 U.S.C. §§ 4980H, 4980D; 29 U.S.C. §§ 1185d, 1132; VC ¶¶ 135, 144. The fines alone would be devastating. 26 U.S.C. § 4980D (imposing fines for "any failure of a group health plan to meet the requirements of" the Affordable Care Act and setting the fines at $100 per day for each "individual to whom such failure relates"); Green Decl. ¶ 4 (Ex. 5) (explaining that Hobby Lobby "has more than 13,000 full-time employees").

Not surprisingly, daily recurring fines of this magnitude create enormous pressure on Petitioners' religious exercise of excluding insurance coverage for abortion-causing drugs and devices. Green Decl. ¶¶ 2, 6-7, 11-15. Likewise, the prospect of such overwhelming financial liability imposes enormous uncertainty on their ability to engage in necessary tasks like continuing to hire new employees, opening new stores, or otherwise making capital expenditures. Green Decl. ¶¶ 16-18.

To protect their constitutional and statutory right to the free exercise of their religion, Petitioners filed a complaint on September 12, 2012, challenging the mandate under the Religious Freedom Restoration Act (RFRA), the First Amendment, and the Administrative Procedure Act, VC ¶¶ 12, 13. They simultaneously moved for a preliminary injunction. Dkt. 6; Dkt. 42 (Reply). On

November 19, 2012, without disputing any of Petitioners' facts, the court denied the preliminary injunction as a matter of law. Dkt. 45. Petitioners filed their notice of appeal that same day and, the day following, moved in the Tenth Circuit for an injunction pending appeal. Tenth Cir. Docket at 1; *see also* Fed. R. App. P. 8(a)(2).[5] After complete briefing, the Court of Appeals denied the motion on December 20, 2012. In hopes of avoiding enormous government pressure to violate their religious beliefs beginning on January 1, 2013, and fearing the consequences to their businesses, Petitioners immediately filed this application for an injunction.

ARGUMENT

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the Court to issue an injunction when (1) the circumstances presented are "critical and exigent"; (2) the legal rights at issue are "indisputably clear"; and (3) injunctive relief is "necessary or appropriate in aid of [the Court's] jurisdictio[n]." *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (quoting *Fishman* v. *Schaeffer*, 429 U.S. 1325, 1326

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[5] Although a party "must ordinarily move first" for such relief "in the district court," *see* Fed. R. App. P. 8(a)(1)(C), that requirement is waived where going to the district court "would be impracticable," *see* Fed. R. App. P. 8(a)(2)(A)(i). Due to the short time available, Petitioners had only six weeks in which to seek review in the Tenth Circuit and this Court, making a repeat motion for preliminary injunction in the district court impracticable. In light of both the immediacy of the government's severe penalties and religious exercise rights at stake, filing first in the district court was both impracticable and excused as a matter of Tenth Circuit law. *See Homans* v. *City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) (excusing requirement where First Amendment rights were at stake and harm was just weeks away and where "the district court would essentially make the same inquiry it made before"); *McClendon* v. *City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996) (waiving requirement where "the district court's resolve [was] demonstrated" by prior orders); *see also* Fed. R. App. P. 8(a)(2). Neither Respondents nor the Tenth Circuit raised any objection to this course.

(1976) (Marshall, J., in chambers); *Communist Party of Indiana* v. *Whitcomb*, 409 U.S. 1235 (1972) (Rehnquist, J., in chambers); and 28 U.S.C. § 1651(a)) (alterations in original). This "extraordinary" relief, *see Lux* v. *Rodrigues*, 131 S. Ct. 5, 6 (2010) (Roberts, C.J., in chambers), is warranted in cases involving the imminent and indisputable violation of civil rights. *See Lucas* v. *Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) (enjoining election where applicants established likely violation of Voting Rights Act); *Am. Trucking Assocs.* v. *Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J., in chambers) (granting injunction); *Williams* v. *Rhodes*, 89 S. Ct. 1 (1968) (Stewart, J., in chambers) (same).

Petitioners present such a case.

I. PETITIONERS FACE CRITICAL AND EXIGENT CIRCUMSTANCES.

In ten days, Petitioners face an impossible choice: violate their religious beliefs, or possibly risk exposure to millions of dollars in fines. A federal law—RFRA—exists precisely to prevent this type of enormous government pressure to give up a religious exercise. Without emergency relief from this Court, Petitioners will suffer this illegal coercion on January 1, 2013 and each and every day thereafter.

Petitioners have no acceptable options. If Petitioners violate their faith under this enormous pressure and provide the drugs at issue, no future relief can repair the injury to their consciences from having been forced to participate in what they understand to be the destruction of human life. If Petitioners remain steadfast in their faith, the penalties for doing so are potentially so large that it is unclear whether Hobby Lobby and Mardel—and the over 25,000 jobs they provide at more than 500 stores across the country—could survive long enough to pursue their case.

In short, Petitioners find themselves in "the most critical and exigent circumstances," *Fishman*, 429 U.S. at 1326 (Marshall, J., in chambers), both as to their ability to exercise their faith and as to the continued viability of their businesses.

The threat to Petitioners' religious freedom derives from the sheer enormity of the government's pressure on them to forego their religious exercise of not paying for a handful of drugs that they believe may cause abortions. It is black letter law that a violation of constitutional rights constitutes irreparable injury. *See, e.g.*, *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable harm is necessary."). Few laws in American history threaten fines as severe as those potentially available under the mandate; no law has ever imposed such a price on the exercise of religion. Such unprecedented government pressure to abandon a religious exercise ten days from now creates extraordinarily exigent circumstances for Petitioners.[6]

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[6] Petitioners are by no means alone in facing this extraordinary government pressure to cease their religious exercise. To date, more than 100 different entities have filed more than 40 different federal lawsuits seeking relief from the Mandate. Fourteen of these cases involve owners of for-profit businesses. Presumably there are many other businesses and business owners who have neither the resources nor the inclination to embroil themselves in litigation against the federal government and will instead be illegally coerced into forfeiting their religious exercise by the threat of massive fines.

Additionally, Petitioners face critical and exigent circumstances concerning the financial viability of their businesses. As the Court explained in *Doran* v. *Salem Inn, Inc.*, where a business "would suffer a substantial loss of business and perhaps even bankruptcy," the case "[c]ertainly ... meets the standards for granting interim relief, for otherwise a favorable final judgment might well be useless." 422 U.S. 922, 932 (1975); *cf. Conkright* v. *Frommert*, 556 U.S. 1401 (2009) (Ginsburg, J., in chambers) (denying a stay where applicants did not allege that required payments would "place the [benefit] plan itself in jeopardy"). That is exactly what Petitioners face. Depending on how the government ultimately calculates the fine, Petitioners could face exorbitant fines *each day*.[7] Few if any businesses could endure daily, recurring fines of that magnitude for any extended period of time. Nor could they continue to hire new employees, open new stores, or make capital expenditures in the face of such overwhelming potential liabilities.

II. PETITIONERS' RIGHTS UNDER RFRA ARE INDISPUTABLY CLEAR.

Petitioners present a simple and straightforward RFRA claim. As the majority of courts to consider the issue has found, forcing business owners with religious objections to provide insurance coverage for abortion-inducing drugs imposes a

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[7] Under 26 U.S.C. §4980D(2), the daily fines are assessed at a rate of $100 per day "with respect to each individual to whom such failure relates." While it is not clear how the IRS or the courts will interpret this language, if it means "each insured person, including family members of employees," the fines could reach up to $1.3 million, each day. Green Affidavit, ¶ 4 (over 13,000 insured persons). Respondents did not dispute the potential magnitude of these fines below. Petitioners, of course, in no way agree that they would be ultimately responsible under the law for paying fines of this magnitude, and would make any arguments available to them under the law to minimize any such penalties. The fact remains, however, that by linking the mandate's requirements to section 4980D—a well as the other enforcement mechanisms—the government has cast a cloud of the gravest uncertainty over Petitioners' religious exercise and the viability of their businesses.

substantial burden on religion, thus triggering strict scrutiny. The court below avoided this conclusion only by contradicting the undisputed record regarding the content of Petitioners' religious beliefs and misunderstanding this Court's prior decisions.

A. Petitioners have established a substantial burden (heavy fines) on a religious exercise (abstention from providing certain insurance for abortion-causing drugs).

Petitioners have identified a specific religious exercise, namely their refusal to purchase health insurance covering abortion-inducing drugs and devices. *See* VC ¶¶ 7, 53-56; 42 U.S.C. § 2000bb-2(4), *as amended by* 42 U.S.C. § 2000cc-5(7)(A); *see also Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (explaining "the 'exercise of religion often involves not only belief and profession but the performance (or abstention from) physical acts").

The government has imposed a substantial—indeed, a crushing—burden on Petitioners' exercise of religion. If Petitioners continue engaging in this particular exercise of religion (i.e., if they continue their religious refusal to provide insurance coverage for the drugs at issue) they will face enormous government fines unless and until they yield. Such a burden on religious practice easily qualifies as "substantial." *See, e.g., Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963) (deprivation of unemployment benefits puts "unmistakable pressure upon [applicant] to forgo [her religious] practice" resulting in "the same kind of burden upon the free exercise of religion" as a "fine imposed against appellant for her Saturday worship."); *see also Abdulhaseeb* v. *Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010) (substantial burden exists where government imposes "substantial pressure on an adherent either not

to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief, such as where the government presents the plaintiff with a Hobson's choice-an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief.").[8] Under RFRA, such a substantial burden on Petitioners' religious exercise triggers strict scrutiny, the "most demanding test known to constitutional law," *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997), which the mandate cannot possibly survive.

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[8] This formulation of "substantial burden" is widely shared among Courts of Appeals under RFRA and its companion statute, RLUIPA. *See, e.g., Westchester Day Sch.* v. *Vill. of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007) ("a substantial burden on religious exercise exists when an individual is required 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 . . . on the other hand.'") (quoting *Sherbert*); *Washington* v. *Klem*, 497 F.3d 272, 280 (3d Cir. 2007) (a substantial burden exists, among other situations, where "the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs."); *Lovelace* v. *Lee*, 472 F.3d 174, 187 (4th Cir. 2006) ("a 'substantial burden' is one that 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs,'") (citing *Thomas*); *Adkins* v. *Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) ("a government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs"); *Living Water Church of God* v. *Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007) ("the Supreme Court generally has found that a government's action constituted a substantial burden on an individual's free exercise of religion when that action forced an individual to choose between 'following the precepts of her religion and forfeiting benefits' or when the action in question placed 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,'"); *Navajo Nation* v. *U.S. Forest Serv.*, 535 F.3d 1058, 1069-70 (9th Cir. 2008) (en banc) ("Under RFRA, a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)."); *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct."); *Kaemmerling* v. *Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) ("A substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,'") (quoting *Thomas*).

B. The Tenth Circuit ignored this Court's precedents by re-writing the content of Petitioners' religious beliefs.

In denying interim relief under RFRA, the Tenth Circuit made two fundamental mistakes directly at odds with this Court's jurisprudence and with the plain text of RFRA. First, instead of accepting Petitioners' stated religious exercise—their abstention from participating in the provision of insurance coverage for abortion-inducing drugs—at face value, the court chose to re-write Petitioners' religious beliefs. Second, the court resurrected a distinction between "direct" and "indirect" burdens that this Court buried decades ago. These two basic errors—which occurred in the Tenth Circuit's lone paragraph of RFRA analysis—obscured the fact that Petitioners are indisputably entitled to relief under RFRA.

In the lower courts, Petitioners clearly and repeatedly set forth their religious beliefs—unchallenged by the government—that prohibit them from providing insurance coverage for abortion-causing drugs in their self-funded insurance plan. VC ¶¶ 7, 53-56. It is beyond question that these beliefs concern actions Petitioners *themselves* cannot participate in. *Id.* In the parlance of theologians, Petitioners *themselves* are religiously prohibited from "cooperating" in conduct contrary to their religious beliefs, which is precisely what their religion dictates they would be doing if they provided insurance coverage for abortion-inducing drugs.

Nevertheless, the Tenth Circuit analyzed the claims as if Petitioners' religious exercise was *not* about *their own* participation in provision of the insurance at issue, but was instead about controlling acts of "independent third parties." Order at 7 (suggesting that Petitioners religious belief is not about their "own participation in

(or abstention from) a specific practice required (or condemned) by [their] religion."). Petitioners' claim, however, has always been about—and only about—seeking to avoid their own "participation in" a specific practice (providing insurance coverage for abortion-inducing drugs) that is "condemned by [their] religion." *Id.* Moreover, Petitioners have never asserted a religious exercise concerning the actions of "independent third parties" at all. *Id.* To the contrary, the crux of Petitioners' claim is that their religious beliefs require Petitioners to remain entirely "independent" of the provision and use of those drugs, which the government mandate is forbidding them from doing. Put another way, Petitioners never filed any lawsuit arguing that their employees' decisions to use or not use any particular drug violated (or even implicated) Petitioners' own religious obligations; this suit only commenced when the government forced Petitioners to become actively involved in such decisions by providing insurance coverage for abortion-inducing drugs.

The Tenth Circuit had no authority to re-write Petitioners' religious beliefs. That is, it had no authority to transform Petitioners' beliefs about their *own* participation, into beliefs about what truly "independent" third parties do. This Court has repeatedly taught that the government may not re-draw the theological lines within religious belief systems. *See, e.g., Smith*, 494 U.S. at 887 (observing that, "[r]epeatedly ... we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim"); *United States* v. *Lee*, 455 U.S. 252, 256-57 (1982) (observing that "[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 participating in tank manufacturing, "it is not for us to say that the line he drew was an unreasonable one"). The court below simply cannot act as an "arbiter[] of scriptural interpretation," *Thomas*, 450 U.S. at 716, and declare that its own version of Petitioners' beliefs is what controls the analysis. Yet the Tenth Circuit's denial of relief *depends* on precisely that kind of forbidden line-drawing.

The Tenth Circuit's second major error is its claim that any burden on Petitioners' religious exercise is "indirect" and therefore ineligible for protection under RFRA. Ex. 1 at 7. Even if Petitioners' religious exercise were not related to avoiding their own direct participation in actions precluded by their faith, the direct/indirect distinction has no basis in law. Notably, no such distinction appears in RFRA or the Free Exercise Clause. To the contrary, this Court long ago rejected any distinction between "direct" and "indirect" burdens in evaluating whether laws burden religious exercise. In *Sherbert* and *Thomas*, for instance, the plaintiffs were not directly commanded to violate their beliefs but were penalized indirectly through loss of unemployment benefits. *See, e.g., Sherbert*, 374 U.S. at 403 (noting that burden was "only an indirect result" of unemployment laws). Yet, in both cases, this Court rejected the government's argument that "the burden upon [plaintiffs'] religion ... is only the indirect consequence of public welfare legislation." *Thomas*, 450 U.S. at 717; *see id.* (noting that "a similar argument was made and rejected in *Sherbert*"). As *Thomas* explained, "[w]hile the compulsion may be indirect, the

infringement upon free exercise is nonetheless substantial." *Id.* at 718. And it must not be forgotten that the mandate's compulsion of Petitioners takes the form—not merely of indirect pressure such as ineligibility for a government benefit—but of direct compulsion through the imposition of devastating fines, which *Sherbert* identified as the paradigm substantial burden. *See Sherbert*, 374 U.S. at 404 (making appellant choose between observing Sabbath or receiving benefits "puts the same kind of burden upon the free exercise of religion *as would a fine imposed against appellate for her Saturday worship*") (emphasis added).

These two errors obscured the obvious conclusion that the mandate substantially burdens Petitioners' religious exercise. Fining people who refuse to violate their faith is a paradigm substantial burden. *Sherbert,* 374 U.S. at 404 (making appellant choose between observing Sabbath or receiving benefits "puts the same kind of burden upon the free exercise of religion as would a fine"). This Court has deemed a modest fine of *five dollars* for believers' refusal to violate their faith a substantial burden. *Wisconsin* v. *Yoder*, 406 U.S. 205, 208, 218 (1972) (fine "not only severe, but inescapable"). Petitioners face potentially devastating fines for refusing to violate their faith. The substantial nature of this burden—coercing Petitioners' consciences by threatening their livelihood with punitive fines—is beyond dispute.

C. The fact that Petitioners exercise religion in the business context presents no obstacle to their indisputable rights under RFRA.

The government argued below that Petitioners are categorically excluded from religious freedom protection because they either own for-profit corporations (the Greens) or are for-profit corporations (Hobby Lobby and Mardel). *See* Defendants'

Memorandum in Opposition to Motion for Preliminary Injunction at 2. This is not the law, and with good reason. There is nothing about earning a profit that is fundamentally incompatible with living in accordance with religious beliefs. Indeed, many religious believers seek to both at once. Thus it is not surprising that RFRA does not draw the profit v. non-profit distinction upon which the government relied below. *See* 42 U.S.C. § 2000bb-2(4) (incorporating 42 U.S.C. § 2000cc(7)(A)) (defining "religious exercise" broadly to "include any exercise of religion, whether or not compelled by, or central to, a system of religious belief.").

Nor does RFRA restrict its protection only to "individuals" but instead extends to all "persons." *See* 42 U.S.C. §2000bb-1(a); *see also*, 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.").

Nor is there any basis for the government's assertion below that Hobby Lobby cannot exercise religion. Petitioner Hobby Lobby takes out advertisements encouraging people to find Jesus Christ, VC ¶47—an obvious exercise of religion. Petitioners' refusal to provide insurance for abortion-inducing drugs—which is undisputedly based on beliefs about God's will concerning unborn human life, VC ¶¶52-54—is likewise an exercise of religion. This Court has repeatedly recognized that corporate entities can engage in religion, and has never drawn the stark distinction proposed by the government. *See, e.g. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993) (granting religious liberty claims of

a "not-for-profit corporation organized under Florida law" and its "President"); *Gonzales* v. *O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006) (same for a New Mexico corporation).

Even if there were doubt about whether the organizational Petitioners (Hobby Lobby and Mardel) can be protected when they exercise religion, there is no doubt that the Green family themselves can raise religious liberty claims when they are forced to use their business in a way that forces them to violate their faith. This Court has recognized that individuals can assert religious exercise claims for burdens imposed on the businesses they own and operate. *See, e.g., United States* v. *Lee*, 455 U.S. 252, 256-57 (1982) (recognizing that an Amish employer could object on religious grounds to paying his share of social security taxes); *Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961) (allowing Jewish merchants to challenge a Sunday closing law because it "operate[d] so as to make the practice of their religious beliefs more expensive.").[9] Other circuits have reached the same logical conclusion. *See, e.g., Storman's, Inc.* v. *Selecky*, 586 F.3d 1109, 1120-21 (9th Cir. 2009); *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619-20 (9th Cir. 1988); *Commack Self-Service Kosher Meats, Inc.* v. *Hooker*, 680 F.3d 194 (2d Cir. 2012).[10] Furthermore,

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[9] Although both *Lee* and *Braunfield* denied relief, each case recognized that a business owner may state a claim for a religious burden on his or her business. *See Lee*, 455 U.S. at 256-57; *Braunfield*, 366 U.S. at 605. None of these cases suggested that the particular form of the business at issue—which is usually a matter of state law—had any bearing on the existence of protectable federal religious freedom rights.

[10] The government's attempt to exclude morality from the corporate world is especially surprising since one of the most robust ongoing debates within the legal academy concerns whether corporations must always be organized exclusively to maximize shareholder wealth. *See, e.g.*, Lynn Stout, Cultivating Conscience: How Good Laws Make Good People (Princeton University Press, 2011); Lynn Stout, On The Proper Motives of Corporate

each of the five other courts to grant preliminary injunctions against the mandate has either explicitly or implicitly acknowledged that either the businesses or their owners may assert religious liberty rights.

D. The mandate cannot survive strict scrutiny.

Because the mandate substantially burdens Petitioners' religious exercise, the government must justify the mandate under strict scrutiny—the "most demanding test known to constitutional law." *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997); 42 U.S.C. § 2000bb-1(b). It cannot hope to do so here. Under strict scrutiny, the government must prove that application of the burden specifically to Petitioners is "the least restrictive means of advancing a compelling interest." *Gonzales*, 546 U.S. at 423 (citing 42 U.S.C. § 2000bb-1(b)); *id.* at 429 (government bears burden even at preliminary injunction stage).

Here, the government has not even shown that Petitioners' decision not to cover emergency contraceptives has *any* impact on the government's asserted interests of promoting women's health and equality. The challenged regulation requires health plans to cover a large range of preventive services for women. *See, e.g.*, 42 U.S.C. § 300gg-13(a). Petitioners already provide all of these services—including sixteen out of the twenty categories of FDA-approved contraceptives—excepting only emergency contraceptives, which they believe can cause abortions. The government's only evidence that it has a compelling interest in forcing coverage of these contraceptives

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Directors (Or, Why You Don't Want to Invite Homo Economicus to Join Your Board), 28 Del. J. Corp. L. 1 (2003). Contrary to the government's position, corporations can have different purposes, and the profit motive does not strip a corporation of the right to seek to do good. Cf. Google, Motto ("Don't be evil.")

is a report issue by the Institute of Medicine ("Institute Report"). Opp. to Prelim. Inj. Mot. at 24-25. But the "Institute Report states only that, to promote public health and equalize access to health care, "[p]reventive services *may* ... include the provision of ... Food and Drug Administration-approved medications and devices, ... including contraceptives," and "[t]here is no specific finding that the government *must* ensure that Plan B, ella, and intrauterine devices, as opposed to other forms of contraception, be covered." *Tyndale*, 2012 WL 5817323, at *16. The government thus cannot meet its burden.

Moreover, an interest is not compelling 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. For example, in *O Centro II*, the Court granted a religious group an exemption from the Controlled Substances Act to use hoasca—a hallucinogen—for religious purposes, because the Act already contained an exemption for the religious use of another hallucinogen—peyote. As the Court explained, because Congress permitted peyote use in the face of concerns regarding health and public safety, "it [wa]s difficult to see how" those same concerns could "preclude any consideration of a similar exception for" the religious use of hoasca. *Id.*

Here, the government has created numerous exemptions from the mandate. It has, for example, exempted employers that meet the Government's narrow definition of "religious employers." *See* 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011), codified at 45 C.F.R. § 147.130(a)(1)(iv)(B). It has likewise created a one-year safe

harbor from government enforcement for most non-profit corporations that have religious objections to the Mandate. *See* HHS, "Guidance on the Temporary Enforcement Safe Harbor" (Aug. 15, 2012); 77 Fed. Reg. 16,501. And, through the Act's grandfathering provision, "[t]he government has exempted over 190 million health plan participants and beneficiaries from the preventive care coverage mandate." *Newland* v. *Sebelius*, No. 1:12-cv-1123, 2012 WL 3069154, at *7-8 (D. Colo. July 27, 2012) (citing 42 U.S.C. § 18011; 26 U.S.C. § 4980H(c)(2)). "[T]his massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs." *Id.*; *see also Tyndale*, 2012 WL 5817323, at *18 (stating that "the 191 million employees excluded from the contraceptive coverage mandate include those covered by grandfathered plans alone," and "[t]he existence of these exemptions significantly undermines the defendants' interest in applying the contraceptive coverage mandate to the plaintiffs").[11]

Finally, where a less restrictive alternative would serve the government's purpose, "the legislature *must* use that alternative." *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (emphasis added). The federal government has already constructed an extensive funding network designed to increase contraceptive access, education, and use, including:

- $2.37 billion in public outlays for family planning in fiscal year 2010.

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[11] It was undisputed below that Petitioners' plan is ineligible for grandfathering due to actions taken before the mandate was promulgated. VC ¶ 59.

- $228 million in fiscal year 2010 for Title X of the Public Health Service Act, a federal program devoted specifically to supporting family planning services.
- $294 million in state spending for family planning in fiscal year 2010.[12]

"Given the existence of government programs" like these, which are already distributing contraceptives directly to those most in need, "the government has failed to meet [its] burden" of showing that the mandate is the least restrictive means of providing access to contraceptives. *Newland*, 2012 WL 3069154 at *8.

Throughout this litigation, the government has "repeatedly invoke[d]" the "purposes underlying the [HHS mandate]," to justify its burdens. But "Congress had a reason for enacting RFRA, too." *O Centro II*, 546 U.S. at 439. "Congress recognized that 'laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.'" *Id.* at 439 (quoting RFRA, 42 U.S.C. §§ 2000bb(a)(2), (5)). Thus, Congress "legislated 'the compelling interest test' as the means for the courts to 'strik[e] sensible balances between religious liberty and competing prior governmental interests.'" *Id.* That balance requires that the HHS mandate, a mere administrative regulation, must yield to the expressed will of Congress in RFRA. *See United States* v. *Larionoff*, 431 U.S. 864, 873 (1977); *Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 171 (1989).

In enacting the Affordable Care Act, Congress went to great lengths to ensure nothing would require those opposing abortions to pay for them, even indirectly. Thus, the Act categorically exempts any "qualified health plan" from having to cover

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12 *Facts on Publicly Funded Contraceptive Services in the U.S.* (Guttmacher Inst. May 2012), *available at* http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited Dec. 11, 2012).

abortion "for any plan year," 42 U.S.C. § 18023(b)(1), and it requires plans that do cover abortions to pay for them out of separately-assessed plan-participant fees kept in a segregated account, *id.* § 18023(b)(2). Similarly, nothing in the Act requires, or even implies, that Congress sought to prevent conscience-based exemptions to its health care programs; to the contrary, it specifically included such exceptions throughout the law. *See, e.g.*, 42 U.S.C. § 18023(b)(1) (exempting "qualified health plans" from covering any abortions); 26 U.S.C. § 1402(e), (g) (exempting certain "ministers," church members, Christian Science practitioners, and members of "recognized religious sect[s]" from certain aspects of the Act). There is simply no support for concluding the government has a compelling interest in forcing Petitioners to cover emergency contraceptives.

E. Most other courts to have considered the issue have granted preliminary injunctions.

Most courts to consider the question have granted preliminary injunctions, and those that have not have stated broad rules of law that would lead to results that cannot possibly be consistent with RFRA. In particular, of the six cases other than *Hobby Lobby* in which a business and/or its owner sought preliminary injunctive relief against the Mandate, all but one of those courts has granted the injunction. *See O'Brien* v. *HHS*, No. 12-3357 (8th Cir.) (injunction pending appeal granted Nov. 28, 2012); *Am. Pulverizer Co.* v. *U.S. Dep't of Health and Human Servs.*, 6:12-cv-03459 (W.D. Mo filed Sept. 28, 2012) (preliminary injunction for business owner granted Dec. 20, 2012); *Tyndale House Publishers, Inc.* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 5817323 (D.D.C. Nov. 16, 2012) (granting preliminary injunction for

business owner); *Legatus* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 5359630 (E.D. Mich Oct. 31, 2012) (same); *Newland* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 3069154 (D. Colo. July 27, 2012) (same), appeal docketed, No. 12-1380 (10th Cir.); *see also Korte* v. *U.S. Dep't of Health and Human Servs.*, 3:12-cv-01072 (S.D. Ill. Oct. 29, 2012) (denying preliminary injunction for business owner), appeal docketed No. 12-3841 (7th Cir. Dec. 18, 2012). These cases also confirmed the obvious—that the balance of harms weighs heavily in favor of temporary injunctive relief.

The only other case in which a similarly-situated plaintiff was denied relief involved similar mischaracterizations of the relevant religious exercise. *See Korte*, at 18-19 (finding burden "de minimis" because plaintiffs were still permitted to be "advers[e] to abortifacients" despite being forced to provide insurance coverage for them). In effect, these cases hold that religious freedom is not violated unless the law requires religious objectors themselves to *use* the drugs at issue. Such a hollow understanding of religious freedom, however, is utterly unnecessary in this country: A law requiring individuals to use contraceptives and abortion-inducing drugs *against their will* would be astonishing. Petitioners' religious beliefs, however, like those of many others, are far more nuanced: they prohibit Petitioners not just from *using* abortion-inducing drugs, but from themselves *facilitating* such use by others. The rationale adopted by both the Tenth Circuit here and the trial court in *Korte* would categorically deny RFRA's protection to that entire class of religious beliefs.

And the results would be astounding. Under this analysis, no religious objector—whether a for profit business, a mosque, or a religious school—would be able to

claim a substantial burden when the government forces it to provide insurance coverage for services they are forbidden to sponsor. Under this analysis, a government requirement that the Catholic University of America or an order of nuns provide insurance coverage for late-term surgical abortion or assisted suicide would create no cognizable burden on religion whatsoever. Nor is this a hypothetical parade of horribles. In the D.C. Circuit last week, the government took the position that RFRA would permit the government to force a Catholic university, Belmont Abbey College, and an Evangelical university, Wheaton College, to provide insurance coverage for contraception, abortion-inducing drugs, and sterilization, notwithstanding their sincerely held religious beliefs. *See* Transcr. of Oral Arg. in *Wheaton Coll.* v. *Sebelius*, 12-5273, at p.36 (Dec. 14, 2012). That is simply not the law, and the fact that an injunction can only be denied based on such reasoning confirms that Petitioners' claim to relief is "indisputably clear."

III. INJUNCTIVE RELIEF WOULD AID THIS COURT'S JURISDICTION.

An injunction under the All Writs Act would be "in aid of" this Court's certiorari jurisdiction, *see* 28 U.S.C. § 1651(a), despite the fact that this case is currently pending in the circuit court. *See, e.g., FTC* v. *Dean Foods Co.*, 384 U.S. 597, 603-04 (1966) (explaining that authority under the All Writs Act "extends to those cases which are within [a court's] appellate jurisdiction although no appeal has been perfected") (quoting *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943)); *United States v. U.S. Dist. Ct. for S. Dist. of NY*, 334 U.S. 258, 263 (1948) (explaining that the writ power "protects the appellate jurisdiction which might be otherwise defeated and extends to support an ultimate power of review, though it not be

immediately and directly involved"). That is so, because Petitioners' case is a uniquely appropriate vehicle for deciding an issue of national importance concerning the interaction of the mandate and RFRA—an issue currently pending in numerous district and circuit courts around the country, which has already provoked directly conflicting legal decisions. During the appellate process, however, the mandate's severe penalties will mount against Petitioners. Interim relief from this Court is therefore necessary to allow Petitioners to complete the appellate process, including any further review by this Court. *See, e.g., In re Tennant*, 359 F.3d 523, 527 (D.C. Cir. 2004) (explaining that appellate injunction under All Writs Act is permissible "in order to protect [the court's] future jurisdiction") (quoting *Telecomm'n Research & Action Ctr.* v. *FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) (*TRAC*); *see also, e.g., McClellan* v. *Carland*, 217 U.S. 268, 280 (1910) (observing "[w]e think it the true rule that where a case is within the appellate jurisdiction of a higher court a writ ... may issue in aid of the appellate jurisdiction which might otherwise be defeated").

Over forty cases challenging the HHS mandate on behalf of non-profit and for-profit organizations are currently pending in federal district and circuit courts.[13] *All*

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[13] *See Wheaton Coll.* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 3637162 (D.D.C. Aug. 24, 2012), on consolidated appeal, Nos. 12-5273 and 12-5291 (D.C. Cir.); *Belmont Abbey Coll.* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 2914417 (D.D.C. July 18, 2012), on consolidated appeal, Nos. 12-5273 and 12-5291 (D.C. Cir.); *Roman Catholic Archbishop of Wash.* v. *Sebelius*, No. 1:12-cv-815 (D.D.C. filed May 21, 2012); *Tyndale House Publishers, Inc.* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 5817323 (D.D.C. Nov. 16, 2012); *Priests for Life* v. *Sebelius*, No. 1:12-cv-00753 (E.D.N.Y.); *Roman Catholic Archdiocese of NY* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 6042864 (E.D.N.Y. Dec. 4, 2012); *Geneva Coll.* v. *Sebelius*, No. 2:12-cv-00207 (W.D. Pa.); *Rev. Donald W. Trautman* v. *Sebelius*, No. 1:12-cv-123 (W.D. Pa.); *Most Rev. David A. Zubik* v. *Sebelius*, 2012 WL 5932977 (W.D. Pa. Nov. 27, 2012);

those cases pose the precise issue raised by Petitioners' case—*i.e.*, whether the mandate to cover objectionable drugs in an employer health plan substantially burdens the employer's religious exercise under RFRA. A subset of those cases involving religious business owners like Petitioners[14] has, moreover, already

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Conestoga Wood Specialties Corp. v. *Sebelius*, Case No. 5:12-cv-06744-MSG (E.D. Pa. filed Dec. 4, 2012); *Liberty Univ.* v. *Geithner*, No. 10-2347 (4th Cir.), *on remand from the Supreme Court*, __ S.Ct. __, 2012 WL 5895687 (Nov. 26, 2012); *Louisiana Coll.* v. *Sebelius*, No. 1:12-cv-00463 (W.D. La.); *Roman Catholic Diocese of Dallas* v. *Sebelius*, No. 3:12-cv-1589 (N.D. Tex.); *Roman Catholic Diocese of Fort Worth* v. *Sebelius*, No. 4:12-cv-314 (N.D. Tex.); *Roman Catholic Diocese of Biloxi* v. *Sebelius*, No. 1:12-cv-158 (S.D. Miss.); *The Criswell Coll.* v. *Sebelius*, 3:12-cv-04409 (N.D. Tex.); *East Texas Baptist Univ.* v. *Sebelius*, Case No. 4:12-cv-03009 (S.D. Tex. filed Oct. 9, 2012); *Legatus* v. *Sebelius*, 2:12-cv-12061 (E.D. Mich.); *Franciscan Univ. of Steubenville* v. *Sebelius*, No. 2:12-cv-440 (S.D. Ohio); *Catholic Diocese of Nashville* v. *Sebelius*, 2012 WL 5879796 (M.D. Tenn. Nov. 21, 2012); *Autocam Corp.* v. *Sebelius*, 1:12-cv-01096 (W.D. Mich.); *Univ. of Notre Dame* v. *Sebelius*, No. 3:12-cv-00253 (N.D. Ind.); *Diocese of Fort Wayne-South Bend, Inc.* v. *Sebelius*, No. 1:12-cv-159 (N.D. Ind.); *Conlon* v. *Sebelius*, No. 1:12-cv-3932 (N.D. Ill.); *Triune Health Group* v. *Sebelius*, No. 1:12-cv-6756 (N.D. Ill.); *Grace Coll.* v. *Sebelius*, No. 3:12-cv-00459 (N.D. Ind.); *Korte* v. *U.S. Dep't of Health and Human Servs.*, 3:12-cv-01072 (S.D. Ill.); *Grote Indus.* v. *Sebelius*, 4:12-cv-00134 (S.D. Ind.); *Nebraska ex rel. Bruning* v. *HHS*, __ F. Supp. 2d __, 2012 WL 2913402 (D. Neb. July 17, 2012), on appeal, No. 12-3238 (8th Cir.) (filed Sept. 14, 2012); *O'Brien* v. *HHS*, __ F. Supp. 2d __, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012), on appeal, No. 12-3357 (8th Cir.) (filed Sept. 28, 2012); *Archdiocese of St. Louis* v. *Sebelius*, No. 4:12-cv-924 (E.D. Mo.); *Coll. of the Ozarks* v. *Sebelius*, No. 6:12-cv-03428 (W.D. Mo.); *American Pulverizer Co.* v. *U.S. Dep't of Health and Human Servs.*, 6:12-cv-03459 (W.D. Mo.); *Annex Med., Inc.* v. *Sebelius*, 0:12-cv-02804 (D. Minn.); *Colorado Christian Univ.* v. *Sebelius*, No. 11-cv-03350 (D. Colo.); *Newland* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 3069154 (D. Colo. July 27, 2012); *Hobby Lobby Stores, Inc., et al.* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 5844972 (W.D. Okla. Nov. 19, 2012); *Eternal Word Television Network, Inc.* v. *Sebelius*, No. 2:12-cv-00501 (N.D. Ala.); *Ave Maria Univ.* v. *Sebelius*, No. 2:12-cv-00088 (M.D. Fla.); *The Roman Catholic Archdiocese of Atlanta* v. *Sebelius*, 1:12-cv-03489 (N.D. Ga.); *The Most Reverend Thomas G. Wenski* v. *Sebelius*, 1:12-cv-23820 (S.D. Fla.).

[14] *See Tyndale House Publishers, Inc.* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 5817323 (D.D.C. Nov. 16, 2012); *Conestoga Wood Specialties Corp.* v. *Sebelius*, Case No. 5:12-cv-06744-MSG (E.D. Pa. filed Dec. 4, 2012); *Legatus* v. *Sebelius*, 2:12-cv-12061 (E.D. Mich.); *Autocam Corp.* v. *Sebelius*, 1:12-cv-01096 (W.D. Mich.); *Conlon* v. *Sebelius*, No. 1:12-cv-3932 (N.D. Ill.); *Triune Health Group* v. *Sebelius*, No. 1:12-cv-6756 (N.D. Ill.); *Korte* v. *U.S. Dep't of Health and Human Servs.*, 3:12-cv-01072 (S.D. Ill.); *Grote Indus.* v. *Sebelius*, 4:12-cv-00134 (S.D. Ind.); *Am. Pulverizer Co.* v. *U.S. Dep't of Health and Human Servs.*, 6:12-cv-03459 (W.D. Mo.); *Annex Med., Inc.* v. *Sebelius*, 0:12-cv-02804 (D. Minn.); *Newland* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 3069154 (D. Colo. July 27, 2012); *Hobby Lobby Stores, Inc., et al.* v. *Sebelius*, __ F. Supp. 2d __, 2012 WL 5844972 (W.D. Okla. Nov. 19, 2012);

resulted in eight merits decisions on that same legal issue, splitting five-to-three. Five courts (four district courts and one circuit court) have granted preliminary injunctions premised on the conclusion that the mandate is likely a substantial burden on the employer's religious exercise. *See supra.* Three courts (two district courts and one circuit court) have denied preliminary injunctive relief premised on the opposite conclusion that the mandate is merely an "indirect" (and therefore insubstantial) burden on the employer's religious exercise.[15]

Petitioners' case lies at the epicenter of the pending business cases, which are the first to have produced merits decisions to date. In the context of a religiously-motivated business owner, Petitioners' case presents the legal issue of whether the mandate "substantially burdens" religious exercise by requiring owners to provide drugs and devices contrary to their beliefs in their insurance plans. This is precisely the issue on which eight different federal courts have already reached irreconcilable conclusions. As discussed above, *both* lower courts in Petitioners' case—in reliance on another erroneous district court opinion—found that the burden on Petitioners' religious exercise was "indirect and attenuated" and therefore insubstantial as a

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O'Brien v. *HHS*, __ F. Supp. 2d __, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012), on appeal, No. 12-3357 (8th Cir.) (filed Sept. 28, 2012); *Geneva Coll.* v. *Sebelius*, No. 2:12-cv-00207 (W.D. Pa.).

[15] *See Hobby Lobby Stores, Inc.*, v. *Sebelius*, No. 12-6294 (10th Cir. Dec. 19, 2012) (denying injunction because burden was "indirect"); *Hobby Lobby Stores, Inc.* v. *Sebelius*, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. Nov. 19, 2012) (same); *Korte* v. *U.S. Dep't of Health and Human Servs.*, 3:12-cv-01072 (S.D. Ill. Dec. 14, 2012) (denying preliminary injunction because burden was "too distant"), appeal docketed No. 12-3841 (7th Cir. Dec. 18, 2012); *O'Brien* v. *HHS*, __ F. Supp. 2d __, 2012 WL 4481208, at *6 (E.D. Mo. Sept. 28, 2012) (denying preliminary injunction because burden was "indirect"), *injunction pending appeal granted*, No. 12-3357 (8th Cir. Nov. 28, 2012).

matter of law. Other courts have expressly disagreed, finding such a conclusion at odds with directly applicable precedent from this Court.

Not only does Petitioners' case squarely pose that issue, but their case is a uniquely appropriate vehicle for deciding it. Petitioners run closely held, family businesses; their religious beliefs are widely-known and undisputedly sincere; and their religious practices are integrated into their business activities in numerous, concrete ways. Moreover, the pressure on Petitioners from the mandate is particularly stark. Because of the nationwide scope of their business and the large number of individuals covered by their insurance plan, Petitioners face exposure to potentially massive daily fines and therefore will suffer obvious, palpable and rapidly mounting burdens on their religious exercise.

And it is precisely because those burdens will rapidly increase during the appellate process—inflicting greater and greater harm Petitioners' on religious exercise and their businesses—that Petitioners need temporary injunctive relief from this Court. Otherwise, the mandate's punitive fines risk scuttling the process of review before Petitioners can complete the process of appellate review, including any further review by this Court.

IV. THE COURT SHOULD ALSO GRANT CERTIORARI BEFORE JUDGMENT.

In addition, Petitioners ask the Court to treat this application as a petition for writ of certiorari. An application for certiorari "before judgment has been rendered in the court of appeals may be made at any time before judgment." 28 U.S.C. § 2101(e). This Court will grant such an application "upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate

practice and to require immediate determination in this Court." S.Ct. R. 11. This standard is satisfied for four reasons.

First, the mandate threatens fundamental freedoms with severe penalties, in ways that are best addressed right now. As a practical matter, many individuals and organizations will be coerced into giving up their liberties in the near future, and those that do not yield may be destroyed by the heavy fines. All of these injuries—whether to Petitioners or others not before this Court—would be best addressed now (and for some will only be addressable now). *Cf. Ex parte Young*, 209 U.S. 123, 163 (1908) (noting inadequacy of later adjudication that would take several years and may not offer prospect of full recovery).

Second, the issue at stake—whether the law protects religious exercises of this nature from government compulsion—is an issue of imperative public importance. The sheer number of cases (now more than forty, with well over one hundred different plaintiffs) attests to the nationwide importance of the issue, and for good reason: religious liberty would be a hollow right if only confined to exercise within the four walls of a church, synagogue, or mosque. Moreover, the principle of law adopted by the lower court here—namely that the law offers no protection whatsoever to religious beliefs about one's *own* participation in anyone else's actions—dramatically narrows the religious liberty of millions of people. Under this principle, a nurse has no right to a religious objection to participating in a late-term abortion (because she is not personally undergoing or performing the procedure),[16] a

[16] Such an outcome runs directly contrary to the long-running concerted government efforts to protect religious objectors to abortion from having to participate or fund abortions

doctor has no right to avoid prescribing life-ending medication for assisted suicides (because she is not personally taking or administering the drugs),[17] and a corrections employee has no right to avoid participating in executions (because she is not actually administering the lethal injection).[18]

Third, the issue in its current posture raises two significant circuit splits that present narrow, well-defined issues for this Court's consideration. As already noted, the Tenth Circuit's conclusion that being forced to finance third parties' immoral conduct cannot be deemed a substantial burden on religious exercise is directly contrary to the Eight Circuit's ruling on the same issue. *Compare Hobby Lobby Stores, Inc.*, v. *Sebelius*, No. 12-6294 (10th Cir. Dec. 19, 2012) (denying injunction pending appeal based on conclusion that "[w]e do not think there is a substantial likelihood that this court will extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship") *with O'Brien* v. *HHS*, No. 12-3357 (8th Cir. Nov. 28, 2012)

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in any way. *See, e.g.*, 42 U.S.C. § 300a-7(b) (prohibiting discrimination against any "entity" that refuses to make facilities available for abortion "on the basis of religious beliefs or moral convictions"); 42 U.S.C. § 18023(b)(4) (Affordable Care Act) (prohibiting discrimination against any "health care facility" due to refusal to "pay for," "provide coverage of," or "refer for" abortion); 22 U.S.C. § 2151b(f)(1) (protecting objecting taxpayers from paying for abortions, even indirectly); *see also Harris* v. *McRae*, 448 U.S. 297, 302 (1980); 75 Fed. Reg. 15,599.

[17] Such an outcome is contrary to the understanding of religious liberty reflected in state laws authorizing assisted suicide. *See, e.g.*, Oregon Death With Dignity Act, Oregon Revised Statutes §127.885 (protecting against compulsion to engage in any form of participation, including use of premises).

[18] Such an outcome is contrary to many state and federal laws protecting corrections employees from such coercion. *See, e.g.*, 18 U.S.C. § 3597(b) (protecting corrections employees from being forced to "participate" or even "be in attendance at" an execution if contrary to their religious or moral convictions).

(granting injunction on appeal to for-profit business). Similarly, although the Tenth Circuit Court of Appeals declined to directly address it, *see* Ex. A at 6 n.4, the District Court's ruling that for-profit organizations—in contrast with nonprofit organizations—have no rights under RFRA, is directly in conflict with opinions of the Eighth and Ninth Circuits—as well as of this Court— which have expressly recognized religious exercise within the context of for-profit businesses. *Compare Hobby Lobby*, Case No. 5:12-cv-1000-HE, at 18-19 nn. 12 & 13 (W.D. Okla. Dkt. No. 45, Nov. 19, 2012) *with O'Brien*, No. 12-3357 (8th Cir. Doc. No. 3979187, Nov. 28, 2012); *EEOC* v. *Townley Eng'g & Mfg.*, 859 F.2d 610, 619-20 (9th Cir. 1988) (recognizing that businesses could assert owner's religious liberty rights); *Stormans, Inc.* v. *Selecky*, 586 F.3d 1109, 1120-21 (9th Cir. 2009) (same); *United States* v. *Lee*, 455 U.S. 252, 256-57 (1982) (recognizing Amish employer's right to raise religious objection to social security tax); *Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961) (allowing Jewish merchants to challenge Sunday closing law). It would not be premature for this Court to issue a writ for certiorari to settle these clearly defined splits of authority among the Courts of Appeals.

Fourth and finally, with more than one hundred plaintiffs currently litigating in over forty courts around the country, the Court *already* has a wealth of lower court decision-making on these issues. In fact, there have now been nine decisions by lower federal courts on the purely legal question of whether business owners and their businesses are categorically forbidden from asserting that the HHS mandate imposes a substantial burden under RFRA. While most courts have recognized

obvious religious liberty rights at issue in these cases, courts taking the minority approach leave certain plaintiffs with no protection of their religious exercise and at significant risk of having their businesses destroyed under crushing government fines, simply because they are located in an outlier circuit. That evolving patchwork of religious exercise protection is grossly unfair given that the issues are purely legal, clearly defined, and ready for resolution by this Court.

In sum, there is no real advantage to waiting to reach these issues.[19] Adding additional squares to the patchwork of lower-court decisions will not provide new insight for this Court's ultimate decision-making. In contrast, granting certiorari now will serve significant advantages in saving parties from years of litigation and uncertainty; saving parties like Petitioners from impermissible government coercion to cease their religious exercise; saving parties like Petitioners from irreparable harm in the face of punitive government fines; and saving the court system and public from years of protracted litigation over a largely legal issue that is ripe for consideration now.

CONCLUSION

Petitioners respectfully ask the Court to enter an injunction under the All Writs Act enjoining application of the mandate against them during the pendency of Petitioners' appeal. In addition, Petitioners respectfully ask the Court to grant

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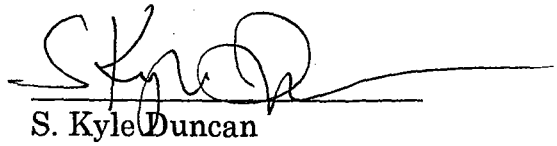
[19] Notably, Respondents have stated that they too understand the issues presented here to be almost entirely legal, and have indicated that they do not intend to seek much discovery. *See East Tex. Baptist Univ.* v. *Sebelius*, Civ. No. 12-3009 (S.D. Tex.), joint discovery / case management plan (Dec. 10, 2012), at 4.

certiorari before judgment to review the district court's denial of preliminary injunctive relief.

Respectfully submitted,



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