No. _____

In the Supreme Court of the United States

FRANCIS A. GILARDI, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal regulations implementing the Patient Protection and Affordable Care Act of 2010 ("ACA") require certain employers, including Petitioners, to cover birth control, including abortion-inducing drugs, sterilization, and related education and counseling services in their health insurance plans ("the Mandate").

Petitioners, Francis and Philip Gilardi, and their closely-held S corporations, Freshway Foods and Freshway Logistics ("the Freshway Companies"), object on religious grounds to paying for and providing the services required by the Mandate in their self-funded health plan, which services they have excluded for over ten years. Petitioners sought a preliminary injunction based on their claim under the Religious Freedom Restoration Act ("RFRA"), which the district court denied.

Although the D.C. Circuit held that the Mandate burdens the Gilardis' religious exercise under RFRA, the court rejected the companies' RFRA claim, holding there was "no basis for concluding a secular organization can exercise religion." This conflicts with a decision of the Tenth Circuit regarding the same Mandate at issue here. The D.C. Circuit's related holding that a closely-held corporation cannot assert the free exercise rights of its owners also conflicts with two Ninth Circuit decisions.

The question presented is whether a closely-held business corporation operated in accordance with the religious beliefs of its owners can exercise religion under RFRA.

PARTIES TO THE PROCEEDINGS

Petitioners are Fresh Unlimited, Inc., d/b/a Freshway Foods, Freshway Logistics, Inc., and their owners Francis Gilardi and Philip Gilardi.

Respondents are the Departments of Health and Human Services, Treasury, and Labor, and the Secretaries thereof, Kathleen Sebelius, Jacob Lew, and Thomas E. Perez, respectively, who are sued in their official capacities. During the litigation below, previous Treasury and Labor Secretaries were replaced by Mr. Lew and Mr. Perez, respectively.

CORPORATE DISCLOSURE STATEMENT

Petitioners Fresh Unlimited, Inc., d/b/a Freshway Foods, and Freshway Logistics, Inc. are Ohio business corporations. Neither corporation has parent companies or is publicly held.

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INTRODUCTION

Petitioners, Francis and Philip Gilardi, and the two closely-held corporations that they own and control, the Freshway Companies, object on religious and moral grounds to paying for and providing birth control and sterilization in the companies' self-funded insurance plan. They have intentionally excluded such drugs, methods, and services from their employee health plan for over ten years because they believe that they would act contrary to the teachings of the Catholic Church by including them in the plan.

Regulations promulgated under the ACA, however, compel employers with at least fifty full-time employees to provide health-insurance coverage, and require most kinds of insurance plans to cover all FDA-approved contraceptives and sterilization procedures. Petitioners contend, among other things, that the regulations substantially burden their free exercise of religion under RFRA, 42 U.S.C. § 2000bb *et seq*., and they sought a preliminary injunction based on this claim. Although the decision below accepted this claim with respect to the Gilardis, it rejected the claim with respect to the companies, holding that there was "no basis for concluding a secular organization can exercise religion." App. 16.

The D.C. Circuit's decision conflicts directly with the Tenth Circuit's decision in *Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), which held that two corporations that challenged the Mandate at issue here, Hobby Lobby and Mardel, "are persons exercising religion for purposes of RFRA." *Id*. at 1128. In addition, the decision below expressly rejected the "pass-through theory of corporate standing" set forth in

the Ninth Circuit's decision in *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988), which held that a corporation could assert the free exercise rights of its owners.[1]

Adding to the conflicts among the courts of appeal stemming from cases challenging the Mandate, the Sixth Circuit held that a for-profit corporation "is not a 'person' capable of 'religious exercise' as intended by RFRA." *Autocam Corp. v. Sebelius*, No. 12-2673, 2013 U.S. App. LEXIS 19152, *11 (6th Cir. Sept. 17, 2013). And the Third Circuit held that a for-profit corporation cannot exercise religion, although it did not decide whether such a corporation is a "person" under RFRA. *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013).

In sum, the lower courts are deeply divided as to whether for-profit and/or "secular" corporations are persons capable of exercising religion, whether under RFRA or the Free Exercise Clause. This petition is now the *fourth* to be filed with this Court, this term, concerning the same legal questions raised by the Mandate. *See Sebelius v. Hobby Lobby Stores*, No. 13-354 (petition filed Sept. 19, 2013); *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, No. 13-356 (petition filed Sept. 19, 2013); *Autocam Corp. v. Sebelius*, No. 13-482 (petition filed Oct. 15, 2013).

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[1] On this point, the decision below also conflicts with the Ninth Circuit's decision in *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009).

Moreover, other cases involving businesses and their owners challenging the Mandate have been briefed and argued in both the Seventh and Eighth Circuits and await decisions. *See Korte v. Sebelius,* No. 12-3841, and *Grote v. Sebelius*, No. 13-1077 (7th Cir. argued May 22, 2013); *O'Brien v. HHS*, No. 12-3357, and *Annex Med., Inc. v. Sebelius*, No. 13-1118 (8th Cir. argued Oct. 24, 2013).[2] Many of the legal issues in these cases are the same as the issues involved in the pending petitions for certiorari, including this one. And there are numerous other federal cases concerning the Mandate that have been stayed pending the outcome of one of the cases on appeal. Seldom before has there been so much litigation, leading to so many conflicting lower court opinions, concerning a regulation that implicates the free exercise of religion.

In *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012), Justice Ginsburg observed, "A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause." *Id*. at 2624 (Ginsburg, J., concurring in part and dissenting in part). This case directly poses such an example. This Court should grant review.

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[2] Injunctions pending appeal are in place in all four cases. *Korte v. Sebelius*, No. 12-3841, 2012 U.S. App. LEXIS 26734 (7th Cir. Dec. 28, 2012); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013); *O'Brien v. U.S. HHS*, No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012); *Annex Med. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013).

OPINIONS BELOW

The panel opinion of the court of appeals is not yet reported but is available at No. 13-5069, 2013 U.S. App. LEXIS 22256 (Nov. 1, 2013), and reprinted at App. 1-76. The decision of the court of appeals granting Petitioners an injunction pending appeal is not reported but is available at No. 13-5609, 2013 U.S. App. LEXIS 15806 (Mar. 29, 2013), and reprinted at App. 79-80. The district court's opinion is reported at 926 F. Supp. 2d 273 (D.D.C. 2013), and reprinted at App. 81-102.

JURISDICTION

The court of appeals issued an opinion on November 1, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant constitutional and statutory provisions are set forth in the appendix to this petition. App. 105-111.

STATEMENT OF THE CASE

I. Factual Background

Francis and Philip Gilardi are brothers who are devout Catholics. They adhere to the teachings of the Catholic Church regarding the sanctity of human life from conception to natural death. App. 115, 119, 135, 159. The Gilardis sincerely believe that actions intended to terminate an innocent human life by abortion, including through the use of drugs that act post-conception, are gravely sinful. App. 115, 119, 135, 159. They also hold to the Catholic Church's teachings

regarding the immorality of artificial means of contraception and sterilization. App. 115, 119, 135, 159.[3]

The Gilardi brothers are the sole owners and directors of the Freshway Companies, two S corporations that are incorporated, and based, in the State of Ohio. App. 115, 118, 134-35, 158-59. Freshway Foods is a closely-held fresh produce processor and packer that has approximately 340 full-time employees. App. 118, 135, 159. Freshway Logistics is a closely-held for-hire carrier of mainly refrigerated products that has approximately fifty-five full-time employees. App. 118, 135, 159.

As the sole owners and directors of the Freshway Companies, the Gilardis set the policies that govern all phases of their operations. App. 117-18, 135, 159. As a result, the Freshway Companies have endeavored to act in a manner that reflects, and is consistent with, the teachings, mission, and values of the Catholic faith, and they desire to continue to do so. App. 119, 135, 159. For example, for approximately the last ten years, a sign stating "It's not a choice, it's a child" has been affixed to the back of trucks that bear the Freshway Foods name as a way for the companies to express a Catholic viewpoint regarding the sanctity of human life to the public. App. 141 (photo); *see also* App. 120, 136, 160.

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[3] Moral opposition to contraception, abortion, and sterilization has been a longstanding teaching of the Catholic Church. *See, e.g., Catechism of the Catholic Church*, Nos. 2270-75, 2370, 2399 (2d ed. 1997).

In addition, Freshway Logistics donates a trailer for use by the local Catholic parish for its annual parish picnic, and uses its trucks to deliver the food donated by Freshway Foods to local food banks. App. 120, 136, 160. Furthermore, Freshway Foods makes annual donations to community organizations, including Holy Angel's Soup Kitchen, Compassionate Care, Bill McMillian's Needy Children, Elizabeth's New Life Center, the YMCA, United Way, Habitat for Humanity, American Legion, and local schools. App. 120, 136, 160.

The Freshway Companies also endeavor to ensure that their employees' religious practices are accommodated as much as possible. For example, the companies provide alternative foods at monthly employee lunches to accommodate employees' religious dietary requirements, adjust break periods during Ramadan to allow their Muslim employees to eat after sundown pursuant to their religion, and provide their Muslim employees with space to pray during breaks and lunches. App. 120-21, 136-37, 160-61.

The Freshway Companies, as managed and operated by the Gilardis, consider the provision of employee health insurance—in a manner that is consistent with the Catholic faith—to be an integral component of furthering their mission and values. App. 121, 137, 161. As such, the companies provide their full-time employees with a self-insured prescription drug and health insurance plan through a third-party administrator and stop-loss provider, which is annually renewed on April 1. App. 121, 137, 161.

For approximately the last ten years, the Freshway Companies have specifically excluded coverage of all contraceptives, abortion, and sterilization from their

health plan because paying for those products and services would violate the sincerely-held religious beliefs and moral values of both the companies and the Gilardis. App. 115, 121, 137-39, 161. Because, however, the health plan is not "grandfathered," the companies are subject to the Mandate, App. 122-23, 138-39, 162, which requires them to include those products and services in their employee health plan contrary to Petitioners' religious beliefs and moral values. App. 115-16, 138-40, 161-64. If the companies fail to comply with the Mandate, they would likely incur over $14.4 million in annual penalties, which would greatly harm both the companies and the Gilardis financially. App. 124, 139, 163.[4]

II. Regulatory Background

The ACA requires non-exempt group health plans to provide coverage for preventative care and screening for women without cost-sharing in accordance with guidelines created by the Health Resources and Services Administration. 42 U.S.C. § 300gg-13(a)(4). These guidelines include, among other things, "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive

[4] Dropping the health plan would harm Petitioners' employees, trigger annual penalties because the companies have over forty-nine employees, 26 U.S.C. § 4980H, and have a severe impact on the Freshway Companies' ability to compete with other companies that offer insurance coverage. App. 124, 139-40, 163.

capacity."[5] FDA-approved contraceptive methods include emergency contraception that can act post-conception (such as "Plan B" and "Ella"), diaphragms, oral contraceptive pills, and intrauterine devices.[6]

The requirement to provide coverage for these goods and services applied to non-exempt employers as of the first time that their group health plans were renewed on or after August 1, 2012; non-compliance will lead to significant annual penalties. 45 C.F.R. § 147.130(a)(1)(iv); 77 Fed. Reg. 8725. Although the Mandate applies to Petitioners with respect to their approximately 395 employees, Defendants have provided several exemptions that, taken together, leave *about 190 million Americans* who are covered by plans that need not comply with the Mandate and/or are employed by entities that are not required to provide a health plan at all. *E.g.,* App. 30-31; *Conestoga Wood*, 724 F.3d at 413 n.26 (Jordan, J., dissenting).

For example, grandfathered health plans are indefinitely exempt from compliance with the Mandate. Grandfathered plans are those that were in existence on March 23, 2010, when the ACA was signed into law, and that have not undergone any of a defined set of changes. *See* 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140. The government describes the rules for grandfathered health plans as preserving a "right to

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[5] Health Res. & Servs. Admin., *Women's Preventive Services: Required Health Plan Coverage Guidelines,* http://www.hrsa.gov/womensguidelines/ (last visited Nov. 2, 2013).

[6] Food and Drug Admin., *Birth Control: Medicines To Help You*, http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last visited Nov. 2, 2013).

maintain existing coverage." 42 U.S.C. § 18011; 45 C.F.R. § 147.140.[7] Defendant Department of Health and Human Services has estimated that "98 million individuals will be enrolled in grandfathered group health plans in 2013." 75 Fed. Reg. 41726, 41732. Although the Mandate does not apply to grandfathered plans, many provisions of the ACA do (for example, the prohibition on excessive waiting periods).[8]

"Religious employers," defined to include entities such as churches, their auxiliaries, church associations, and the exclusively religious activities of religious orders, are also exempt from the Mandate. 45 C.F.R. § 147.131. Moreover, employers with fewer than fifty full-time employees have no obligation to provide employee health insurance under the ACA, 26 U.S.C. § 4980H(c)(2)(A); as of 2010, over 31 million individuals worked for employers with fewer than fifty employees.[9] These employers can avoid providing the coverage that Petitioners cannot provide without violating their religious beliefs by not offering any employee health plan.

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[7] The Congressional Research Service has noted that "[e]nrollees could continue and renew enrollment in a grandfathered plan indefinitely." Cong. Research Serv., RL 7-5700, *Private Health Insurance Provisions in PPACA*, at 11 (May 4, 2012).

[8] *Application of the New Health Reform Provisions of Part A of Title XXVII of the PHS Act to Grandfathered Plans*, http://www.dol.gov/ebsa/pdf/grandfatherregtable.pdf (last visited Nov. 2, 2013).

[9] *See Statistics of U.S. Businesses (SUSB) Main*, http://www.census.gov/econ/susb/ (last visited Nov. 2, 2013) (select "U.S., NAICS sectors, small employment sizes").

A non-exempt employer that provides a health insurance plan that does not comply with the Mandate faces penalties of $100 per day for each "individual to whom such failure relates," 26 U.S.C. § 4980D, as well as potential enforcement lawsuits, 26 U.S.C. §§ 1132, 1185d. For Petitioners, that would amount to over $14.4 million in penalties *every year* for continuing to exclude the coverage that Petitioners cannot provide without violating their religious principles.

III. Lower Court Proceedings

Petitioners brought suit in the U.S. District Court for the District of Columbia, alleging that the Mandate violates their rights under RFRA and the Free Exercise and Free Speech Clauses of the First Amendment; they also alleged that the Mandate violates the Administrative Procedure Act. App. 112-33. Petitioners filed a motion for a preliminary injunction based upon their RFRA claim, preserving their other claims for further proceedings. App. 82. The district court denied the motion, holding that Petitioners had not established a likelihood of success on the merits of their RFRA claim because they did not show that the Mandate substantially burdens their religious exercise. App. 89-101.

Petitioners filed a notice of interlocutory appeal and the district court stayed all proceedings. Petitioners also filed an emergency motion with the court of appeals seeking an injunction pending appeal because the Mandate would soon begin to apply to Petitioners (as of April 1, 2013). A motions panel initially denied the motion but later reconsidered and granted it. App. 79-80.

On November 1, 2013, a majority of a three-judge panel of the D.C. Circuit (Judges Brown and Edwards) rejected the RFRA claim with respect to the Freshway Companies. App. 7-16. The court held that only individuals and "religious organizations"—a category that the majority did not define—can exercise religion for purposes of RFRA and the Free Exercise Clause, rejecting the government's reliance upon a line between for-profit and non-profit organizations. App. 9-14. The court acknowledged that though "the [Supreme] Court has never seriously considered such a claim by a secular corporation or other organizational entity [this] is not to say it never will." App. 12. The court also rejected the reasoning of the Ninth Circuit's decision in *Townley*, 859 F.2d 610, which held that a closely held corporation can assert the free exercise rights of its owners in some contexts. App. 14-16.

A different majority (Judges Brown and Randolph) then held that the Mandate substantially burdens the Gilardis' religious exercise, App. 16-24, and that applying the Mandate to the Gilardis neither furthered a compelling interest nor was the least restrictive means of doing so. App. 24-34. Thus, the court reversed the district court's denial of a preliminary injunction with respect to the Gilardis, affirmed the denial with respect to the Freshway Companies, and remanded for consideration of the other preliminary injunction factors. App. 34-35, 77-78.

Judge Randolph wrote a concurring opinion in which he argued that the court did not need to reach the issue of whether the Freshway Companies are covered by RFRA's protections because, in his view, "the government could enforce the mandate against the

corporation only by compelling the Gilardis to act." App. 35 (Randolph, J., concurring). He also asked:

> If secular for-profit corporations can never exercise religion, what of profitable activities of organized religions? If only religious for-profit organizations have a free-exercise right, how does one distinguish between religious and non-religious organizations? Why limit the free-exercise right to religious organizations when many business corporations adhere to religious dogma? If non-religious organizations do not have free-exercise rights, why do non-religious natural persons (atheists, for example) possess them?

App. 35-36 (citations omitted).

Judge Edwards wrote a separate opinion in which he argued that the Freshway Companies cannot exercise religion, App. 42-43 (Edwards, J., concurring in part and dissenting in part), the Gilardis have standing to assert their RFRA claim, App. 43-50, the Mandate does not substantially burden the Gilardis' religious exercise, App. 50-68, and the Mandate satisfies strict scrutiny, App. 68-76.

REASONS FOR GRANTING THE WRIT

In holding that a business corporation cannot exercise religion under RFRA or the First Amendment, because, according to the decision below, only religious organizations or individuals may do so, the D.C. Circuit has furthered the divide among the lower courts on a subject of fundamental importance: the ability to practice religion when using the corporate form and in the commercial context. The decision below rejects the

notion that a business corporation can assert *any* religious claim under RFRA or the Free Exercise Clause against a law requiring the corporation to take action in violation of the religious tenets, principles, or policies that govern the corporation. So, for example, a retail store whose religious-based corporate policies require that it close for business on holy days or the Sabbath could not challenge a law requiring businesses to remain open seven days a week. A deli that has a corporate policy against selling pork for religious reasons could not challenge a regulation requiring businesses to sell pork. A medical practice that has a religious-based policy against performing abortions could not challenge a law requiring all OB/GYN medical practices to offer abortion services.

Certainly, not all corporations that are engaged in commercial activity have corporate policies, practices, or procedures that are based upon religious principles. But for those that do, like the Freshway Companies, it is wrong to hold, as did the court below, that they have no religious freedom. A corporation that can assert a *free speech* right to display a sign stating "Respect the Sabbath," should also be able to assert a *free exercise* right to fulfill this religious admonition by closing on the Sabbath. In the case of the Freshway Companies, which have an uncontested First Amendment right to state "It's not a choice, it's a child" on their delivery trucks, App. 141 (photo), they should have a First Amendment right to continue to act on this religious principle by excluding drugs from their health plan that have the potential to cause abortions.

As Judge Noonan of the Ninth Circuit observed with respect to corporations and free exercise:

> Just as a corporation enjoys the right of free speech guaranteed by the First Amendment, so a corporation enjoys the right guaranteed by the First Amendment to exercise religion. The First Amendment does not say that only one kind of corporation enjoys this right. The First Amendment does not say that only religious corporations or only not-for-profit corporations are protected. The First Amendment does not authorize Congress to pick and choose the persons or the entities or the organizational forms that are free to exercise their religion. All persons—and under our Constitution all corporations are persons —are free.

Townley, 859 F.2d at 623 (Noonan, J., dissenting).

This Court has time and again recognized that religion can be practiced in the corporate form. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525–26 (1993); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330 (1987); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.29 (1983); *see also O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft,* 389 F.3d 973, 973 (10th Cir. 2004) (a "New Mexico corporation"), *aff'd by Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 772 (6th Cir. 2010) (an "ecclesiastical corporation"), *rev'd on other grounds by Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

This Court has also recognized that exercising religion and earning a living through commercial activity are not necessarily incompatible. *See United States v. Lee*, 455 U.S. 252 (1982); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

What this Court has yet to recognize explicitly lies at the juxtaposition of these two lines of decisions: the ability of a corporation engaged in commercial activity to operate under religious principles. The Court's silence on this question has undoubtedly contributed to the fractured nature of the multiple, conflicting decisions below wrestling with the question. Now, therefore, is the time for this Court to speak.

I. The Decision Below Raises Issues of Vital Importance Concerning the Exercise of Fundamental Rights, Warranting Review by This Court.

The D.C. Circuit asked the "simple" question this way: "do corporations enjoy the shelter of the Free Exercise Clause?" App. 9. Looking to the "nature, history, and purpose" of the Free Exercise Clause, the court ultimately answered that question: *yes*, for religious organizations, *no* for secular ones (although the court declined to shed light on how to draw the line between religious and secular organizations). The court stated that, while this Court has "heard free-exercise challenges from religious entities and religious organizations . . . . listened to the grievances of religious sects and member congregations . . . . [and] even entertained claims by religious and educational institutions," it could "glean nothing from [this] Court's jurisprudence that suggests other entities may raise a

free-exercise challenge." App. 11-12. (citations omitted). It noted that "[w]hen it comes to the free exercise of religion . . . [this] Court has only indicated that people and churches worship. As for secular corporations, [this] Court has been all but silent." App. 13.

While it is certainly true, as previously mentioned, that this Court has never explicitly held that a "secular" corporation has a right to operate under binding religious norms, it is also true that this Court has never *rejected* that argument either. And though the Court has been silent on this specific issue, it has not been silent on whether religion can be practiced in the corporate form, *see*, *e.g.*, *Lukumi* and *O Centro*; it has not been silent on whether individuals have free exercise rights with respect to their commercial activities, *see*, *e.g.*, *Lee* and *Braunfeld*. And it has not been silent about a corporation's free speech rights, no matter the nature or purpose of the corporation. *See*, *e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

In the absence of *any* decision by this Court teaching that a secular corporation cannot follow religious norms, taking these principles together provides ample support for the proposition that all corporations, whether labeled as "religious" or "secular," "for-profit" or "non-profit," can, at least in certain contexts, adhere to religious norms. An opposite conclusion, like the one reached by the court below, would render free exercise secondary to free speech in the First Amendment by protecting the right of *all*

corporations to speak, but protecting the right of only *some* to act pursuant to religion. The First Amendment does not state, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, *unless it involves the regulation of a secular corporation*." *See* U.S. Const. Amend. I. And RFRA does not state that the government "shall not substantially burden a person's exercise of religion, *unless that person is a secular corporation*." *See* 42 U.S.C. § 2000bb-1(a).

When this Court observed that "First Amendment protection extends to corporations," *Citizens United*, 130 S. Ct. at 899, it did not exclude recognition of the free exercise rights of secular or for-profit corporations. What this Court teaches with respect to the speech of corporations, secular or not, should extend to the free exercise of religion through the corporate form, secular or not, as the free exercise of religion should not hold second rank to free speech, and the corporate nature of the means of speaking or exercising religion should make no difference. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 796 (1978) ("The proper question . . . is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the law at issue] abridges expression that the First Amendment was meant to protect."); *id.* at 802 ("[T]he First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms.") (Burger, C.J., concurring).

The court below declined to recognize that the Freshway Companies exercise religion when they act in

accordance with the teachings of the Catholic Church because, according to the court, while there is "a robust body of caselaw giving rise to the constitutional right of corporate political speech, . . . [n]o such *corpus juris* exists to suggest a free-exercise right for secular corporations." App. 14. While there is no doubt that this Court's corporate free speech doctrine is built upon a solid foundation of decisional law, the court below did not sufficiently explain why this Court's corporate free speech cases do not support a secular corporation's right to operate under religious norms as well. It is settled that both an individual and a corporation can speak in a manner protected by the First Amendment, and that both an individual and a corporate body (at least a "religious" one) can engage in religious exercise. Why should characterizing an organization as "secular," according to some undefined criterion, make any dispositive difference concerning the exercise of religion? While it is true that free speech and free exercise rights are not identical, in that they protect different (although sometimes overlapping) types of activity and expression, it is equally true that "[t]he Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment." *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

Perhaps predicting that this Court may grant certiorari in one or more of the pending cases involving corporations challenging the Mandate, the D.C. Circuit recognized that though this Court "has never seriously considered . . . a [free exercise] claim by a secular corporation or other organizational entity [this] is not to say it never will." App. 12. It even opined that "perhaps [the] constitutional arithmetic, *Citizens*

United plus the Free Exercise Clause equals a corporate free-exercise right, will ultimately prevail." App. 13. With these statements, the D.C. Circuit all but asks this Court to intervene and resolve this issue of vital importance. This Court should do so.[10]

II. The Decision Below Conflicts with Other Lower Court Decisions on the Issue of Corporate Free Exercise.

A. The Decision Below Conflicts with a Tenth Circuit Decision.

The decision below directly conflicts with the Tenth Circuit's decision in *Hobby Lobby* on the issue of whether a secular or for-profit corporation can exercise religion. Like this case, *Hobby Lobby* involved two

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[10] Petitioners recognize that the decision below concerning the Gilardis' RFRA claim could be read as effectively rendering moot the Freshway Companies' RFRA claim, as Judge Randolph would seem to suggest in his concurring opinion. App. 35-37 (Randolph, J., concurring). But the companies' claim is not moot so long as the government adheres to the position it has taken throughout this litigation and all related cases, *viz*., that the Mandate applies solely to the corporate entities themselves as absolutely distinct and separate from the individual owners. In fact, it is Respondents' position that the Gilardis themselves are not the object of the regulations at all, only their companies, and it would be consistent with that position for the government to pursue enforcement of the Mandate against the Freshway Companies regardless of an injunction that may be entered (based on the decision below) in favor of Francis and Philip Gilardi. The decision below therefore leaves the companies exposed to the potential assessment of penalties and costly, disruptive enforcement actions by the government. Whatever Petitioners' prospect may be of ultimate vindication in those actions based on the decision below, they should not be put to the burden of defending against such actions.

closely held, for-profit corporations and the family members that owned and operated them. The corporations and the family members challenged the Mandate that Petitioners challenge here under the same causes of action (RFRA and the Free Exercise Clause). 723 F.3d at 1120.

Contrary to the decision below, the Tenth Circuit held "as a matter of statutory interpretation that Congress did not exclude for-profit corporations from RFRA's protections. Such corporations may be 'persons' exercising religion for purposes of the statute." *Id*. at 1129. The Tenth Circuit noted that nothing in other federal statutes, case law, or the text of RFRA itself altered the default meaning of "person" in the Dictionary Act, "which includes corporations regardless of their profit-making status." *Id*. at 1129–32 (citing 1 U.S.C. § 1).

The Tenth Circuit further held that, "as a matter of constitutional law, Free Exercise rights may extend to some for-profit organizations." *Id*. at 1129. Applying the "First Amendment logic of *Citizens United*," it reached a conclusion wholly contrary to that of the decision below. While the D.C. Circuit stated that there was "no basis for concluding a secular organization can exercise religion," App. 16, the Tenth Circuit held that there is no principled basis to "recognize constitutional protection for a corporation's political expression but not its religious expression." *Id*. at 1135.

The conflict between the irreconcilable decisions of the Tenth and D.C. Circuits on whether a secular or for-profit corporation can exercise religion could not be more palpable.

B. The Decision Below Conflicts with Two Ninth Circuit Decisions.

The D.C. Circuit's decision also conflicts with decisions from the Ninth Circuit allowing for-profit companies to assert, and thereby vindicate, the free exercise rights of their owners. Although the D.C. Circuit found the Ninth Circuit's "pass-through theory of corporate standing [to be] logically and structurally appealing," the D.C. Circuit specifically rejected the Ninth Circuit's decisions in *Townley*, 859 F.2d 610, and *Stormans*, 586 F.3d 1109, wherein the Ninth Circuit permitted two closely-held family businesses to advance the free exercise rights of their owners. App. 14-16.

In *Townley*, a husband and wife owned 94% of a company that manufactured mining equipment. They sought to run the company pursuant to their Christian faith since they were "unable to separate God from any portion of their daily lives, including their activities at the Townley company." 859 F.2d at 612. Their company sought a religious exemption from Title VII of the Civil Rights Act to permit the company to require its employees to attend weekly religious services. The company claimed that it was entitled to invoke the Free Exercise Clause on its own behalf. *Id.* at 619. Although the Ninth Circuit declined to address whether a for-profit company has rights under the Free Exercise Clause *independent* from its owners, the court did determine that because the company was "merely the instrument through and by which Mr. and Mrs. Townley express their religious beliefs," it could assert the Townleys' free exercise rights. *Id.* at 619-20. The Ninth Circuit allowed the free exercise rights of the

owners, who were not parties to the action, to pass through their company. *Id.* at 620.

In *Stormans*, one of the plaintiffs was a for-profit grocery store that also operated a pharmacy. The store was owned by family members who, based on their religious beliefs, did not want their pharmacy to be compelled by the government to dispense the Plan B abortifacient. 586 F.3d at 1120. With regard to its standing to bring a free exercise claim, the business argued that its operational principles were an "extension of," and identical to, the beliefs of the family members. Thus, the business argued that it did not "present any free exercise rights of its own different from or greater than its owners' rights." *Id.* The Ninth Circuit held that the company had standing to assert the free exercise rights of its owners, who were not plaintiffs in the action. *Id.*

The D.C. Circuit's ruling that the Freshway Companies cannot assert the free exercise rights of the Gilardi brothers is in direct conflict with the rulings of the Ninth Circuit. The Freshway Companies are instruments through which the Gilardi brothers express their religious beliefs, in particular, their beliefs about actions that they should or should not take concerning the sanctity of human life. The D.C. Circuit erred in ruling that the companies could not advance a claim that the Mandate violates the Gilardis' religious exercise rights as protected by RFRA. The conflict between the D.C. and Ninth Circuits should be resolved by this Court to ensure uniformity in the protection of free exercise rights in this country.

* * *

In the decision below, and in conflict with the Third and Sixth Circuits, the D.C. Circuit held that the owners of two closely-held, family-owned corporations are substantially burdened by the Mandate. And, in conflict with the Tenth Circuit, the court below held that the corporations cannot themselves exercise religion and thus cannot challenge the Mandate in their own right. The D.C., Third and Sixth Circuits have also rejected the Ninth Circuit's approach of allowing a closely-held corporation to assert the free exercise rights of its owners. And, while a majority of the Tenth Circuit held that two "for-profit" corporations are persons capable of exercising religion under RFRA, and thus could challenge the Mandate in their own right, the court did not rule on whether the individual owners of the corporations were themselves burdened by the Mandate.

Clearly, the lower courts are at odds with one another as to who has standing to challenge the Mandate, whose religious exercise is substantially burdened by the Mandate, and whether a secular or for-profit corporation has any religious exercise rights at all. Given these conflicting decisions, and the fact that the Mandate impacts the exercise of a fundamental liberty protected by the First Amendment, there cannot be a more compelling case or controversy warranting this Court's intervention.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and review the D.C. Circuit's decision in tandem with the petitions now pending before this Court in *Hobby Lobby* (No. 13-354), *Conestoga Wood* (No. 13-356), and *Autocam* (No. 13-482). In the

alternative, Petitioners suggest that this Court hold this petition pending the disposition of one or more of these three petitions, and then grant certiorari, vacate the decision below, and remand for further proceedings in light of this Court's decision therein.

Respectfully submitted,

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NOVEMBER 2013

APPENDIX

APPENDIX

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APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5069

[Argued September 24, 2013]
[Decided November 1, 2013]

FRANCIS A. GILARDI, ET AL., APPELLANTS	)
v.	)
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., APPELLEES	)

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cv-00104)

Francis J. Manion, pro hac vice, argued the cause for appellants. With him on the briefs were *Colby M. May* and *Carly F. Gammill*.

Kimberlee Wood Colby was on the brief for *amici curiae* Association of Gospel Rescue Missions, et al., in support of appellants.

Deborah J. Dewart was on the brief for *amicus curiae* Liberty, Life, and Law Foundation in support of appellants.

Dwight G. Duncan was on the brief for *amici curiae* 28 Catholic Theologians, et al. in support of appellants.

Lawrence J. Joseph was on the brief for *amicus curiae* Eagle Forum Education & Legal Defense Fund in support of appellants.

William Lee Saunders, Jr. was on the brief for *amici curiae* American Association of Pro-Life Obstetricians and Gynecologists, et al. in support of appellants.

Dorinda C. Bordlee was on the brief for *amici curiae* Abortion Breast Cancer Coalition, et al. in support of appellants.

Noel J. Francisco was on the brief for *amicus curiae* Archdiocese of Cincinnati in support of appellants.

Michael Dewine, Attorney General, Office of the Attorney General of the State of Ohio, and *Jennifer L. Pratt*, Assistant Attorney General, were on the brief for *amcius curiae* State of Ohio in support of appellants.

Michael F. Smith was on the brief for *amicus curiae* Life Legal Defense Foundation in support of appellants.

Alisa B. Klein, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General, *Ronald C. Machen, Jr.*, U.S. Attorney, *Beth S. Brinkmann*, Deputy Assistant Attorney General, and *Mark B. Stern*, Attorneys.

Lisa S. Blatt, *Robert J. Katerberg*, *Andrew S. Macurdy*, and *Julianna S. Gonen* were on the brief for *amici curiae* Center for Reproductive Rights, et al. in support of appellees.

Charles E. Davidow and *Marcia D. Greenberger* were on the brief for *amici curiae* American Association of University Women, et al. in support of appellees.

Ayesha N. Khan, *Gregory M. Lipper*, and *Daniel Mach* were on the brief for *amici curiae* Americans United for Separation of Church and State, et al. in support of appellees.

Michelle A. Kisloff was on the brief for *amici curiae* Ovarian Cancer National Alliance, et al. in support of appellees.

Martha Jane Perkins was on the brief for *amici curiae* National Health Law Program, et al. in support of appellees.

Jennifer C. Pizer, *Camilla B. Taylor*, and *Thomas W. Ude, Jr.* were on the brief for *amicus curiae* Lambda Legal Defense and Education Fund, Inc. in support of appellees.

Bruce H. Schneider was on the brief for *amici curiae* Physicians for Reproductive Health, et al. in support of appellees.

Before: BROWN, *Circuit Judge*, and EDWARDS and RANDOLPH, *Senior Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* BROWN, with whom *Senior Circuit Judge* EDWARDS joins except as to parts VI, VII, and VIII, and with whom *Senior*

Circuit Judge RANDOLPH joins except as to parts III and IV.

Opinion concurring in part and concurring in the judgment filed by *Senior Circuit Judge* RANDOLPH.

Opinion concurring in part and dissenting in part filed by *Senior Circuit Judge* EDWARDS.

BROWN, *Circuit Judge.* Two years after our decision *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), we are asked to revisit the behemoth known as the Affordable Care Act. This time, however, we are not confronted with a question of constitutional authority. Instead, we must determine whether the contraceptive mandate imposed by the Act trammels the right of free exercise—a right that lies at the core of our constitutional liberties—as protected by the Religious Freedom Restoration Act. We conclude it does.

I

Two brothers, Francis and Philip Gilardi, are equal owners of Freshway Foods and Freshway Logistics—both companies are closely-held corporations that have elected to be taxed under Subchapter S of the Internal Revenue Code. The two companies collectively employ about 400 employees and operate a self-insured health plan through a third-party administrator and stop-loss provider.

As adherents of the Catholic faith, the Gilardis oppose contraception, sterilization, and abortion. Accordingly, the two brothers—exercising their powers as owners and company executives—excluded coverage of products and services falling under these categories.

But along came the Affordable Care Act. Part of the Act directs all group health plans and health insurance issuers to provide, without cost-sharing requirements, preventive care as determined by the Health Resources and Services Administration. 42 U.S.C. § 300gg-13(a)(4). In turn, the Administration issued guidelines requiring coverage for "all Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," as prescribed by a healthcare provider. *Women's Preventive Services Guidelines*, HEALTH RES. & SERVS. ADMIN., http://www.hrsa.gov/womensguidelines/; *see* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection Affordable Care Act, 77 Fed. Reg. 8725, 8725–26 (Feb. 15, 2012) (citing the online HRSA Guidelines); *see also* 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. 147.131(c).[1] There are exceptions—some ephemeral, some permanent—for grandfathered plans, religious organizations, and small businesses. *See* 26 U.S.C. § 4980H(a); *id.* § 4980H(c)(2)(A); 42 U.S.C. § 18011; 45 C.F.R. §§ 147.130(a)(1)(iv)(A)–(B). But the Freshway companies do not fall into any of these categories. As a result, the Gilardis were faced with two choices: adjust their companies' plans to provide the mandated contraceptive services in contravention of their

[1] For ease of reference, we will refer to this provision as "the contraceptive mandate."

religious beliefs, or pay a penalty amounting to over $14 million per year.[2]

Finding themselves on the horns of an impossible dilemma, the Gilardis and their companies filed suit in district court, alleging the contraceptive mandate violated their rights under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, the Free Exercise Clause, the Free Speech Clause, and the Administrative Procedure Act. The plaintiffs moved for a preliminary injunction, but the district court denied their request. With respect to the Freshway companies, the court determined they could not "exercise" religion and thus no substantial burden on religious exercise was demonstrable under RFRA. As for the Gilardis, the court found any burden on the Gilardis' religious beliefs was indirect.

The plaintiffs timely filed an interlocutory appeal and moved for an injunction pending appeal. After having initially denied their motion, we issued, *sua sponte*, an order giving them a temporary reprieve from the mandate.

II

Our standard of review for a denial of a preliminary injunction rests upon what aspect of the district court's decision we are examining. Insofar as our review concerns the district court's consideration of the preliminary-injunction factors and the ultimate decision to grant or deny the injunction, we review for

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[2] The Gilardis could have dropped their healthcare coverage altogether, but they regard this option as morally unthinkable. *See* J.A. at 41 ¶ 10; J.A. at 52 ¶ 10.

an abuse of discretion. *See In re Navy Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012). But we review the legal conclusions underlying the decision *de novo* and review findings of fact for clear error. *Id.*; *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

"In ruling on a preliminary injunction a key issue—often the dispositive one—is whether the movant has shown a substantial likelihood of success on the merits." *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, 639 F.3d 1078, 1083 (D.C. Cir. 2011). To determine this likelihood, we must answer whether the contraceptive mandate of 45 C.F.R. § 147.130(a)(1)(iv), as applied to the Appellants, violates their free-exercise rights as protected by RFRA. As the parties have made eminently clear, we must separately examine the claims by the Freshway companies and their owners.

III

We begin with the Freshway companies. Before addressing the merits of their RFRA claim, we must first ask whether they may bring the challenge at all. The statute allows "[a] *person* whose religious exercise has been burdened" to seek judicial relief, but leaves us bereft of guidance on who a "person" is. *See* 42 U.S.C. § 2000bb-1(c) (emphasis added).

For at least one of our sister circuits (as well as the Appellants), the Dictionary Act, 1 U.S.C. § 1, dispositively answers the question. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1129, 1132 (10th Cir. 2013) (en banc). Under the Act, the definition of "person" extends to "corporations, companies,

associations, firms, partnerships, societies, and joint stock companies"—in other words, it encompasses the corporeal and the incorporeal. 1 U.S.C. § 1. The Freshway companies largely depend on the Dictionary Act's elision of the differences in identity, hoping it applies to their RFRA claim.

But the focus on personhood is too narrow; instead, we must construe the term "person" together with the phrase "exercise of religion." *See Rasul v. Myers*, 512 F.3d 644, 668 (D.C. Cir. 2008) ("Because RFRA prohibits the Government from 'substantially burden[ing] a *person's* exercise of religion' instead of simply the exercise of religion, 42 U.S.C. § 2000bb-1(a), we must construe 'person' as qualifying 'exercise of religion.'" (emphasis in original)), *vacated and remanded on other grounds by* 555 U.S. 1083 (2008); *see also* 42 U.S.C. § 2000bb-1(c) ("A *person whose religious exercise* has been burdened in violation of this section may . . . obtain appropriate relief against a government." (emphasis added)). And RFRA provides us with no helpful definition of "exercise of religion"; all we can glean from the statute is that "'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). We must therefore turn to the full body of our free-exercise caselaw to discern whether the Freshway companies are persons capable of religious exercise under the statute. *See Rasul*, 512 F.3d at 671; *see also Autocam Corp. v. Sebelius*, --- F.3d ----, 2013 WL 5182544, at *7 (6th Cir. Sept. 17, 2013); *Hobby Lobby*, 723 F.3d at 1167 (Briscoe, C.J., concurring in part and dissenting in part).

IV

The query is simple: do corporations enjoy the shelter of the Free Exercise Clause? Or is the free-exercise right a "purely personal" one, such that it is "unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals"? *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (quoting *United States v. White*, 322 U.S. 694, 698–701 (1944)). We turn to the "nature, history, and purpose" of the Clause for our answer. *Id.*

At the time of the Framing, a great debate raged on the precise formulation of what we now know as the Free Exercise Clause. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1480–85 (1990). The earliest drafts from the House of Representatives focused on the protection of conscience, rather than the "exercise of religion." *See id.* at 1482; *see also* 1 ANNALS OF CONGRESS 729 (1789) (noting a later amendment to change the Clause's prototype to read: "no religion shall be established by law, nor shall the equal rights of conscience be infringed"). And as the debates went on, strong concerns arose that the rights of religious sects would not be "well secured under the . . . Constitution." 1 ANNALS OF CONGRESS 730 (remarks of Daniel Carroll, Aug. 15, 1789). To address these concerns and others, the House continued to tinker and toil; once the dust had settled, it eventually proposed a constitutional amendment barring Congress from "prevent[ing] the free exercise" of religion and "infring[ing] the rights of conscience." 1 *id.* at 766. But the Senate had different

ideas, and in the end, it was the free exercise of religion—standing alone—that was sent to the states for ratification. *See* McConnell, *supra*, at 1488; *see also* LOUIS FISHER, RELIGIOUS LIBERTY IN AMERICA: POLITICAL SAFEGUARDS 56 (2002).

This history reveals two things about the Clause's purpose relevant to our inquiry today. First, the constitutional guarantee "extended the broader freedom of action to all believers," allowing for the inclusion of "conduct as well as belief." McConnell, *supra*, at 1490. Second, the adopted formulation encompassed both individual judgment, as well as "the corporate or institutional aspects of religious belief." *Id.* Because the word religion "connotes a community of believers," the prohibition against the impingement on religious free exercise must be understood to cover the activities of both individuals and religious bodies. *See id.*

And these two groups have been the beneficiaries of the Supreme Court's free-exercise jurisprudence. To be sure, the right has largely been understood as a personal one. Before incorporation, the Court described the free-exercise right as an individual one—"the indefeasible right to worship God according to the dictates of conscience." *Cummings v. Missouri*, 71 U.S. 277, 304 (1866). Incorporation did nothing to alter that sentiment; shortly after *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court reaffirmed the personal nature of the right as part of "the mind and spirit of man." *See Jones v. City of Opelika*, 316 U.S. 584, 594 (1942), *overruled on other grounds by* 319 U.S. 103 (1943); *see also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) ("[The purpose of the Free

Exercise Clause] is to secure religious liberty in the *individual* by prohibiting any invasions thereof by civil authority." (emphasis added)). And that understanding still resonates with the modern Court. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 679 n.4 (2002) (Thomas, J., concurring) ("In particular, these rights inhere in the Free Exercise Clause, which unlike the Establishment Clause protects individual liberties of religious worship.").

That is not to say the Court views organizations as constitutional outliers—indeed, its jurisprudence reflects the foundational principle that religious bodies—representing a communion of faith and a community of believers—are entitled to the shield of the Free Exercise Clause. The Court has heard free-exercise challenges from religious entities and religious organizations. *See Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 381 (1990); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330 (1987); *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 292 (1985); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 107–08 (1952). It has listened to the grievances of religious sects and member congregations. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 699 (2012); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 425 (2006); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993). It has even entertained claims by religious and educational institutions. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 579–80 (1983).

Beyond these cases involving religious organizations, however, we glean nothing from the Court's jurisprudence that suggests other entities may raise a free-exercise challenge. But that the Court has never seriously considered such a claim by a secular corporation or other organizational entity is not to say it never will. For the nonce, only one aberrational case comes to mind. In *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961), a corporation operated by members of the Orthodox Jewish faith challenged the constitutionality of Massachusetts' Sunday closing laws. *See id.* at 618. The Court summarily disposed of the corporation's free-exercise claim, tersely noting that *Braunfeld v. Brown*, 366 U.S. 599 (1961), obviated the need for further discussion. *See Crown Kosher*, 366 U.S. at 631. Technically speaking, the Court did rule on the merits of the case. But it remained *dubitante* about standing—perhaps the novelty of a secular corporation bringing a free-exercise challenge was *too* novel. *See id.* ("Since the decision in [*Braunfeld*] rejects the contentions presented by these appellees on the merits, we need not decide whether appellees have standing to raise these questions."); *cf. Hobby Lobby*, 723 F.3d at 1150 (Hartz, J., concurring). Meanwhile, we need not base a right of free exercise for nonreligious organizations on so thin a reed of caselaw, especially as both we and the Supreme Court have expressed strong doubts about that proposition. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 321 (1980) (explaining that a free-exercise challenge is "one that ordinarily requires individual participation"); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003) (noting "the dubious proposition that a charitable

corporation not otherwise defined can exercise religion as protected in the First Amendment").

Citing *Citizens United v. FEC*, 558 U.S. 310 (2010), the Freshway companies argue that corporations—religious or otherwise—are entitled to the full array of First Amendment protections, including the right to free exercise. They are not the only proponents of this position. *See Hobby Lobby*, 723 F.3d at 1135 (majority opinion) ("Because Hobby Lobby and Mardel express themselves for religious purposes, the First Amendment logic of *Citizens United,* where the Supreme Court has recognized a First Amendment right of for-profit corporations to express themselves for political purposes, applies as well." (citation omitted)); *see also Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 400 (3d Cir. 2013) (Jordan, J., dissenting) (citing *Citizens United*, 558 U.S. at 342). There is an appeal to this simple reasoning; after all, the free-exercise and free-speech rights are enshrined in the same constitutional provision, separated only by a semicolon.

Perhaps Appellants' constitutional arithmetic, *Citizens United* plus the Free Exercise Clause equals a corporate free-exercise right, will ultimately prevail. But we must be mindful that *Citizens United* represents the culmination of decades of Supreme Court jurisprudence recognizing that all corporations speak. *See Conestoga Wood*, 724 F.3d at 384. When it comes to the free exercise of religion, however, the Court has only indicated that people and churches worship. As for secular corporations, the Court has been all but silent.

Consider *Bellotti*—the progenitor of *Citizens United*. When the *Bellotti* Court declared "political speech does not lose First Amendment protection 'simply because its source is a corporation,'" *Citizens United*, 558 U.S. at 342 (quoting *Bellotti*, 435 U.S. at 784), it reviewed many cases in which the Court invalidated a state law because it "infringe[d on] protected speech by corporate bodies." *Bellotti*, 435 U.S. at 778 n.14. In other words, *Bellotti* crystallized a robust body of caselaw giving rise to the constitutional right of corporate political speech, which the *Citizens United* Court could rely on as a firm foundation.

No such *corpus juris* exists to suggest a free-exercise right for secular corporations. Thus, we read the "nature, history, and purpose" of the Free Exercise Clause as militating against the discernment of such a right. When it comes to corporate entities, only religious organizations are accorded the protections of the Clause. And we decline to give credence to the notion that the for-profit/non-profit distinction is dispositive, as that, too, is absent from the Clause's history. Fortunately, we need not opine here on what a "religious organization" is, as the Freshway companies have conceded they do not meet that criterion.

The Freshway companies alternatively assert they can vindicate the free-exercise rights of their owners. They reason that if "a company is owned and controlled by a few like-minded individuals who share the same religious values and run the company pursuant to those values," the company may serve as the owners' surrogate. Appellants' Br. at 50. This pass-through theory of corporate standing is logically and structurally appealing in light of the government's

shell game. And *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988) provides longstanding, if illusory, support. In *Townley*, the Ninth Circuit concluded— without much in the way of legal substantiation—that the corporation was "merely the instrument through and by which [the owners] express[ed] their religious beliefs." *Id.* at 619.

Admittedly, there is a certain theological congruence to *Townley*'s characterization. The Bible says "faith without works is dead." *James* 2:26 (King James). As amici point out, not only are Catholic employers morally responsible for the management of their companies, "instructing or encouraging someone else to commit a wrongful act is itself a grave moral wrong—i.e., 'scandal'—under Catholic doctrine." Br. of Catholic Theologians at 3. Thus, amici reason, "the Mandate thrusts Catholic employers into a 'perfect storm' of moral complicity in the forbidden actions." Br. of Catholic Theologians at 5; *see also* Br. of the Archdiocese of Cincinnati at 16–17 nn. 6, 7. When even attenuated participation may be construed as a sin, *see, e.g.*, *United States v. Lee*, 455 U.S. 252, 261 n.12 (1982), it is not for courts to decide that the corporate veil severs the owner's moral responsibility.

But dogma does not dictate justiciability. Though *Townley*'s conclusion is theologically defensible, its standing *bona fides*, supported only by a reference to a footnote in *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985), are more dubious. The *Alamo Foundation* Court relied on a theory of religious associational standing; in other words, the organization could raise a free-exercise defense on behalf of one of its executives because the

executive was an adherent to the group's religious creed. *See id.* at 303 n.26. How this supports standing for a secular corporation to vindicate its owners' free-exercise rights is unclear.

Townley's misconception of religious associational standing has spread from one free-exercise case to another, even creeping its way into the current contraceptive mandate challenges. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009); *see also Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 800–02 (E.D. Mich. 2013); *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 428 (W.D. Pa. 2013). While we decline the Freshway companies' invitation to accept *Townley*'s *ipse dixit* that closely held corporations can vindicate the rights of their owners, we understand the impulse. The free exercise protection—a core bulwark of freedom—should not be expunged by a label. But for now, we have no basis for concluding a secular organization can exercise religion.

V

That leaves the Gilardis.[3] Obviously, they have no difficulty satisfying the threshold inquiry to which their enterprises succumbed; they are, most assuredly, "persons" under RFRA. *See also Rasul v. Myers*, 563 F.3d 527, 533 (D.C. Cir. 2009) (Brown, J., concurring) ("RFRA does not define 'person,' so we must look to the word's ordinary meaning. There is little mystery that a 'person' is 'an individual human being . . . as distinguished from an animal or a thing.'" (quoting

[3] We agree with Judge Edwards that the Gilardis' Article III standing is indisputable. *See* Op. of Edwards, J., at 6–7.

WEBSTER'S NEW INTERNATIONAL DICTIONARY 1606 (1981)). And there is no dispute that the mandate, as directed to the Gilardis, is a palpable and discernible infringement of free exercise. All that stands between the Gilardis and the hope of vindication is the uncertain[4] barrier of the shareholder-standing rule and an inchoate concern about prudential standing—a "jurisditional issue which cannot be waived or conceded" in this circuit. *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 674 (D.C. Cir. 2013).

The shareholder-standing rule gives us little pause; we are satisfied that the Gilardis have been "injured in a way that is separate and distinct from an injury to the corporation." *See Crosby v. Beam*, 548 N.E.2d 217, 219 (Ohio 1989); *see also Rawoof v. Texor Petroleum Co.*, 521 F.3d 750, 757 (7th Cir. 2008) (employing the state-law derivative action rule to address shareholder standing in a federal question case). If the companies have no claim to enforce—and as nonreligious corporations, they cannot engage in religious exercise—we are left with the obvious conclusion: the right belongs to the Gilardis, existing independently of any right of the Freshway companies. Thus, the Gilardis' injury—which arises therefrom—is "separate

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[4] We assume, without deciding, that Congress did not intend to abrogate the prudential-standing requirement in enacting RFRA. We share Judge Edwards' concerns about whether prudential-standing principles apply to RFRA challenges and whether the shareholder-standing rule is part of the prudential-standing equation. *See* Op. of Edwards, J., at 9–12. But it would be imprudent to decide these questions without the benefit of full briefing on this issue, especially as the Gilardis can easily surmount the shareholder-standing hurdle.

and distinct," providing us with an exception to the shareholder-standing rule.[5]

VI

We now reach the heart of the Gilardis' RFRA claim. The Act requires the Gilardis to "allege[] a substantial burden on [their] religious exercise." *Kaemmerling v. Lappin*, 553 F.3d 669, 677 (D.C. Cir. 2008). Religious exercise is broadly defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A); *see also id.* § 2000bb-2. A "substantial burden" is "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Kaemmerling*, 553 F.3d at 678 (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981)).

We begin with the peculiar step of explaining what is *not* at issue. This case is not about the sincerity of the Gilardis' religious beliefs, nor does it concern the

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[5] Our conclusion is buttressed by other considerations. First, Ohio caselaw does not treat the derivative-action rule as an unyielding one; to the contrary, some flexibility has been shown when it comes to close corporations such as the Freshway companies. *See, e.g.*, *Yackel v. Kay*, 642 N.E.2d 1107, 1109–10 (Ohio Ct. App. 1994). Moreover, none of the principles underlying the shareholder-standing rule is offended by allowing the Gilardis' suit to proceed—there is no danger of multiple lawsuits, and no creditor or shareholder interests will be compromised as a result of their RFRA challenge. *See* 12B W. FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5911.50 (2006). We recognize that shareholders of large public corporations will be subject to different constraints and will likely find the burden threshold insuperable.

theology behind Catholic precepts on contraception. The former is unchallenged, while the latter is unchallengeable. *See id.* at 716 ("Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); *see also United States v. Ballard*, 322 U.S. 78, 86 (1944) ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."). Equally uncontroverted is the nature of the Gilardis' religious exercise: they operate their corporate enterprises in accordance with the tenets of their Catholic faith. *See Hobby Lobby*, 723 F.3d at 1189 (Matheson, J., concurring in part and dissenting in part).

The only dispute touches on the characterization of the burden. The burden is too remote and too attenuated, the government says, as it arises only when an employee purchases a contraceptive or uses contraceptive services. We disagree with the government's foundational premise. The burden on religious exercise does not occur at the point of contraceptive purchase; instead, it occurs when a company's owners fill the basket of goods and services that constitute a healthcare plan. In other words, the Gilardis are burdened when they are pressured to choose between violating their religious beliefs in managing their selected plan or paying onerous penalties. *See Thomas*, 450 U.S. at 717–18; *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) ("The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable,

for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."); *Kaemmerling*, 553 F.3d at 678.

The Framers of the Constitution clearly embraced the philosophical insight that government coercion of moral agency is odious. Penalties are impertinent, according to Locke, if they are used to compel men "to quit the light of their own reason, and oppose the dictates of their own consciences." JOHN LOCKE, A LETTER CONCERNING TOLERATION 13–14 (J. Brook ed., 1792) (1689). Madison described conscience as "the most sacred of all property," James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, at 174, *reprinted in* JAMES MADISON'S "ADVICE TO MY COUNTRY" 25, 83–84 (David B. Mattern ed., 1997), and placed the freedom of conscience prior to and superior to all other natural rights. Religion, he wrote, is "the duty which we owe to our Creator . . . being under the direction of reason and conviction only, not of violence or compulsion," 1 MADISON PAPERS 174 (1962), "precedent" to "the claims of Civil Society," JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785); *see also United States v. Macintosh*, 283 U.S. 605, 633–34 (1931) (Hughes, C.J., dissenting) ("[I]n the forum of conscience, duty to a moral power higher than the state has always been maintained. . . . The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.").

From thence sprang the idea that the right to free exercise necessarily prohibits the government from "compel[ling] a man to furnish contributions of money for the propagation of opinions which he disbelieves."

THOMAS JEFFERSON, THE VIRGINIA ACT FOR ESTABLISHING RELIGIOUS FREEDOM (1786). And that prohibition has plainly manifested itself throughout the years as an integral component of the free-exercise guarantee. Justice Brennan, writing for the Court in *Sherbert v. Verner*, 374 U.S. 398 (1963), put it well: "Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals because they hold religious views abhorrent to the authorities." *Id.* at 402 (citations omitted).

The contraceptive mandate demands that owners like the Gilardis meaningfully approve and endorse the inclusion of contraceptive coverage in their companies' employer-provided plans, over whatever objections they may have. Such an endorsement—procured exclusively by regulatory ukase—is a "compel[led] affirmation of a repugnant belief." *See id.* That, standing alone, is a cognizable burden on free exercise. And the burden becomes substantial because the government commands compliance by giving the Gilardis a Hobson's choice. They can either abide by the sacred tenets of their faith, pay a penalty of over $14 million, and cripple the companies they have spent a lifetime building, or they become complicit in a grave moral wrong. If that is not "substantial pressure on an adherent to modify his behavior and to violate his beliefs," we fail to see how the standard could be met. *See Thomas*, 450 U.S. at 718.

In suggesting that no substantial burden lies with the Gilardis, the government invokes the principles undergirding the bargain for the corporate veil. True, it is an elementary principle of corporate law that "incorporation's basic purpose is to create a distinct

legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). And as part of that fiction, shareholders forgo certain rights pertaining to the corporation. *See Grote v. Sebelius*, 708 F.3d 850, 858 (7th Cir. 2013) (Rovner, J., dissenting). But we cannot simply stop there. Shareholders make such a sacrifice because the corporation can generally exercise some analogue of the forgone right. As a corporation is "capable of making and executing contracts, possessing and owning real and personal property in its own name, suing and being sued," a shareholder cannot expect to exercise the right to take these actions in his or her personal capacity. *See* 1 W. FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 25 (2006). This is no less true with constitutional rights. *See Franks v. Rankin*, Nos. 11AP-934, 11AP-962, 2012 WL 1531031, at *10 (Ohio Ct. App. May 1, 2012) (rejecting a shareholder's due process claim brought on behalf of the corporation).

Mindful of these principles, consider the ramifications of the government's argument. It contends free exercise is an individual right. If the Gilardis had run their businesses as sole proprietorships, they would presumably have a viable RFRA claim under the government's theory. *Cf. Braunfeld*, 366 U.S. at 601 (describing individual merchants who challenged a Sunday closing law under the Free Exercise Clause). But the government, relying on what is perhaps an incomplete understanding of corporate law, argues the Gilardis lose the ability to make such a claim by taking advantage of state

incorporation law. And as a corollary to the government's expansive theory, the party being regulated—the corporation—cannot make a free-exercise claim, as it is not an individual capable of exercising religion. So, in the government's view, there is no corporate analogue, and the individual right disappears into the ether.

This interpretation is perplexing and troubling. It is perplexing because we do not believe Congress intended important statutory rights to turn on the manner in which an individual operates his businesses. The government's logic is also quite troubling because it would eventually reach First Amendment free-exercise cases. The same language, "exercise" "of religion," appears both in the Constitution and RFRA. *Compare* U.S. CONST. AMEND. I ("Congress shall make no law respecting an establishment *of religion*, or prohibiting *the free exercise* thereof . . . ."), *with* 42 U.S.C. § 2000bb-1(a) ("Government shall not burden a person's *exercise of religion* . . . ."). Thus, if the government is correct, the price of incorporation is not only the loss of RFRA's statutory free-exercise right, but the constitutional one as well. And that would create a risk of an unconstitutional condition in future cases. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[T]his Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on the basis that *infringes on his constitutionally protected interests* . . . ." (emphasis added)).

A parade of horribles will descend upon us, the government exclaims, if religious beliefs could serve as a private veto for the contraceptive mandate. Hyperbole aside, we note it was *Congress*, and not the courts, that allowed for an individual's religious conscience to prevail over substantially burdensome federal regulation. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the Supreme Court provided an apt response:

> 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). Congress determined that the legislated test [of RFRA] "is a workable test for striking sensible balances between religious liberty and competing governmental interests." § 2000bb(a)(5).

Id. at 436 (alteration in original).

VII

As the Gilardis have demonstrated the substantial nature of their burden, we now turn to strict scrutiny, a "searching examination" where the onus is borne exclusively by the government. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2419 (2013); *see also* 42 U.S.C. § 2000bb-1(b). "[U]nless the government demonstrates a compelling governmental interest, and uses the least restrictive means of furthering that interest," the mandate must be set aside. *See Holy Land*, 333 F.3d at

166 (internal quotation marks omitted); *see also* 42 U.S.C. § 2000bb. While "strict scrutiny must not be strict in theory, but fatal in fact," neither should it be "strict in theory but feeble in fact." *Fisher*, 133 S. Ct. at 2421 (internal quotation marks omitted).

A

It is difficult to divine precisely what makes an interest "compelling," but a few reliable metrics exist. The interest cannot be "broadly formulated"—the test demands particularity. *See O Centro*, 546 U.S. at 431 (citing *Yoder*, 406 U.S. at 213, 221). The "compelling" nature of the interest is contingent on its context. *See id.* (citing *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995)). And the interest must be "of the highest order," *Yoder*, 406 U.S. at 215, meaning it cannot leave "appreciable damage to [a] supposedly vital interest unprohibited," *Lukumi*, 508 U.S. at 547 (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in the judgment)).[6]

The government cites several concerns to bolster its claim that the contraceptive mandate serves a compelling interest (or interests), but its recitation is sketchy and highly abstract. Perhaps the government thought it best to focus on justiciability, hoping its *ipse dixit* would be sufficient to survive strict scrutiny. After

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[6] Much ink has already been spilled on how the government's interests leave "appreciable damage" unprohibited. *See Conestoga Wood*, 724 F.3d at 413–14 (Jordan J., dissenting); *Hobby Lobby*, 723 F.3d at 1143–44. We share these concerns, but need not repeat them here.

all, if no one has standing to object, the state avoids the searching inquiry into its means. Here, the articulated concerns range from "safeguarding the public health" to "protecting a woman's compelling interest in autonomy" and promoting gender equality. But the government does little to demonstrate a nexus between this array of issues and the mandate.

For example, as a standalone principle, "safeguarding the public health" seems too broadly formulated to satisfy the compelling interest test. It has been used to justify all manner of government regulations in other contexts. *See Roe v. Wade*, 410 U.S. 113, 154 (1973) (abortion laws); *Loxley v. Chesapeake Hosp. Auth.*, No. 97-2539, 1998 WL 827285, at *4 (4th Cir. Dec. 1, 1998) (competence of medical personnel); *Dunagin v. City of Oxford*, 718 F.2d 738, 747 (5th Cir. 1983) (en banc) (liquor advertisement rules). And here, the government relies on the broad sweep of that interest once more, citing *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011), an individual-mandate case in which a district court found the public health interest sufficient. But the invocation of the interest in *Mead* seems empty, reflexive, and talismanic. The government cites *Mead* as if to say, "once a compelling interest, always a compelling interest." It fails to recognize that "safeguarding the public health" is such a capacious formula that it requires close scrutiny of the asserted harm. *See O Centro*, 546 U.S. at 431. We cannot be satisfied with the government's representation as to the compelling nature of the interest simply because other courts have reached that conclusion in the generality of cases. *See Yoder*, 406 U.S. at 221.

The nebulousness of the government's interest, however, prevents us from engaging in the type of exacting scrutiny warranted here. What exactly is the government trying to ameliorate? Is it the integrity of "the health and insurance markets"? Surely, that cannot be the answer; the comprehensive sweep of the Affordable Care Act will remain intact with or without the mandate. Or is it a need to provide greater access to contraceptive care? If so, as we note below, the reasons underpinning that need are tenuous at best. If we are to assess whether an exemption for the Gilardis would pose an "impediment to [a governmental] objective[]," we must first be able to discern what that objective *is*. *See id.* at 221, 236. Simply reciting *Mead* is not enough.

The government's invocation of a "woman's compelling interest in autonomy" is even less robust. The wording is telling. It implies autonomy is not the state's interest to assert. Nevertheless, the government, quoting *Eisenstadt v. Baird*, 405 U.S. 438 (1972), claims the mandate protects a woman's ability to decide "whether to bear or beget a child." *See id.* at 453.

Our difficulty in accepting the government's rationale stems from looking at the *Eisenstadt* quote in its entirety: "If the right of privacy means anything, it is the right of the individual, married or single, *to be free from unwarranted governmental intrusion* into matter so fundamentally affecting a person as the decision to bear or beget a child." *Id.* (emphasis added). Regardless of what this observation means for us

today,[7] it is clear the government has failed to demonstrate how such a right—whether described as noninterference, privacy, or autonomy—can extend to the compelled subsidization of a woman's procreative practices. Again, our searching examination is impossible unless the government describes its purposes with precision. As with *Mead*, simply invoking *Eisenstadt* is not enough.

Equally unconvincing is the government's assertion that the mandate averts "negative health consequences for both the woman and the developing fetus." From the outset, we note the science is debatable and may actually undermine the government's cause. For the potential mother, as one amicus notes, the World Health Organization classifies certain oral contraceptives as carcinogens, marked by an increased risk for breast, cervical, and liver cancers. Br. of the Breast Cancer Prevention Institute, at 8–9. On the other hand, the contraceptives at issue have been approved by the Food and Drug Administration, supported by research touting their benefits. *See* Op. of Edwards, J., at 30. This tug-of-war gives us pause because the government has neither acknowledged nor resolved these contradictory claims.

Even giving the government the benefit of the doubt, the health concerns underpinning the mandate can be variously described as legitimate, substantial, perhaps even important, but it does not rank as

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[7] *See* A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly's Draft Abortion Opinion*, 29 HARV. J.L. & PUB. POL'Y 1035, 1048 (2006) (describing the transformation of the right described in *Griswold* and *Roe*).

compelling, and that makes all the difference. *Cf. Hutchins v. District of Columbia*, 188 F.3d 531, 541 (D.C. Cir. 1999) (en banc). Caselaw concerning the analogous context of abortion is particularly illuminating in this regard. Time and again, the government's interest in such cases has been deemed legitimate and substantial. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *see also Gonzales v. Carhart*, 550 U.S. 124, 145 (2007). But it has never been *compelling*. *See Casey*, 505 U.S. at 932 (Blackmun, J., concurring in part and dissenting in part) ("[W]hile a State has 'legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child,' legitimate interests are not enough. To overcome the burden of strict scrutiny, the interests must be compelling."). And we have no reason to believe otherwise here. While we do not exclude the possibility that the state's interest in safeguarding maternal or fetal health sometimes may be compelling, we cannot draw such a conclusion in this particular context. *See O Centro*, 546 U.S. at 431.

Finally, we note "gender equality" is a bit of a misnomer; perhaps the government labeled it as such for the veneer of constitutional importance attached to the term. More accurately described, the interest at issue is resource parity—which, in the analogous abortion context, the Supreme Court has rejected as both a fundamental right and as an equal-protection issue. *See Harris*, 448 U.S. at 317–18 ("Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an

entitlement to such funds as may be necessary to realize all the advantages of that freedom."); *Maher v. Roe*, 432 U.S. 464, 471 (1977) ("But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.").

The government cites *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), to advance its "gender equality" interest. There, the Court observed that "[a]ssuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests." *Id.* at 626. But when that observation is put into context, it fails to support the government's case. *U.S. Jaycees* concerned an organization that had shut women out entirely from a superior class of membership; it did not involve disparate membership fees or any resource-parity issue that may sustain the government's argument. *See id.* at 613, 628. This case is quite different. Beyond the question of access, it is difficult for the government to suggest the interests of women are monolithic, and unlike *U.S. Jaycees*, the government's proposed solution clearly impinges on other core prerogatives.

B

Let us assume, however, the government has a compelling interest. Even then, we cannot see how the mandate is "the least restrictive means of furthering that . . . interest." *See* 42 U.S.C. § 2000bb-1. It suffers from two flaws that cannot be overcome. First, there are viable alternatives—presented by the Gilardis and others—that would achieve the substantive goals of the mandate while being sufficiently accommodative of religious exercise. *See* Appellants' Br. at 61; *see also*

Conestoga Wood, 724 F.3d at 414–15 (Jordan, J., dissenting). The government could defeat these alternatives by proving they would "present an administrative problem of such magnitude, or . . . afford the exempted class so great a competitive advantage, that such a requirement would . . . render[] the entire statutory scheme unworkable." *Sherbert*, 374 U.S. at 408–09. But it has made no such case; for all we know, a broader religious exemption would have so little impact on so small a group of employees that the argument cannot be made.

Moreover, the mandate is self-defeating. When a government regulation "fail[s] to prohibit nonreligious conduct that endangers [its asserted] interests in a similar or greater degree" than the regulated conduct, it is underinclusive by design.[8] *See Lukumi*, 508 U.S. at 543. And that underinclusiveness can suggest an inability to meet the narrow-tailoring requirement, as it raises serious questions about the efficacy and asserted interests served by the regulation. In this case, small businesses, businesses with grandfathered plans (albeit temporarily), and an array of other employers are exempt either from the mandate itself or

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[8] Underinclusiveness is generally a relevant consideration of the narrow-tailoring inquiry. *See Lukumi*, 508 U.S. at 546 ("First, even were the governmental interests compelling, the ordinances are not drawn in narrow terms to accomplish those interests. As we have discussed, all four ordinances are *overbroad or underinclusive* in substantial respects." (emphasis added)). We recognize the considerable overlap between narrow-tailoring underinclusiveness and the "appreciable damage" component of the compelling-interest prong. Nevertheless, we need not reconcile the distinctions between the two—under both formulations, the government falls short. *See supra* at 24 n.6.

from the entire scheme of the Affordable Care Act. Therefore, the mandate is unquestionably underinclusive. *See Hobby Lobby*, 723 F.3d at 1143; *see also Conestoga Wood*, 724 F.3d at 414 (Jordan, J., dissenting) ("It cannot legitimately be said to vindicate a compelling governmental interest because the government has already exempted from its reach grandfathered plans, employers with under 50 employees, and what it defines as 'religious employers', thus voluntarily allowing millions upon millions of people—by some estimates 190 million—to be covered by insurance plans that do not satisfy the supposedly vital interest of providing the public with free contraceptives." (internal citations omitted)).

A word on *Lee*. We would be remiss if we omitted this observation by the Court:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

455 U.S. at 261. The government understands this quote to foreclose free-exercise claims by employers like the Gilardis. But once again, context matters. We mention *Lee* in our narrow-tailoring discussion because that is where it belongs.[9] The Court made the

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[9] *Lee* also reinforces our doubts about whether the government's asserted interests are sufficiently compelling. The proper functioning of the tax system was perceived as an interest of "a high order," *see* 455 U.S. at 260, akin to interests of "public safety, peace, or order" that justified government intrusions on religious

statement quoted above while evaluating whether the "limitation on religious liberty . . . [was] essential to accomplish an overriding governmental interest." *Id.* at 257. In engaging in that inquiry, the Court examined "whether accommodating the Amish belief [would] unduly interfere with fulfillment of the governmental interest [of assuring contribution to the Social Security scheme]." *Id.* at 259.

Lee was a rare case in which the government fended off a strict-scrutiny challenge by proving exemptions would "present an administrative problem of such magnitude . . . that such a requirement would have rendered the entire statutory scheme unworkable." *Sherbert*, 374 U.S. at 408–09; *see Lee*, 455 U.S. at 158 ("Moreover, a comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer."). Proving the incompatibility of the requested religious exemption was necessary to prove that the government had employed the least-restrictive means. *See Lee*, 455 U.S. at 259–60 ("Unlike the situation presented in [*Yoder*], it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs."). Congress had carefully determined the breaking point of Social Security—any uncontemplated exemptions could render the statutory scheme unworkable. *See id*. at 258.

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exercise in the past, *see Sherbert*, 374 U.S. at 403. Given our many doubts about the interests posited, we are skeptical about whether the mandate is designed to address "the gravest abuses, endangering paramount interest." *See Sherbert*, 374 U.S. at 406.

In contrast, the government has not proven—nay, even asserted—statutory unworkability here. Its "private veto" concern is somewhat on point, but without substance or substantiation, is nowhere near enough. If we found narrow tailoring satisfied by mere *ipse dixit*, the strict-scrutiny inquiry would become feeble indeed. And unlike *Lee*, where the government successfully asserted the Social Security system required every contribution that Congress did not otherwise exempt, there is nothing to suggest the preventive-care statute would become unworkable if employers objecting on religious grounds could opt out of one part of a comprehensive coverage requirement. The Gilardis' employees will still receive an array of services such as well-woman visits, gestational-diabetes screenings, HPV testing, counseling for sexually-transmitted infections, support for breastfeeding, and counseling for interpersonal and domestic violence. *See Women's Preventive Services Guidelines*, HEALTH RES. & SERVS. ADMIN., http://www.hrsa.gov/womensguidelines/. The provision of these services—even without the contraceptive mandate—by and large fulfills the statutory command for insurers to provide gender-specific preventive care. At the very least, the statutory scheme will not go to pieces.

VIII

We conclude the district court erred in denying a preliminary injunction for the Gilardis on the grounds that their case was unlikely to succeed on the merits; therefore, we reverse the district court's denial of a preliminary injunction for the individual owners. Because the court premised its decision entirely on a

question of law, we must remand for consideration of the other preliminary-injunction factors. *See Chaplaincy of Full Gospel Churches*, 454 F.3d at 304. We affirm the district court's denial of a preliminary injunction with respect to the Freshway companies.

So ordered.

RANDOLPH, *Senior Circuit Judge*, concurring in part and concurring in the judgment:

I do not join parts III and IV of Judge Brown's opinion because I do not believe we need to reach the potentially far-reaching corporate free-exercise question. Other courts in contraceptive-mandate cases have "decline[d] to address the unresolved question of whether for-profit corporations can exercise religion." *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 114 (D.D.C. 2012); *see Legatus v. Sebelius*, 901 F. Supp. 2d 980, 988 (E.D. Mich. 2012); *cf. Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc) (majority opinion) (addressing only claims by corporate, but not individual, plaintiffs). The same approach may be used without deciding the rights of the Freshway Corporations because the government could enforce the mandate against the corporations only by compelling the Gilardis to act. Since "it is not necessary to decide more, it is necessary not to decide more." *PDK Labs. Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).

We should be particularly hesitant to pass unnecessarily on such a complex issue. If secular for-

profit corporations can never exercise religion, what of profitable activities of organized religions? *See Hernandez v. Comm'r*, 490 U.S. 680, 709 (1989) (O'Connor, J., dissenting). If only religious for-profit organizations have a free-exercise right, how does one distinguish between religious and non-religious organizations? *See Hobby Lobby Stores*, 723 F.3d at 1136-37 & n.12; *id.* at 1170-75 (Briscoe, C.J., concurring in part and dissenting in part). Why limit the free-exercise right to religious organizations when many business corporations adhere to religious dogma? *See* Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Money-Makers?*, 21 GEO. MASON L. REV. (manuscript at 11-24) (forthcoming fall 2013). If non-religious organizations do not have free-exercise rights, why do non-religious natural persons (athiests, for example) possess them? *Torcaso v. Watkins*, 367 U.S. 488, 495-96 & n.11 (1961). If a corporate free-exercise right is recognized, in any form, there are equally challenging secondary questions. How should the beliefs of a religious corporation be determined? Can publicly traded corporations be religious? If so, do they take on the religions of their shareholders as a matter of course? If a religious corporation is sold, does it retain its religious identity? These questions, challenging in themselves, would confront us in different permutations across the diverse entity forms and organizational structures of the American business landscape.

I also write separately to emphasize the importance of the Freshway Corporations' election to be taxed under subchapter S of the Internal Revenue Code. I.R.C. §§ 1361–1379. As a result, the Freshway Corporations do not pay corporate income taxes. *See*

I.R.C. § 1363(a). Instead, the income of the Freshway Corporations passes through, pro rata, to their shareholders, the Gilardis. *See* I.R.C. § 1366(a)(1). Subchapter S disregards the corporate form for purposes of the corporate income tax. We must ask why Congress would have disregarded the corporate form for subchapter S corporations but then wanted it imposed to prevent their owners from asserting free-exercise rights under RFRA. There is no good answer, or at least we have received none. It would be incongruous to emphasize the corporate veil in rigid form for RFRA purposes while disregarding it for tax purposes under subchapter S. This inference is particularly compelling because both subchapter S and the "tax" that enforces the contraceptive mandate are part of the Internal Revenue Code. I.R.C. § 4980D.

The pass-through provisions of subchapter S matter for an additional reason. If the Gilardis do not order the Freshway Corporations to comply with the mandate, then their individual tax returns will be directly affected. As shareholders of an S Corporation (technically, they are treated as one shareholder under I.R.C. § 1361(c)(1)(A)(ii)), they would "take[] into account" their "pro rata share of the corporation's . . . income" in determining their income tax liabilities. I.R.C. § 1366(a)(1). In other words, as a direct result of the mandate's operation the Gilardis themselves will have less income in each taxable year. This underscores the "pressure on [the Gilardis] to modify [their] behavior and to violate [their] beliefs." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981).

EDWARDS, *Senior Circuit Judge*, concurring in part and dissenting in part:

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I agree that Appellants Francis and Phil Gilardi have standing to pursue a cause of action under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb–2000bb-4. I also agree with Judge Brown that the corporate entities that are solely owned by the Gilardis, Freshway Logistics, Inc. and Fresh Unlimited, Inc., d/b/a Freshway Foods (collectively "Freshway"), do not have standing to seek relief under RFRA.

However, I strongly disagree with the majority's holding on the merits. Under the Patient Protection and Affordable Care Act of 2010 ("Affordable Care Act"), 42 U.S.C. § 300gg-13(a)(4), Freshway is required to include in its health care plan "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012); *see id.* at 8725 n.1 (providing hyperlink to the applicable Health Resources and Services Administration guidelines). The Gilardis contend that compliance with this directive—also known as "the Mandate"—will force them to violate "their Catholic religious beliefs" against contraception. Br. of Appellants at 14.

No one doubts the sincerity of the Gilardis' religious beliefs against contraception. Their legal claim, however, is seriously wanting. The Gilardis complain that the Mandate imposes a "substantial burden" on their "exercise of religion" under RFRA, 42 U.S.C. § 2000bb-1(a), because *their companies* are required to

provide health insurance that includes contraceptive services. This is a specious claim.

It has been well understood since the founding of our nation that legislative restrictions may trump religious exercise. *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961). Were it otherwise, "professed doctrines of religious belief [would be] superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." *Reynolds v. United States*, 98 U.S. 145, 167 (1878). As the Court noted in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988):

> The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions.

Id. at 452.

The Gilardis' claim in this case finds no support in the law. They are not required to use or endorse contraception, and they remain free to openly oppose contraception. The Mandate requires nothing more than that the companies, *not the Gilardis*, offer medical insurance that includes coverage of contraceptive services for those employees who want it. The Supreme Court has never applied the Free Exercise Clause to

find a substantial burden on a plaintiff's religious exercise where the plaintiff is not himself required to take or forgo action that violates his religious beliefs, but is merely required to take action that might enable other people to do things that are at odds with the plaintiff's religious beliefs. Therefore, the Gilardis cannot claim to be substantially burdened by the Affordable Care Act—a neutral statute of general applicability that regulates public health and welfare and in no way limits their exercise of religion.

If I were to indulge the implausible suggestion that the Mandate imposes a substantial burden on Appellants' exercise of religion, I would disagree with the majority's conclusion that the Government has failed to establish that the Mandate is the least restrictive means of furthering a compelling interest. When the record in this case is viewed through the lens of well-established precedent, the Mandate easily satisfies the requirements of the compelling governmental interest test.

As the Supreme Court made clear in *United States v. Lee*, 455 U.S. 252 (1982), a decision that has been repeatedly cited and never questioned:

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, *but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory*

> *schemes which are binding on others in that activity.*

Id. at 261 (emphasis added). Freshway and the Gilardis get no pass on this rule merely because the companies are solely owned by the Gilardis. *Lee* and other like authorities show that Appellants' claim on the merits is spurious.

I. STANDING

A. The Companies Have No Standing to Pursue a Cause of Action Under RFRA

Although the Supreme Court has long recognized Free Exercise protection for individuals and religious organizations, "the nature, history, and purpose" of the Clause counsel against extending the right to nonreligious corporate entities. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978); *Grote v. Sebelius*, 708 F.3d 850, 857 (7th Cir. 2013) (Rovner, J., dissenting) ("General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion." (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012))); *see also Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 384 (3d Cir. 2013) ("*Citizens United* [*v. FEC*, 558 U.S. 310 (2010),] is . . . grounded in the notion that the Court has a long history of protecting corporations' rights to free speech. . . . [T]here is [not] a similar history of courts providing free exercise protection to corporations.").

The dispositive point here is that while general business corporations may engage in expression related to their business interests, independent of their

owners' interests, general business corporations "do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors." *Grote*, 708 F.3d at 857 (Rovner, J., dissenting) (quoting *Hobby Lobby*, 870 F. Supp. 2d at 1291). Therefore, "[r]eligious exercise is, by its nature, one of those 'purely personal' matters referenced in [*Bellotti*, 435 U.S. at 778 n.14] which is not the province of a general business corporation." *Id.* Freshway has conceded that it is not a religious organization for purposes of the Free Exercise Clause; therefore, the companies have no standing to pursue a claim under RFRA.

B. The Owners of the Companies Have Standing in This Case to Pursue a Cause of Action Under RFRA

Unlike Freshway, the Gilardis satisfy the requirements of Article III and are not barred for want of standing from pursuing a cause of action under RFRA.

The Government argues that

> Plaintiffs cannot circumvent the distinction between religious organizations and secular companies by attempting to shift the focus of the RFRA inquiry from Freshway Foods to the Gilardis, who are the corporations' controlling shareholders. . . . The[] obligations [of the Affordable Care Act] lie with the corporations themselves. *The Gilardis cannot even establish standing to challenge the contraceptive-coverage requirement, much less demonstrate that the*

> *requirement may be regarded as a substantial burden on their personal exercise of religion.*

Br. for the Appellees at 24 (emphasis added). It appears that the Government has conflated the requirements of Article III standing with the merits of the Gilardis' claim under RFRA. Indeed, apart from the foregoing passing reference to "standing," the Government never bothers to address the requirements of Article III. Rather, it rests principally on its claim that an action to redress injuries to a corporation cannot be maintained by a stockholder in his own name. *Id*. at 25.

To satisfy Article III's standing requirements, a plaintiff must show that (1) he or she has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The Gilardis easily satisfy these requirements.

As the sole owners of the companies, the Gilardis are inextricably tied to Freshway. They therefore suffer injury in fact because they cannot operate their businesses according to their faith. Br. of Appellants at 16-17. Furthermore, the Gilardis injury is imminent and concrete, it is caused by the Mandate, and it will be redressed by a favorable judicial decision. Therefore, the Gilardis have Article III standing to pursue a cause of action under RFRA.

It is true that when a plaintiff's asserted injury is based on governmental regulation of a third party, proof of standing may be problematic. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 758-59 (1984); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-46 (1976); *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938-39 (D.C. Cir. 2004). This is because the necessary elements of causation and redressability in such a case rest on the independent choices of the regulated third party. As such, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Defenders of Wildlife*, 504 U.S. at 562. There is no such third-party standing problem with respect to the Gilardis' claim.

This case presents a situation in which a for-profit corporation is fully owned by two related shareholders. Freshway and the shareholder-owners are separate legal entities, but are otherwise inextricably connected. The Gilardis control the corporations and feel a concomitant responsibility to manage the companies' business activities consistent with their Catholic faith. This connection between the Government Mandate and Freshway's conduct leaves little doubt regarding the requirements of causation and redressability under Article III. We have upheld standing in cases involving Government regulation of third parties where the connection between the Government action and the third-party conduct was less clear than it is in this case. *See, e.g.*, *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 309-10 (D.C. Cir. 2001) (holding that the Government's addition of dioxin to the list of known carcinogens caused municipalities and companies to reduce or end their use of PVC plastic

produced by the plaintiff-manufacturer, and that a decision setting aside the Government's action likely would give redress to the manufacturer). There is no question here that the Mandate compels Freshway to take action that the Gilardis challenge under RFRA. Therefore, causation and redressability are satisfied.

Finally, because RFRA provides that "[s]tanding to assert a claim or defense under [the Act] shall be governed by the general rules of standing under article III of the Constitution," 42 U.S.C. § 2000bb-1(c), the Gilardis clearly have met the *only* requirements for standing that are set forth in RFRA.

The Government ignores the requirements of Article III standing and, instead, rests its argument on "the bedrock principle that a corporation is 'a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.'" Br. for the Appellees at 26 (citing *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001)). Apparently, the Government means to suggest that this "bedrock principle" effectively forecloses the Gilardis' standing to pursue a claim under RFRA. Or, to put it another way, the Government seems to contend that the cited principle is the foundation for a prudential rule that limits a claimant's right to pursue a cause of action under RFRA even when the claimant has satisfied the requirements of Article III. The Government cites no Supreme Court authority to support this proposition, and I can find none.

First, contrary to the Government's argument, the general rule relating to shareholder suits is not inviolate. As the Supreme Court noted in *Franchise*

Tax Board of California v. Alcan Aluminium Limited, there is "an exception to this rule allowing a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated." 493 U.S. 331, 336 (1990). The Gilardis' claim under RFRA asserts a cause of action in their own right for an alleged denial of their exercise of religion. This does not offend the shareholder standing rule.

Second, although the Government does not explicitly assert that the shareholder standing rule is a prudential standing requirement, the Sixth Circuit reached this conclusion in *Autocam Corporation v. Sebelius*, No. 12-2673, 2013 WL 5182544 (6th Cir. Sept. 17, 2013). While recognizing that RFRA provides only that the Article III requirements must be met for standing, the Sixth Circuit nonetheless concluded that prudential requirements must also be satisfied. The *Autocam* decision first points out that "'Congress legislates against the background of [the Supreme Court's] prudential standing doctrine, which applies unless it is expressly negated.'" *Id*. at *4 (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)). The decision then goes on to say that, because "RFRA makes no mention of prudential standing" nor states "that Article III constitutes the exclusive set of requirements for standing," prudential standing requirements must apply in RFRA cases in addition to Article III requirements. *Id.* Finally, the decision holds that the shareholder standing rule is an established component of prudential standing doctrine. *Id*. I respectfully disagree.

Autocam cites *Franchise Tax* in support of the proposition that the shareholder standing rule is a component of prudential standing doctrine. But *Franchise Tax* merely stated that "we think" the "shareholder standing" rule is "related to" the principle of prudential standing that requires a plaintiff to assert his own legal interests. 493 U.S. at 336. *Franchise Tax* did not actually rely on the shareholder standing rule to conclude that the plaintiff lacked standing. *Id.* at 338. We can find no Supreme Court decision applying the shareholder standing rule to uphold the dismissal of a party's law suit for want of "prudential standing," nor can we find a decision citing *Franchise Tax* for this general idea.

Autocam's reliance on *Bennett v. Spear* also seems misplaced. In *Bennett*, the prudential standing doctrine to which the Court was referring was the "zone of interest" test, not the shareholder standing rule. 520 U.S. 162-63. In many cases involving challenges to administrative agency actions, in addition to determining whether a petitioner has Article III standing, a court must also determine "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). The zone of interest inquiry, which is "basically one of interpreting congressional intent," *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 394 (1987), is a prudential requirement that applies unless expressly negated by Congress. *See Bennett*, 520 U.S. at 163. There is not the slightest doubt in this case that the Gilardis' cause of action is within the zone of interests protected by RFRA.

As already noted, the *Autocam* decision rests in part on the assumption that "Congress did not remove [the] prudential [shareholder] standing limitations when it enacted RFRA." 2013 WL 5182544, at *4. This reasoning is fallacious because neither the Government nor the Sixth Circuit cites any authority holding that the shareholder standing rule was a prudential limitation governing Free Exercise claims before the enactment of RFRA. Since the Supreme Court has never held that such a prudential standing requirement limits who may pursue Free Exercise claims, it is a *non sequitur* to say that "Congress legislates against the background of [the Supreme Court's] prudential standing doctrine." *Id.* (alterations in original).

Third, *Bennett* makes clear that prudential standing can be negated by Congress. If there were any prudential standing requirements applicable to Free Exercise claims before the enactment of RFRA, Congress eliminated them when RFRA was passed. In *Bennett*, the Court held that a statutory provision stating that "any person may commence a civil suit" was sufficient to make it clear that any party who satisfied the requirements of Article III could bring suit to challenge an agency action under the statute. 520 U.S. at 164. The holding in *Bennett* controls the disposition in this case with respect to prudential standing. RFRA tellingly states that "[s]tanding to assert a claim or defense . . . shall be governed by the general rules of standing under article III of the Constitution." 42 U.S.C. § 2000bb–1(c). The phrase "shall be governed by" makes it plain that Article III, and nothing more, controls with respect to claims under RFRA.

In sum, I agree with the majority that the Gilardis have standing to pursue a claim under RFRA. It is important to note, however, that the Gilardis' standing rests on their inextricable ties to Freshway. The companies are operated as an extension of the two owners' religious beliefs; there are no minority shareholders with different views. Thus, the cognizable constitutional injury—an alleged encroachment on personal religious exercise—only exists in this case because the Gilardis' fully-owned companies are a vehicle by which they express their personal religious views, e.g., they direct delivery trucks to display bumper stickers conveying "their religious views regarding the sanctity of human life to the public." Br. of Appellants at 11-12.

The Mandate applying to their companies touches the Gilardis' religious exercise rights under RFRA. The touching is not substantial, but it is sufficient to satisfy the requirements of Article III. The merits of the Gilardis' claim under RFRA is quite another matter, however.

II. FREE EXERCISE JURISPRUDENCE

A. First Principles: The Limited Reach of the Free Exercise Clause

Through the entire history of Free Exercise jurisprudence, the Supreme Court has remained true to the principle that the Free Exercise Clause does not ensure freedom from any regulation to which a party holds a religious objection. Indeed, the Court has consistently recognized that any such rule would be problematic because it "would place beyond the law any act done under claim of religious sanction." *Cleveland*

v. United States, 329 U.S. 14, 20 (1946); *accord Reynolds*, 98 U.S. at 167 ("To permit this would . . . in effect . . . permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.").

In early cases, the Supreme Court routinely held that religious activities must be subordinate to general public welfare legislation. Mormons were thus not exempt for the sake of religious exercise from laws criminalizing polygamy. *Reynolds*, 98 U.S. at 145; *Cleveland*, 329 U.S. at 20. A child who wished to distribute religious literature with her family was not exempt from child labor laws. *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944) ("[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that includes, to some extent, matters of conscience and religious conviction."). And in *Braunfeld v. Brown*, the Court upheld the application of a Sunday closing law to Jewish merchants who observed the Sabbath on Saturday, even though the law "ma[de] the practice of their religious beliefs more expensive" by forcing them to close two days a week. 366 U.S. at 605; *accord McGowan v. Maryland*, 366 U.S. 420 (1961). The Sunday closing law was intended to establish a "day of community tranquility, respite and recreation" for the general well-being of citizens, *Braunfeld*, 366 U.S. at 602, and "[t]o strike down . . . legislation which imposes only an indirect burden on the exercise of religion . . . would radically restrict the operating latitude of the legislature." *Id.* at 606.

When one studies the history of Free Exercise jurisprudence in the United States, it is inescapable

that the Free Exercise Clause of the First Amendment has been narrowly defined for good reasons. This point was amplified by Justice O'Connor in *Lyng*:

> However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions.

485 U.S. at 452.

B. The Evolution of the Substantial Burden/Compelling Governmental Interest Test During the Twenty-seven Years from *Sherbert* to *Smith*

RFRA states in relevant part:

(a) In general

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –
>
> > (1) is in furtherance of a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1.

RFRA was enacted to overturn the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which had vitiated the substantial burden/compelling governmental interest test enunciated in *Sherbert*, 374 U.S. 398. *See* 42 U.S.C. § 2000bb(b)(1) (stating that a purpose of the statute is "to restore the compelling interest test as set forth in" *Sherbert*). It is also undisputed that, in passing RFRA, Congress meant to restore the *entire body* of Free Exercise jurisprudence that developed during the twenty-seven years following the Court's decision in *Sherbert* up until the Court's decision in *Smith*. *See, e.g.*, S. REP. NO. 103-111, at 8-9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898; H.R. REP. NO. 103-88, at 6-7 (1993). An examination of the relevant case law during these twenty-seven years confirms that, when it enacted RFRA, Congress never meant to abandon the

first principles that have historically limited the reach of the Free Exercise Clause.

The compelling interest framework was first articulated in *Sherbert*, where the Court held that South Carolina violated the plaintiff's Free Exercise rights when it denied her unemployment benefits on the grounds that observing the Sabbath did not constitute "good cause" for declining work on Saturday. 374 U.S. at 400-01. The Court explained that the state must show a compelling interest for refusing to accommodate the plaintiff's Sabbath observance. *Sherbert* cited *Braunfeld* approvingly. Unlike *Sherbert*, *Braunfeld* involved a situation in which there was "a strong state interest in providing one uniform day of rest for all workers," and "[r]equiring exemptions for Sabbatarians . . . appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable." *Id.* at 408-09. In *Sherbert*, however, as the Court later explained, the Government acted pursuant to a statutory scheme that created "a mechanism for individualized exemptions." *Bowen v. Roy*, 476 U.S. 693, 708 (1986). When a "state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship . . . tends to exhibit hostility, not neutrality, towards religion." *Id.*

In the majority of the Free Exercise cases decided during the twenty-seven years following *Sherbert*, the Court applied this compelling interest framework to hold either (a) that there was no substantial burden on religious exercise, or (b) that the burden was justified

by the Government's interest in administering a statutory scheme that, by its nature, required uniform enforcement in order to be administrable. The Court amplified these lines of analysis in *Lee*.

In *Lee*, the Court upheld the Government's application of Social Security taxes to an Amish employer who held a religious objection to the Social Security system. Accepting the plaintiff's "contention that both payment and receipt of social security benefits is forbidden by the Amish faith," the Court concluded that Social Security taxes imposed a substantial burden on Lee's Free Exercise. 455 U.S. at 257. Nonetheless, the Court found the burden justified because in *Lee*, as in *Braunfeld*, uniform application of the law was necessary to make general public welfare regulations administrable: "[M]andatory participation [by all covered employers and employees] is indispensable to the fiscal vitality of the . . . system," *id.* at 258, and "[t]he tax system could not function if denominations were allowed to challenge [it] because tax payments were spent in a manner that violates their religious belief." *Id.* at 260.

In at least six more Free Exercise cases decided during the twenty-seven years post-*Sherbert*, the Court applied the substantial burden/compelling governmental interest framework to hold that the disputed Government action or regulation imposed no substantial burden, or that the burden was justified under the reasoning in *Lee* and *Braunfeld*:

- *Gillette v. United States*, 401 U.S. 437, 461 (1971) (the Military Selective Service Act, exempting persons who oppose participating in war generally, but not those who hold religious

objections to a particular war, does not violate Free Exercise) ("Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.").

- *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983) (denying tax-exempt status to a religious school that practiced racial discrimination as part of a religious belief against interracial dating and marriage did not violate Free Exercise) ("Th[e] governmental interest [in eradicating racial discrimination] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." (citing *Lee*, 455 U.S. at 259-60; *Prince,* 321 U.S. at 170; *Gillette,* 401 U.S. 437; and *Reynolds*, 98 U.S. 145)).

- *Hernandez v. Comm'r*, 490 U.S. 680, 698 (1989) (denying tax deductible status to fees paid for training sessions that were "the central practice of Scientology" did not violate Free Exercise); *id.* at 699-700 ("*Lee* establishes that even a substantial burden would be justified by the 'broad public interest in maintaining a sound tax system,' free of 'myriad exceptions flowing from a wide variety of religious beliefs.'" (quoting *Lee*, 455 U.S. at 260)).

- *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985) (the Fair Labor Standards Act did not burden the religious exercise of a non-profit religious organization or its "associates," who received food and shelter in

exchange for work carrying out the organization's commercial enterprises).

- *Bowen*, 476 U.S. at 706-07 (rejecting a claim that using a social security number to administer Government programs violated the Free Exercise of Native Americans who believed the number would impair their child's spirit) ("[T]he nature of the burden is relevant to the standard the government must meet to justify the burden. . . . [A]dministration of complex [benefits] programs requires certain conditions and restrictions. Although in some situations, a mechanism for individual consideration will be created, a policy decision . . . to treat all applicants alike and . . . not . . . to become involved in case-by-case inquiries into the genuineness of each religious objection . . . is entitled to substantial deference." (citing *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1989); *Sherbert*, 374 U.S. at 404)).

- *Lyng*, 485 U.S. at 442 (no substantial burden on religious exercise even though building a road across a stretch of national forest that would "cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway" of the Native American tribes); *id.* at 450-51 ("[*Sherbert*] does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their

> religious beliefs, require government to bring forward a compelling justification. . . .").

During this same twenty-seven year period, the Court found Free Exercise violations only when the disputed governmental policy allowed for individualized or discrete exemptions, and the state declined to grant exemptions or exceptions to accommodate religious beliefs. Three of the four successful Free Exercise cases, like *Sherbert*, presented a discretionary decision as to whether the plaintiff had "good cause" for refusing employment that conflicted with their religious practice. *Thomas*, 450 U.S. 707 (claimant denied unemployment benefits because he refused a job assembling weapons on the grounds of a religious objection); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987) (claimant was denied unemployment benefits because of refusal to work on the Sabbath); *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829 (1989) (claimant denied unemployment benefits because he refused to work on Sunday).

In the fourth case, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that the state lacked a compelling interest in requiring Amish families to send their children to school for the ninth and tenth grades. The Court reiterated that "[i]t is true that activities of individuals, even when religiously based, are often subject to regulation . . . to promote the health, safety, and general welfare." *Id.* at 220 (citing *Gillette*, 401 U.S. 437; *Braunfeld*, 366 U.S. 599; *Prince*, 321 U.S. 158; *Reynolds*, 98 U.S. 145). But it concluded that the state had not shown why its educational objectives required Amish children to attend "an additional one or two years of formal high school . . . in place of their

long-established program of informal vocational education." *Id.* at 222. In other words, there was no demonstrated need for a uniform attendance rule. Indeed, the accommodation sought by the Amish was not at odds with the state's objective of ensuring meaningful education for minors. Therefore, the Court concluded that the Government simply had not shown that the state's educational objectives would be compromised by granting a discrete exemption for Amish students.

In sum, a careful reading of the Supreme Court's Free Exercise decisions during the twenty-seven years post-*Sherbert* shows that Free Exercise challenges to generally applicable, neutral Government policies were rarely successful. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1417 (1990) ("Since 1972, the Court has rejected every claim for a free exercise exemption to come before it, outside the narrow context of unemployment benefits governed strictly by *Sherbert*." (footnotes omitted)).

C. Congress' Enactment of RFRA in Reaction to *Smith*: Restoration of the Substantial Burden/Compelling Governmental Interest Test

After twenty-seven years of consistently applying the substantial burden/compelling governmental interest framework to decide cases arising under the Free Exercise Clause, the Supreme Court inexplicably discarded this analytical framework in *Smith*, 494 U.S. 872. The reaction from Congress was swift and clear.

In *Smith,* the Court held that criminalizing the use of peyote did not violate the free exercise of Native American sects that traditionally used the hallucinogen during religious ceremonies. The Court did not require the state to provide a compelling justification for denying an exemption, stating that the *Sherbert* compelling interest test was "inapplicable" to "an across-the-board criminal prohibition on a particular form of conduct." *Id.* at 884-85. While pre-*Smith* cases had often applied the compelling interest framework to conclude that a claimant's religious exercise was not substantially burdened, or that the Government's compelling interest justified any burden, *Smith* went a step further by eliminating this framework entirely.

In response to *Smith*, Congress enacted RFRA. The statute notes that "the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). It then states that the purpose of RFRA is to "restore the compelling interest test as set forth" in *Sherbert* and *Yoder* and to "guarantee its application in all cases where free exercise of religion is substantially burdened." *Id.* § 2000bb(b)(1).

Reports from both houses make clear that Congress sought to restore the *entire body* of Free Exercise jurisprudence as it existed during the twenty-seven years post-*Sherbert.* S. REP. NO. 103-111, at 9 ("Pre-*Smith* case law makes it clear that only governmental actions that place a substantial burden on the exercise of religion must meet the compelling interest test. . . . The act thus would not require such a justification for every government action that may have some

incidental effect on religious institutions. . . . [T]he compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*."); H.R. REP. NO. 103-88, at 7 ("This bill is not a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions. . . . [T]he [compelling interest] test generally should not be construed more stringently or more leniently than it was prior to *Smith*."); 139 CONG. REC. S26178 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy) ("Not every free exercise claim will prevail, just as not every claim prevailed prior to the *Smith* decision."). Indeed, RFRA itself says that "the compelling interest test as set forth in *prior Federal court rulings* is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5) (emphasis added).

Senator Hatch, a sponsor of RFRA, explained that the bill was amended to add the word "substantial" before "burden" so as to be "consistent with the case law developed by the Court prior to the *Smith* decision" that "does not require the Government to justify every action that has some effect on religious exercise." 139 CONG. REC. S26180 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch).

Since the passage of RFRA, the Supreme Court has confirmed that, as Congress intended, RFRA reinstates the full body of pre-*Smith* jurisprudence. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the Court held that declining to permit a "Christian Spiritist" sect's sacramental use of hoasca, a hallucinogenic tea prohibited by the Controlled

Substances Act, violated Free Exercise under RFRA. The Government conceded that prohibiting the sect from using hoasca imposed a substantial burden on the group's religious exercise. *Id.* at 426. The Court made clear that the principles of *Braunfeld* and *Lee* still apply under RFRA, explaining that "the Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program." *Id.* at 435.

Applying these principles, the Court concluded that the Government failed to prove that the Controlled Substances Act required uniform application in order to be administrable. Critical to this conclusion was the fact that the Controlled Substances Act authorized the Attorney General to "'waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety.'" *Id.* at 432 (quoting 21 U.S.C. § 822(d)). Furthermore, the Act granted an exemption to all members of Native American tribes for the sacramental use of peyote. *Id.* at 433. "The well-established peyote exception also fatally undermines the Government's broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA." *Id.* at 434. *O Centro* easily fits within the body of Free Exercise cases decided during the twenty-seven years post-*Sherbert*.

III. THE MANDATE DOES NOT *SUBSTANTIALLY* BURDEN APPELLANTS' RELIGIOUS OBJECTIONS TO THE USE OF CONTRACEPTIVE PRODUCTS

Requiring Freshway's health plan to cover contraceptive products does not *substantially* burden the Gilardis' personal objection to using contraception. The Gilardis have standing in this case only because of the alleged injuries that arise from the Mandate's application to their companies, not to them. Their alleged injuries are sufficient to satisfy the requirements of Article III, but they have failed to show that the Mandate *substantially* burdens their personal religious activities.

There are three reasons why the Mandate does not *substantially* burden the Gilardis' "exercise of religion." First, the Mandate does not require the Gilardis to use or purchase contraception themselves. Second, the Mandate does not require the Gilardis to encourage Freshway's employees to use contraceptives any more directly than they do by authorizing Freshway to pay wages. Finally, the Gilardis remain free to express publicly their disapproval of contraceptive products.

Because the Mandate does not require the Gilardis to personally engage in conduct prohibited by their religious beliefs, this case differs from every case in which the Court has found a substantial burden on religious exercise. In *O Centro* and *Yoder*, for instance, there was no dispute as to whether the regulations substantially burdened the plaintiffs' religious exercise. The disputed Government policies in those cases very plainly prevented the plaintiffs, personally, from engaging in their religious practices (using hoasca and

home-schooling one's children), and the only question was whether the burdens were justified.

In contrast, the Gilardis cannot claim that they are being forced to use contraceptives, which would directly conflict with their religious beliefs. Rather, they complain that because *their companies* are required to purchase insurance that includes coverage for contraception, they as owners are enabling third parties to engage in conduct that they oppose. This is a specious claim. The Gilardis can find no support for their position in the controlling case precedents. No Free Exercise decision issued by the Supreme Court has recognized a substantial burden on a plaintiff's religious exercise where the plaintiff is not *himself* required to take or forgo action that violates his religious beliefs, but is merely required to take action that *might* enable other people to do things that are at odds with the plaintiff's religious beliefs.

Furthermore, the Mandate does not require the Gilardis to directly facilitate employees' use of contraception. The Gilardis do not contend that their religious exercise is violated when Freshway pays wages that employees might use to purchase contraception, and the Mandate does not require the Gilardis to facilitate the use of contraception any more directly than they already do by authorizing Freshway to pay wages. Amici supporting the Gilardis' position attempt in vain to distinguish between the Mandate and paying wages. First, they argue that the Mandate requires the Gilardis to become an "essential cause" of increasing the number of employees who use contraception. Br. of 28 Catholic Theologians and Ethicists at 22-23. But the Gilardis are no more of an

"essential cause" of increasing the use of contraception when they authorize Freshway to pay for a benefits plan that employees *might* use to get contraception than they are when they authorize wages that an employee *might* use to purchase contraception she would not otherwise be able to afford.

Amici also attempt to distinguish between the Mandate and paying wages by arguing that covering contraceptive products is akin to the difference between giving an underage person a "gift certificate" to buy beer, and giving him money that he might spend on beer. *Id.* at 21-22. But this analogy fails. Health coverage under the Mandate is not like giving a gift certificate to buy beer specifically, but more like a gift certificate to a supermarket where the recipient may purchase whatever is available, including beer. Just as the Government does not directly encourage religion when it provides vouchers that recipients *may* choose to spend on religious schools, the Gilardis do not directly encourage the use of contraception when they provide insurance coverage that recipients *may* choose to spend on contraceptives. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) ("The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the [party granting the benefits], whose role ends with the disbursement of benefits.").

Amici also contend that the difference between the Mandate and paying wages is akin to the difference between a person who opposes the death penalty being required to pay taxes that fund executions, and being required to "purchase the drugs for a lethal injection

and personally deliver them to the facility where the execution will take place." Br. of 28 Catholic Theologians and Ethicists at 19. The problem with this rather extraordinary example is that the Mandate does not require the Gilardis to have nearly this degree of personal involvement in providing contraceptives. The Mandate does not require the Gilardis to transfer funds from Freshway's accounts directly to the manufacturers or retailers of contraception. Nor are the companies required to deliver or distribute contraception to employees. Under the Employee Retirement Income Security Act, 29 U.S.C. § 1132(d)(1), Freshway is a distinct legal entity from its self-insured group health plan. The plan is operated by a third-party administrator, and, pursuant to health privacy regulations, the Gilardis are actually prohibited from being informed whether individual employees purchase contraceptive products, or about any other information regarding employees' health care decisions. *See* Br. of Americans United for Separation of Church and State, *et al.*, at 29-30 (citing 45 C.F.R. § 164.508; 45 C.F.R. § 164.510). Moreover, the Gilardis are free to procure Mandate-compliant coverage for their employees through an entirely independent, third-party insurance carrier, rather than administering their own group health plan. *Id.* This is a far cry from personally purchasing contraceptives and delivering them to employees.

Finally, the Gilardis suggest that because Freshway is required to offer health insurance that includes contraception, they as owners are being pressed to effectively endorse the use of contraception. This claim fails because the Supreme Court has held that a party's First Amendment rights are not violated when he must

comply with a Government policy that sends a message contrary to his beliefs. Hence, an institute of higher education may be required to host military recruiters on campus, even if it strongly opposes military policy. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47 (2006). Parties who comply with a regulation contrary to their beliefs "remain[] free to disassociate [themselves] from those views." *Id.* at 65 (citation omitted). The Gilardis likewise remain free to "disassociate" themselves from any message that might suggest that they endorse contraception. They may denounce publicly the use of contraception, for instance, by issuing a statement to Freshway's employees expressing their disapproval of the Mandate and contraception; and they are free to continue authorizing Freshway to display slogans on company delivery trucks expressing their views about the sanctity of human life. There are countless ways the Gilardis can make clear that their involuntary compliance with federal law does not signify that they endorse the use of contraception. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012) ("Nothing in these final regulations precludes employers or others from expressing their opposition, if any, to the use of contraceptives, requires anyone to use contraceptives, or requires health care providers to prescribe contraceptives if doing so is against their religious beliefs.").

For the foregoing reasons, the Gilardis simply cannot establish that the Mandate *substantially* burdens their personal objection to contraception. The

Mandate does not regulate the Gilardis; it regulates their *companies*. So the Mandate requires nothing of the Gilardis, save what is required of any managers of business operations subject to federal law. And we do not normally assume that managers of for-profit companies are personally affronted by the requirements of federal law.

More particularly, the Mandate does not require the Gilardis to use or purchase contraception themselves; it does not require them to facilitate Freshway's employees' use of contraceptives any more directly than they do by authorizing Freshway to pay wages; and they remain free to publicly express their disapproval of contraceptive products. Because the Gilardis cannot show a *substantial* burden on their personal religious exercise, they cannot prevail on the merits of their RFRA claim as a matter of law. I would therefore affirm the District Court's denial of a preliminary injunction on this ground, without inquiring into whether the Mandate serves a compelling governmental interest.

IV. COMPELLING GOVERNMENTAL INTERESTS JUSTIFY THE MANDATE

Even though I would deny the preliminary injunction on the ground that the Gilardis cannot show that the Mandate substantially burdens their exercise of religion, I will also address the Government's compelling interests in order to respond to my colleagues' opinion on this point.

In *O Centro*, the Court made clear that "the Government can demonstrate a compelling interest in

uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program." 546 U.S. at 435. The Government has met this test in defending the Mandate. The Mandate therefore satisfies the compelling interest test under *O Centro*, *Lee*, *Braunfeld*, and *Hernandez*.

The Mandate obviously serves the compelling interests of promoting public health, welfare, and gender equality. Br. for the Appellees 38-40. *See, e.g.*, *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) ("Even if [the Act] does work some slight infringement on [plaintiffs'] right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984) ("Assuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests."); *Prince*, 321 U.S. 158 (upholding child labor laws); *Olsen v. DEA*, 878 F.2d 1458, 1462 (D.C. Cir. 1989) (upholding laws regulating drug use).

Contraceptive products are used for health care purposes beyond preventing unwanted pregnancy. They are prescribed to prevent disease. Contraceptives reduce the risk of ovarian, endometrial, and gynecologic cancers. *See* Br. of the Ovarian Cancer Nat'l Alliance, *et al*. at 5-25 (describing how the Mandate is based, in part, on ensuring that women have access to cancer-preventative benefits unrelated to preventing pregnancy). Contraceptives and sterilization also preserve the health of adult women

with diabetes, lupus, and heart conditions, who would be at physical risk if they became pregnant. *See* Br. of Nat'l Health Law Program, *et al.* at 7-13.

Coverage for contraceptive products eliminates gender discrimination because the cost of contraception falls disproportionately on women, and the costs of health care are generally much higher for women than men. Br. for the Appellees at 41 ("Congress found that . . . 'women of childbearing age spend 68 percent more in out-of-pocket health care costs than men.'" (quoting 155 CONG. REC. S28843 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand))). Gender inequality in the cost of health care is caused, in part, by the fact that many health services specific to women have historically been excluded from insurance coverage. *See* Br. for Nat'l Women's Law Center, *et al.* at 7 ("Congress intended . . . to help alleviate the 'punitive practices of insurance companies that charge women more and give [them] less in benefits.'" (quoting 155 CONG. REC. S28842 (Dec. 1, 2009) (statement of Sen. Mikulski))).

Furthermore, it is critical to the functioning of the Affordable Care Act's statutory scheme that exemptions from the Mandate are, like exemptions from the Social Security tax, extremely limited. Allowing religious exemptions to for-profit, secular corporations would undermine the universal coverage scheme: If the Gilardis' companies were exempted from covering contraception, another corporation's owners might just as well seek a religious exemption from covering certain preventative vaccines. A Christian Scientist, whose religion has historically opposed conventional medical treatment, might claim that his

corporation is entitled to a religious exemption from covering all medical care except healers who treat medical ailments with prayer. Paul Vitello, *Christian Science Seeks Truce with Modern Medicine*, N.Y. TIMES, Mar. 24, 2010, at A20, *available at* http://www.nytimes.com/2010/03/24/nyregion/24heal.html?pagewanted=all&_r=0 (last visited Oct. 13, 2013). Muslim or Jewish business owners might claim a religious exemption from covering any medication derived from pork products (for instance, the gelatin used to make capsules or coating of many pills). S. Pirzada Sattar & Debra A. Pinals, Letter to the Editor, *When Taking Medications Is a Sin*, 53 PSYCHIATRIC SERVICES 213 (2002), *available at* http://journals.psychiatryonline.org/article.aspx?Volume=53&page=213&journalID=18 (last visited Oct. 13, 2013). Just as in *Lee* and *Braunfeld*, "[t]he whole point of . . . a 'uniform' [policy] would . . . be[] defeated by exceptions." *O Centro*, 546 U.S. at 435 (quoting *Sherbert*, 374 U.S. at 408 (discussing *Braunfeld,* 366 U.S. at 608-09)).

The existing exemptions to the Mandate do not establish that the Government lacks a compelling interest in enforcing it against all large, for-profit secular employers. First, the exemptions are not as broad as the Gilardis make them out to be. The exemption for grandfathered plans is temporary, intended to be a means for gradually transitioning employers into mandatory coverage. A health plan loses grandfathered status as soon as it changes its cost-sharing, benefits, or employer-contribution terms. 45 C.F.R. § 147.140(g). The Department of Health and Human Service's "mid-range estimate" is that 66% of small employer plans and 45% of large employer plans

will relinquish their grandfathered status by the end of 2013. Interim Final Rules for Group Health Plans and Health Insurance, 75 Fed. Reg. 34,538, 34,552 (June 17, 2010).

In fact, the Gilardis voluntarily relinquished Freshway's grandfathered status by increasing the employees' co-payments for doctor visits. Br. for the Appellees at 43; Joint Appendix at 25. That the Gilardis voluntarily relinquished grandfathered status despite their opposition to the Mandate supports the Department's prediction that most other employers are likely to do so in the short term, as they will inevitably modify their coverage plans to accommodate changes in the cost of health care.

Furthermore, contrary to the Gilardis' suggestion, employers with fewer than fifty employees are not specifically exempted from the Mandate. Rather they are exempt altogether from being required to provide health coverage under the Affordable Care Act. 26 U.S.C. § 4980H(c)(2)(A). Small businesses that do elect to provide health coverage—as many do in order to offer more competitive benefits to employees and to receive tax benefits—must provide coverage that complies with the Mandate. Br. for the Appellees at 42. In other words, the Mandate would apply to the Gilardis even if they had fewer than fifty employees, so long as they chose to provide health coverage, as they contend they are committed to doing. Br. of Appellants at 13-14.

The only permanent, specific exemption from the Mandate is for religious, non-profit employers. 45 C.F.R. § 147.130(a)(1)(iv)(B) (current rules defining religious non-profits in terms of Internal Revenue Code

status); Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013) (proposed rules exempting any non-profit organization that holds itself out as a religious organization). This exemption for religious non-profits surely does not undermine the Government's position that uniform enforcement is essential to the scheme, in the way that the exemption for Native American tribes using peyote was fatal to such a claim in *O Centro*. In *O Centro*, the existing exemption for the religious use of peyote by Native American tribes was much larger than the exemption sought by the 130 members of the Christian Spiritist sect. If the Controlled Substances Act was administrable with a much larger exemption for all Native Americans, why would a smaller exemption for 130 hoasca users defeat the scheme? Furthermore, the nature of the exemption sought in *O Centro*—the Christian Seperatist sect's sacramental use of hoasca—was essentially indistinguishable from the nature of the exemption that had already been granted for the Native American tribes' sacramental use of peyote.

This case is a far cry from the situation seen in *O Centro*. The exemption sought by the Gilardis for secular, for-profit corporations is potentially *much larger* than the exemption for non-profit religious entities that exists under the Mandate. In addition, the exemption sought in this case is fundamentally different from the exemption that has already been granted. The Court has long recognized that federal workplace regulations apply differently to secular, for-profit corporations than to non-profit religious organizations. *E.g.*, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694

(2012) (Free Exercise Clause shields a minister of a religious non-profit from being sued for violating the Americans with Disabilities Act); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (Title VII's exemption of non-profit churches from provisions prohibiting religious discrimination does not violate Establishment Clause); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (interpreting the National Labor Relations Act as exempting Church-operated educational institutions from National Labor Review Board's jurisdiction). In exempting religious non-profits, the Department of Health and Human Services reasoned that "[r]eligious accommodations in related areas of federal law, such as the exemption for religious organizations under Title VII of the Civil Rights Act of 1964, are available to nonprofit religious organizations but not to for-profit secular organizations." Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013). The Americans with Disabilities Act also exempts religious non-profits, but not for-profit, secular corporations. 42 U.S.C. § 12113(d)(1), (2).

If an exemption for religious non-profits were taken as proof that the Government lacks a compelling interest in enforcing regulations against secular, for-profit corporations, this would suggest that secular corporations should likewise be entitled to religious exemptions from Title VII, the National Labor Relations Act, and the Americans with Disabilities Act. Furthermore, the Mandate's exception for religious non-profits is nothing like the exceptions in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), where the ordinances prohibiting

animal sacrifices were so replete with exceptions that the Court concluded their purpose was "suppression of . . . the Santeria worship service." *Id.* at 534.

It is very important to recall that the Court in *Lee* rejected the argument that limited exemptions from the Social Security tax proved the Government lacked a compelling interest in uniform enforcement all for-profit employers. The Court explained that Congress was justified in "dr[awing] a line . . . exempting the self-employed Amish but not all persons working for an Amish employer." 455 U.S. at 261. The Court's reasoning is equally applicable here: "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Id.* The Court explained that "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees." *Id.*; *accord Hernandez*, 490 U.S. at 700 ("The fact that Congress has already crafted some deductions and exemptions in the Code also is of no consequence, for the guiding principle is that a tax 'must be uniformly applicable to all, except as *Congress* provides explicitly otherwise.'" (quoting *Lee*, 455 U.S. at 261)).

Freshway, the employer in *Lee*, and other for-profit corporations are different from religious non-profits in that they use labor *to make a profit*, rather than to perpetuate a religious values-based mission. In choosing to use labor for financial gain, the corporation and its owners submit themselves to legislation—such as Title VII, the Fair Labor Standards Act, the

Americans with Disabilities Act, and the Affordable Care Act—designed to protect the health, safety, and welfare of employees. They cannot voluntarily capitalize on labor but invoke their personal religious values to deny employees the benefit of laws enacted to promote employee welfare.

Because the Gilardis have voluntarily chosen to capitalize on labor, they have agreed to accept certain limitations on their conduct that arise from the Government's compelling interest in securing the safety and welfare of their employees. For this reason, even if the Mandate were a substantial burden on the Gilardis' religious exercise—which it is not—this record supports the conclusion that the burden is justified by the Government's compelling interest in enforcing a public-welfare statutory scheme that, like the Social Security tax, simply "could not function" if for-profit employers of various "denominations were allowed to challenge the . . . system because . . . payments were spent in a manner that violates their religious belief." *O Centro*, 546 U.S. at 435 (quoting *Lee*, 455 U.S. at 258).

The judgment of the District Court should be affirmed.

APPENDIX B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5069

September Term, 2013

[Filed November 1, 2013]

FRANCIS A. GILARDI, ET AL., APPELLANTS	)
v.	)
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., APPELLEES	)

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cv-00104)

Before: BROWN, *Circuit Judge*, and EDWARDS and RANDOLPH, *Senior Circuit Judges*

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause be reversed as to the denial of a preliminary injunction for the individual owners and be remanded for consideration of the other preliminary-injunction factors; and be affirmed as to the denial of a preliminary injunction with respect to the Freshway companies, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
/s/
Jennifer M. Clark
Deputy Clerk

Date: November 1, 2013

Opinion for the court filed by Circuit Judge Brown, with whom Senior Circuit Judge Edwards joins except as to parts VI, VII, and VIII, and with whom Senior Circuit Judge Randolph joins excepts as to parts III and IV.
Opinion concurring in part and concurring in the judgment filed by Senior Circuit Judge Randolph.
Opinion concurring in part and dissenting in part filed by Senior Circuit Judge Edwards.

APPENDIX C

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5069
1:13-cv-0014-EGS

September Term, 2013

[Filed March 29, 2012]

Francis A. Gilardi, et al.,	)
	)
Appellants	)
	)
v.	)
	)
United States Department of Health and Human Services, et al.,	)
	)
Appellees	)
	)

BEFORE: Rogers, Tatel, and Brown, Circuit Judges

O R D E R

The panel has reconsidered its order filed March 21, 2013, which denied appellants' emergency motion for an injunction pending appeal. Accordingly it is

ORDERED, on the court's own motion, that the motion for an injunction pending appeal be granted.

The portion of the March 21, 2013 order setting forth the briefing schedule and scheduling the case for oral argument remains in effect.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 13-104(EGS)

[Filed March 3, 2013]

FRANCIS A. GILARDI, JR., *et al.*	)
	)
Plaintiffs,	)
	)
v.	)
	)
KATHLEEN SEBELIUS, *et* al.	)
	)
Defendants.	)
	)

MEMORANDUM OPINION

Plaintiffs Francis A. Gilardi, Jr., Philip M. Gilardi, Fresh Unlimited, Inc., d/b/a Freshway Foods, and Freshway Logistics, Inc. filed a complaint on January 24, 2013 seeking declaratory and injunctive relief against defendants United States Department of Health and Human Services, Kathleen Sebelius, United States Department of the Treasury, Timothy F. Geithner, United States Department of Labor, Hilda L. Solis, and their successors in office. Plaintiffs allege several causes of action. Count I alleges a violation of the Religious Freedom Restoration Act, 42 U.S.C.

§§ 2000bb, *et seq*. Count II alleges a violation of the First Amendment's free exercise clause. Count III alleges a violation of the First Amendment's free speech clause. Finally, Count IV alleges a violation of the Administrative Procedure Act.

Pending before the Court is plaintiffs' motion for a preliminary injunction. Plaintiffs seek injunctive relief as to Count I and allege that certain federal regulations promulgated under the Patent Protection and Affordable Care Act ("Affordable Care Act" or "ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), violate plaintiffs statutory rights under the Religious Freedom Restoration Act ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-1). Upon consideration of the motion, the opposition and reply thereto, the *Amicus Curiae* Brief of the State of Ohio, the entire record, and for the reasons explained below, plaintiffs' motion is **DENIED**.

I. BACKGROUND

Francis A. Gilardi, Jr. and Philip M. Gilardi (collectively the "Gilardis"), are Ohio residents and "adherents of the Catholic faith" who "hold to the Catholic Church's teachings regarding the immorality of artificial contraceptives, sterilization, and abortion." Compl. ¶ 3. The Gilardis are the sole owners of plaintiffs Fresh Unlimited, Inc., d/b/a Freshway Foods ("Freshway Foods") and Freshway Logistics, Inc. ("Freshway Logistics") (collectively the "Freshway Corporations"), both of which are Subchapter S corporations and are incorporated under the laws of the State of Ohio. The Freshway Corporations are engaged in the processing, packing, and shipping of produce and other refrigerated products, Compl. ¶¶ 16-18, and have

a total of about 400 employees between the companies, *id*. ¶¶ 17-18. The Gilardis each own a 50% share in the Freshway Corporations. They state that "[a]s the two owners with controlling interests in the two corporations, they conduct their businesses in a manner that does not violate their sincerely-held religious beliefs or moral values, and they wish to continue to do so." Compl. ¶ 3. The Freshway Corporations provide their full-time employees with a self-insured employee health benefits plan that provides employees with health insurance and prescription drug coverage through a third-party administrator and stop-loss provider. Compl. ¶ 29. The plan is to be renewed on April 1, 2013. *Id*.

Plaintiffs' claims arise out of certain regulations promulgated in connection with the Affordable Care Act. The Affordable Care Act requires that all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, for "women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [("HSRA")]." 42 U.S.C. § 300gg-13(a)(4). The HSRA, an agency within the Department of Health and Human Services ("HHS"), commissioned the Institute of Medicine ("IOM") to conduct a study on preventive services necessary to women's health. On August 1, 2011, HSRA adopted IOM's recommendation to include "the full range of Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *See* HRSA,

Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Mar. 2, 2013).

Several exemptions and safe-harbor provisions excuse certain employers from providing group health plans that cover women's preventive services as defined by HHS regulations. First, the mandate does not apply to certain "grandfathered" health plans in which individuals were enrolled on March 23, 2010, the date the ACA was enacted. 75 Fed. Reg. 34538-01 (June 17, 2010). Second, certain "religious employers" are excluded from the mandate. 76 Fed. Reg. 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A); see 78 Fed. Reg. 8456, 8459 (Feb. 6, 2013) (proposing to broaden the August 2011 definition of religious employer to ensure that "an otherwise exempt employer plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths"). Third, a temporary enforcement safe-harbor provision applies to certain non-profit organizations not qualifying for any other exemption. 77 Fed. Reg. 8725, 8726-77 (Feb. 15, 2012).

The parties agree that the Freshway Corporations do not qualify for any of these exemptions. As secular, for-profit employers, Freshway Foods and Freshway Logistics do not satisfy the definition of "religious employer" and are not eligible for the protection of the safe-harbor. The grandfathered plans provision also does not protect the corporations because the current health insurance plan has undergone material changes since 2010, including an increase in the cost of doctor

visit co-pays. *See* Decl. of Francis A. Gilardi, Jr., ECF No. 21-2, at ¶ 13.

The Gilardis state that they "have concluded that complying with the Mandate would require them to violate their religious beliefs and moral values because the Mandate requires them and/or the corporations they own and control to arrange for, pay for, provide, and facilitate contraception methods, sterilization procedures, and abortion because certain drugs and devices such as the 'morning-after pill,' 'Plan B,' and 'Ella' come within the Mandate's . . . definition of 'Food and Drug Administration-approved contraceptive methods' despite their known abortifacient[1] mechanisms of action." Compl. ¶ 5.

On February 8, 2013, plaintiffs moved for a preliminary injunction as to Count I, which alleges a violation of the Religious Freedom Restoration Act ("RFRA"). Plaintiffs argue that they satisfy the standard for a preliminary injunction because they are likely to succeed on the merits because the RFRA "substantially burdens" plaintiffs' free exercise of religion and defendants cannot establish that the regulations survive strict scrutiny. Furthermore, plaintiffs argue, they will suffer irreparable harm absent a preliminary injunction, the balance of equities tips in plaintiffs' favor, and the public interest favors a preliminary injunction.

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[1] Plaintiffs use the word "abortifacient" to refer to drugs such as Plan B and Ella that they allege cause abortions. *See, e.g.*, Compl. ¶ 5. Plaintiffs do not allege that the regulations will require them to provide insurance coverage for the medical procedure of abortion.

II. STANDARD OF REVIEW

A plaintiff seeking a preliminary injunction must establish (1) a substantial likelihood of success on the merits; (2) that it is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in its favor; and (4) that an injunction is in the public interest. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). The purpose of a preliminary injunction "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenish*, 451 U.S. 390, 395 (1981). It is "an extraordinary and drastic remedy" and "should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). In this Circuit, these four factors have typically been evaluated on a "sliding scale," such that if "the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009). The Circuit has recently stated, without holding, that existing Supreme Court precedent suggests "that a likelihood of success is an independent, free-standing requirement for a preliminary injunction." *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (citing *Winter* but finding that preliminary injunction was not appropriate even under less stringent sliding-scale analysis). Because this Court finds that plaintiffs have failed to establish a likelihood of success, a preliminary injunction is not appropriate under either standard, and the Court need not reach the issue raised in *Sherley*. *See, e.g., In re Akers*, --- B.R. ----, 2012 WL 5419318, at *4 (D.D.C.

2012) (stating that, "[w]hichever way *Winter* is read, it is clear that a failure to show a likelihood of success on the merits alone is sufficient to defeat a preliminary injunction motion"); *Arkansas Dairy Co-op Ass'n, Inc. v. U.S. Dep't of Agr.*, 573 F.3d 815, 832 (D.C. Cir. 2009) (declining to proceed to review remaining preliminary injunction factors when plaintiff had shown no likelihood of success on the merits); *see Apotex, Inc. v. FDA*, 449 F.3d 1249, 1253 (D.C. Cir. 2006) (determining movant was not likely to succeed on the merits and declining to address the other factors).

III. DISCUSSION

A. Likelihood of Success on the Merits

The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1, provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section." Subsection (b) provides that "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is (1) in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

Congress enacted the RFRA in response to the Supreme Court's decision in *Employment Division, Department of Human Services of Oregon v. Smith*, 494 U.S. 872 (1990), in which the Court held that the right to free exercise of religion under the First Amendment does not exempt an individual from a law that is neutral and of general applicability, and explicitly

disavowed the test used in earlier decisions, which prohibited the government from substantially burdening a plaintiff's religious exercise unless the government could show that its action served a compelling interest and was the least restrictive means to achieve that interest. 42 U.S.C. § 2000bb. The purpose of the RFRA was to "restore the compelling interest test" as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Id*.

The RFRA does not define "substantial burden" but because the RFRA intends to restore *Sherbert v. Verner* and *Wisconsin v. Yoder*, those cases are instructive in determining the meaning of "substantial burden." In *Sherbert*, plaintiff's exercise of her religion was impermissibly burdened when plaintiff was forced to choose between following the precepts of her religion" resting and not working on the Sabbath and forfeiting certain unemployment benefits as a result, or "abandoning one of the precepts of her religion in order to accept work." 374 U.S. at 404. In *Yoder*, the "impact of the compulsory [school] attendance law on respondents' practice of the Amish religion [was found to be] not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218.[2]

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[2] In a recent case, the government conceded that the Controlled Substances Act placed a "substantial burden" on the "sincere exercise of religion" by a religious sect that would be prohibited from engaging in their traditional communion in which they used

Plaintiffs argue that their exercise of religion is substantially burdened because "they must facilitate, subsidize, and encourage the use of goods and services that they sincerely believe are immoral or suffer severe penalties." Pls.' Mot. for Prelim. Injunction ("Pls.' Br.") at 13. Plaintiffs argue that the substantial burden imposed on the Freshway Corporations is the same as that imposed upon the Gilardis because the "beliefs of the Gilardis extend to, and are reflected in, the actions of the two corporations." *Id.* at 14.

As an initial matter, the Court is troubled by plaintiffs' apparent disregard of the corporate form in this case. Plaintiffs argue that "requiring the two corporations to provide group health coverage that the Gilardis consider immoral is the same as requiring the Gilardis themselves to provide such immoral coverage." *Id.* at 14. The Court strongly disagrees. The Gilardis have chosen to conduct their business through corporations, with their accompanying rights and benefits and limited liability. They cannot simply disregard that same corporate status when it is advantageous to do so. In a recent case dealing with similar issues, *Autocam Corp. v. Sebelius*, the court noted that

> [a]s corporate owners, [plaintiffs] quite properly enjoy the protections and benefits of the corporate form. But the legal separation of the owners from the corporate enterprise itself also has implcations at the enterprise level. A corporate form brings obligations as well as

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a hallucinogenic tea. *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 426 (2006).

> benefits. "When followers of a particular sect enter into commercial activities as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *United States v. lee*, 455 U.S. 252, 263, n.3 (1982). Whatever the ultimate limits of this principle may be, at a minimum it means the corporation is not the *alter ego* of its owners for purposes of religious belief and exercise.

No. 12-1096, 2012 WL 6845677, at *7 (W.D. Mich. Dec. 24, 2012) (denying motion for preliminary injunction on similar facts), *injunction pending appeal denied*, No. 12-2673 (6th Cir. Dec. 28, 2013). Similarly, the court in *Conestoga Wood Specialties, Inc. v. Sebelius* stated that

> '[I]ncorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.' *Cedric Kushner Promotions, Ltd. v.* King, 533 U.S. 158, 163 (2001). . . . It would be entirely inconsistent to allow [individual plaintiffs] to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose to challenge these regulations. We agree with the *Autocam court*, which stated that this separation between a corporation and its owners "at a minimum [ ] means the corporation is not the *alter ego* of its owners for the purposes of religious belief and exercise."

No. 12-6744, 2013 WL 140110, at *8 (E.D. Pa. Jan. 11, 2013), *injunction pending appeal denied*, No. 13-1144 (3d Cir. Jan. 29, 2013).

The Court agrees with the *Autocam* and *Conestoga* courts and finds that the Gilardis cannot simply impute their views onto the corporation such that requiring the corporation to provide preventive services coverage is the same as requiring the Gilardis personally to provide preventive services coverage. The Freshway Corporations are legally separate from the Gilardis. As such, their religious views, legal and statutory obligations, and benefits cannot be imputed to each other. Accordingly, they must be evaluated separately for purposes of the RFRA.

1. The Freshway Corporations' RFRA Claim

Plaintiffs argue that the substantial burden imposed on the Freshway Corporations is the same as that imposed upon the Gilardis because the "beliefs of the Gilardis extend to, and are reflected in, the actions of the two corporations." Pls.' Br. at 14. Plaintiffs contend that "requiring the two corporations to provide group health coverage that the Gilardis consider immoral is the same as requiring the Gilardis themselves to provide such immoral coverage." Pls.' Br. at 13. Defendants respond that the coverage regulations do not substantially burden any exercise of religion because secular, for-profit corporations do not exercise religion. Defs.' Opp. to Pls.' Mot. for Prelim. Injunction ("Defs.' Br.") at 11-12.

As explained above, the Court declines to disregard the corporate form by imputing the religious beliefs of the Gilardis to the corporations they own. Accordingly,

the Court must evaluate whether providing preventive services coverage will cause a substantial burden on the religious exercise of the Freshway Corporations.

(a) Substantial Burden

The RFRA states that "[g]overnment shall not substantially burden a person's exercise of religion . . . ." 42 U.S.C. §§ 2000bb-1(a). Accordingly, a threshold issue is whether the Freshway Corporations "exercise" religion. For the reasons explained below, the Court finds that they do not.[3]

The Freshway Corporations are secular, for-profit corporations that are engaged in the processing, packing, and shipping of produce and other refrigerated products, Compl. ¶¶ 16-18, and have a total of about 400 employees between the companies, *id*. ¶¶ 17-18. The complaint states the following allegations regarding the religious activities of the Freshway Corporations: Freshway Foods makes annual monetary and/or in-kind donations, primarily food, to many community non-profit charitable organizations, including the YMCA, Habitat for Humanity, the American Legion, and Holy Angel's Soup Kitchen. Compl. ¶ 28(d). Freshway Logistics donates a trailer for use by the local Catholic parish for its annual picnic and uses its trucks to deliver food donated by Freshway Foods to food banks. Compl. ¶ 28(e). During monthly employee appreciation lunches, the Freshway Corporations provide alternative foods for their

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[3] Because the Court finds that the Freshway Corporations do not exercise religion, the Court does not reach the question of whether they are "persons" within the scope of the RFRA.

employees to accommodate restrictions posed by their various religions. Compl. ¶ 28(f). They also provide their Muslim employees with space to pray during breaks, and during Ramadan, employees are permitted to adjust break periods in order to eat after sundown in accordance with their religion. Compl. ¶ 28(g).

Several allegations in the complaint allege the Gilardis' religious activities taken in connection with the company. The complaint states that, for the last ten years "Francis and Philip Gilardi have affixed to the back of the trucks they own through a separate company, but which bear the name of Freshway Foods, a sign stating 'It's not a choice, it's a child,' as a way to promote their pro-life views to the public." Compl. ¶ 28(a). The Gilardis also drafted a values statement listing values by which the Freshway Companies would be run. The statement lists "Ethics: Honest, Trustworthy and Responsible to: -Each Other; -Our Customers; -Our Vendors. Non-negotiable – Supersedes everything." Compl. ¶ 28(c).[4]

The Court is not persuaded that it must consider the Gilardis' actions in drafting values statements and in affixing a slogan to their delivery trucks. Even considering these actions, however, the court finds that they are insufficient to establish religious activity taken by the Freshway Corporations. The statement of values drafted by the Gilardis does not mention religion at all, and the affixing of a slogan to the back

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[4] The complaint also alleges that the Gilardis "strongly support financially and otherwise their Catholic parish, schools, and seminary." Compl. ¶ 28(b). The complaint does not allege any connection between this activity and the Freshway Corporations.

of a delivery truck is incidental, at most, to the activities of the corporations.

That leaves the Court with the stated activities of the Freshway Corporations. The corporations' charitable activities and accommodations of their employees who practice other religions, while commendable, do not establish that the Freshway Corporations themselves "exercise religion." Rather, the Court finds that the Freshway Corporations are engaged in purely commercial conduct and do not exercise religion under the RFRA.

The cases cited by plaintiffs do not compel a different result. For example, in *Tyndale House Publishers, Inc. v. Sebelius*, the court noted the "unique" structure of the plaintiff corporation, which was formed to publish religious books and Bibles and was owned in large part by a non-profit religious entity. No. 12-1635, 2012 U.S. Dist. LEXIS 163965, at *24 n.10. In deciding whether Tyndale's owners had standing to assert a free exercise claim on Tyndale's behalf—a different issue than the issue currently before this Court—the court held that "when the beliefs of a closely-held corporation and its owners are inseparable, the corporation should be deemed the alter ego of its owners for religious purposes." *Id*. at *25. In this case, two large produce distribution companies are owned by two people who are members of the Catholic faith. The religious beliefs of the Gildardis cannot fairly be said to be "inseparable" from the religious beliefs of the Freshway Corporations. Indeed, on the record before the Court, there is nothing to suggest that the corporations have any religious beliefs.

Accordingly, the Court finds *Tyndale* to be distinguishable from this case.

Plaintiffs also argue that the religious beliefs of the Gilardis should be taken into account because "corporations do not run themselves or comply with legal mandates except through human agency." Pls.' Reply in Supp. of Mot. for Prelim. Injunction ("Pls.' Reply") at 11. They further contend, citing the recent decision of *Korte v. United States Department of Health and Human Services*, that the Gilardis would have to operate the companies in a manner that they believe to be immoral in order to comply with the preventive services requirement. *Id.* at 11 (citing No. 12-3841, 2012 U.S. App. LEXIS 26734, at *9 (7th Cir. Dec. 28, 2012)). In *Korte*, the district court denied injunctive relief on an RFRA claim to a secular, for-profit construction company that challenged the preventive services coverage requirement. No. 12-1072, 2012 WL 6553996 (S.D. Ill. Dec. 14, 2012). In that case, the district court found that any burden on the individual owners' religious beliefs caused by the corporation's coverage of contraceptive services was "too distant to constitute a substantial burden." *Id*. at *10. The Seventh Circuit granted an injunction pending appeal. 2012 U.S. App. LEXIS 26734, at *9. The Seventh Circuit held that the corporate form was not dispositive of the individual plaintiffs' claim because in order for the company to comply with the mandate, the individual plaintiffs would be required to violate their religious beliefs. *Id*. For the reasons stated above, the Court finds that the corporate form is dispositive in this case and should not be disregarded. In this respect, the court relies on several recent decisions. *See Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278,

1291 (W.D. Okla. 2012) (distinguishing between the "purely personal" matter of religious exercise by a corporation's owners and the actions of a corporation), *injunction pending appeal denied*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012); *Conestoga*, No. 12-6744, 2013 WL 140110, at *10 (E.D. Pa. Jan. 11, 2013) (treating corporation and its owners separate for purposes of RFRA and finding that the secular, for-profit corporation did not exercise religion); *see also Conestoga*, No. 13-1144, slip. op. at 3 (3d. Cir. Jan. 29, 2013) (adopting district court's reasoning that plaintiff corporation did not exercise religion under RFRA). To the extent that *Korte* suggests a different result, the Court declines to follow it.

The Court declines to reach the question of whether *any* secular, for-profit corporation can exercise religion. *Cf. Hobby Lobby Stores,* 870 F. Supp. 2d at 1291 (holding that plaintiff corporations lacked standing to pursue an RFRA claim and stating that "[g]eneral business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors."); *Briscoe v. Sebelius*, No. 13-285, 2013 U.S. Dist. LEXIS 26911, at *15 (D. Colo. Feb. 27, 2013) ("Secular, for-profit corporations neither exercise nor practice religion."). Rather, under the facts of this case, the Freshway Corporations do not exercise religion and therefore cannot succeed on the merits of a claim that the regulations substantially burden their exercise of religion.

2. The Gilardis' RFRA Claim

The Gilardis allege that the regulations create a substantial burden on the Gilardis' exercise of religion because the regulations require them to "facilitate, subsidize, and encourage the use of goods and services that they sincerely believe are immoral or suffer severe penalties. It is this forced subsidization, and not the manner in which the employee may spend their own money or conduct their personal lives, to which plaintiffs object." Pls.' Br. at 13.

With respect to the Gilardis, defendants argue that the regulations do not create a substantial burden because they only apply to the corporations, not their owners. Defs.' Br. at 18. Defendants also argue that even if the regulations did create a burden on the Gilardis' exercise of their religion, that burden is too attenuated and indirect to be substantial. *Id*. at 23.

(a) Substantial Burden

As an initial matter, the Court declines to follow several recent cases suggesting that a plaintiff can meet his burden of establishing that a law creates a "substantial burden" upon his exercise of religion simply because he claims it to be so. *See Monaghan v. Sebelius*, No. 12-15488, 2012 U.S. Dist. LEXIS 182857, at *10-11 (E.D. Mich. Dec. 30, 2012) (stating that because Monaghan claimed that "taking steps to have [the company] provide contraception coverage violates his beliefs as a Catholic," the court "will assume that abiding by the mandate would substantially burden Monaghan's adherence to the Catholic Church's teachings); *Legatus v. Sebelius*, No. 12-12061, 2012 U.S. Dist. LEXIS 156144, at *20 (E.D. Mich. Oct. 31,

2012) (stating that plaintiff shows a substantial burden simply by saying so). The Court agrees with the reasoning of the court in *Conestoga*, in stating that "[w]hile we wholeheartedly agree that 'courts are not arbiters of scriptural interpretation,'" the RFRA still imposes the requirement on courts to determine "whether the burden a law imposes on a plaintiff's stated religious belief is 'substantial.'" *Conestoga*, 2013 WL 140110, at *12 (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981)). Determining whether the impact of the regulation on plaintiffs' religious exercise is "substantial" thus necessarily requires an understanding of the nature of the religious exercise. Otherwise, as the *Conestoga* court noted, "[i]f every plaintiff were permitted to unilaterally determine that a law burdened their religious beliefs, and courts were required to assume that such burden was substantial, simply because the plaintiff claimed it was the case, then the standard expressed by Congress under the RFRA would convert to an 'any burden' standard." *Id*. at *13 (citing *Washington v. Klem*, 497 F.3d 272, 279-81 (3d Cir. 2007)); *see Autocam*, 2012 WL 6845677, at *7 (stating that if a court cannot look beyond plaintiffs' assertion of religious belief, every governmental regulation would be subject to a "private veto"). Accordingly, the Court finds that it is necessary to determine the nature of plaintiffs' religious exercise in order to determine whether it has been "substantially burdened."

Here, plaintiffs have made several arguments regarding the nature of their religious exercise. The Gilardis "hold to the teachings of the Catholic Church regarding the sanctity of human life from conception to natural death. They sincerely believe that actions

intended to terminate an innocent human life by abortion are gravely sinful." Compl. ¶ 25. The Gilardis "also sincerely believe in the Catholic Church's teaching regarding the immorality of artificial means of contraception and sterilization." *Id*. ¶ 26. The Gilardis state that they "have concluded that complying with the Mandate would require them to violate their religious beliefs and moral values because the Mandate requires them and/or the corporations they own and control to arrange for, pay for, provide, and facilitate contraception methods, sterilization procedures, and abortion because certain drugs and devices [come within the scope of the HRSA guidelines] despite their known abortifacient mechanisms of action." *Id*. ¶ 5. "Plaintiffs cannot arrange for, pay for, provide, or facilitate employee health plan coverage for contraceptives, sterilization, abortion, or related education and counseling without violating their sincerely-held religious beliefs and moral values." *Id*. ¶ 32.

Having set forth the nature of the Gilardis' religious exercise, the Court must next determine whether the requirement that the Freshway Corporations comply with the regulations constitutes a "substantial burden" on the Gilardis' exercise of religion. The Court finds that it does not.

The regulations do not compel the Gilardis to personally "arrange for, pay for, provide or facilitate" health coverage. *See Hobby Lobby*, 870 F. Supp. 2d at 1294 ("The mandate in question applies only to Hobby Lobby and Marden, not to its officers or owners."). The regulations do not require the Gilardis to "personally support, endorse, or engage in pro-abortion or

pro-contraception activity." *Briscoe*, 2013 U.S. Dist. LEXIS 26911, at *16. Rather, the regulations are imposed on the Freshway Corporations. For the reasons explained above, the Court declines to disregard the corporate form. Specifically, the Court finds that the Freshway Corporations are not the *alter egos* of the Gilardis for the limited purpose of asserting the Gilardis' religious beliefs.[5] The Gilardis remain free to personally oppose contraception and, indeed, even the regulations that are the subject of this lawsuit. Accordingly, the Court finds that the regulations do not impose a substantial burden on the Gilardis' exercise of religion.

The plaintiffs argue that "indirectness" is not a barrier to finding a substantial burden. Pls.' Br. at 13 (citing *Thomas*, 450 U.S. at 718). Plaintiffs argue that *Thomas* established that the impact of a "substantial burden" need not be direct. Pls.' Reply at 11. Plaintiffs misread *Thomas*. In that case, the Supreme Court held that Indiana's denial of unemployment compensation benefits to claimant, who quit his job because his religious beliefs forbade participation in the production of armaments, violated his First Amendment right to free exercise of religion. In that case, however, the burden of the denial of benefits rested with the person exercising his religion, not a separate person or corporate entity, as is the case here. The compulsion was indirect, rather than the burden, as in this case. *See Conestoga*, 2013 WL 140110, at *14 n.15

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[5] Plaintiffs have not requested, nor does the Court understand their argument to be, that the Court find that the Freshway Corporations are the *alter egos* of the Gilardis for all purposes.

(distinguishing *Thomas*). The Court therefore finds *Thomas* to be distinguishable.

The Court also does not find the fact that the health insurance provided by the Freshway Corporations is through a "self-insurance" mechanism compels a different result. *Compare Tyndale*, 2012 U.S. Dist. LEXIS 163965, at *42-43 (finding that a self-insured plan differed materially from a group policy because in a self-insurance scheme the plaintiff "directly pays for the services used by its plan participants, thereby removing one of the 'degrees' of separation that the court deemed relevant in *O'Brien*") *with Briscoe*, 2013 U.S. Dist. LEXIS 26911, at *15 (denying injunctive relief under RFRA for plaintiff corporation that provided self-insured plan) *and Grote Industries, LLC v. Sebelius*, No. 12-134, 2012 WL 6725905, at *7 (S.D. Ind. Dec. 27, 2012) (same), *injunction granted pending appeal*, No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013). The Court finds that self-insurance, as is the case here, is not dispositive. The Freshway Corporations are providing the insurance, not the Gilardis. Accordingly, the Court finds that the Gilardis have failed to demonstrate a likelihood of success in establishing a "substantial burden" on their exercise of religion.

IV. CONCLUSION

For all of the foregoing reasons, the Court finds that plaintiffs have failed to demonstrate a likelihood of success on the merits, and plaintiffs' motion for a preliminary injunction is **DENIED**. Because the Court has decided the motion on the papers pursuant to Local Civil Rule 65.1(d), the motions hearing currently scheduled for March 6, 2013 is hereby **CANCELED**.

An appropriate Order accompanies this Memorandum Opinion.

Signed: Emmet G. Sullivan
United States District Judge
March 3, 2013

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 13-104 (EGS)

[Filed March 3, 2013]

FRANCIS A. GILARDI, JR., *et al.*	)
	)
Plaintiffs,	)
	)
v.	)
	)
KATHLEEN SEBELIUS, *et* al.	)
	)
Defendants.	)
	)

ORDER

For the reasons set forth in the accompanying Memorandum Opinion filed on this day, it is hereby

ORDERED that plaintiffs' motion for a preliminary injunction is **DENIED**; and it is further

ORDERED that because the Court has decided the motion on the papers pursuant to Local Civil Rule 65.1(d), the motions hearing currently scheduled for March 6, 2013 is hereby **CANCELED**.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
March 3, 2013

APPENDIX F

Relevant Constitutional and Statutory Provisions

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ....

* * *

1 U.S.C. § 1

Words denoting number, gender, and so forth

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.

* * *

42 U.S.C. § 300gg-13 (Supp. V 2011)

Coverage of preventive health services

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage

shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

(1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force;

(2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and[1]

(3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration.[2]

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.[2]

(5) for the purposes of this chapter, and for the purposes of any other provision of law, the current recommendations of the United States Preventive Service Task Force regarding breast cancer screening, mammography, and prevention shall be

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[1] So in original. The word "and" probably should not appear.

[2] So in original. The period probably should be a semicolon.

considered the most current other than those issued in or around November 2009.

Nothing in this subsection shall be construed to prohibit a plan or issuer from providing coverage for services in addition to those recommended by United States Preventive Services Task Force or to deny coverage for services that are not recommended by such Task Force.

(b) Interval

(1) In general

The Secretary shall establish a minimum interval between the date on which a recommendation described in subsection (a)(1) or (a)(2) or a guideline under subsection (a)(3) is issued and the plan year with respect to which the requirement described in subsection (a) is effective with respect to the service described in such recommendation or guideline.

(2) Minimum

The interval described in paragraph (1) shall not be less than 1 year.

(c) Value-based insurance design

The Secretary may develop guidelines to permit a group health plan and a health insurance issuer offering group or individual health insurance coverage to utilize value-based insurance designs.

42 U.S.C. § 2000bb

Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to

guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb-1

Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section

shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-2

Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. § 2000bb-3

Applicability

(a) In general

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.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

42 U.S.C. § 2000bb-4

Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. _____

[Filed January 24, 2013]

FRANCIS A. GILARDI, JR.
601 North Stolle Avenue
Sidney, Ohio 45365

PHILIP M. GILARDI
601 North Stolle Avenue
Sidney, Ohio 45365

FRESH UNLIMITED, INC., d/b/a
Freshway Foods
601 North Stolle Avenue
Sidney, Ohio 45365

FRESHWAY LOGISTICS, INC.
601 North Stolle Avenue
Sidney, Ohio 45365

Plaintiffs,

vs.

UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN SERVICES

200 Independence Avenue, SW
Washington, DC 20201

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

UNITED STATES DEPARTMENT OF THE TREASURY
1500 Pennsylvania Avenue, NW
Washington, DC 20220

TIMOTHY F. GEITHNER, in his official capacity as the Secretary of the United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

UNITED STATES DEPARTMENT OF LABOR
200 Constitution Avenue, NW
Washington, DC 20210

HILDA L. SOLIS, in her official capacity as Secretary of the United States Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Francis A. Gilardi, Jr., Philip M. Gilardi, Fresh Unlimited, Inc., d/b/a Freshway Foods, and Freshway Logistics, Inc. (hereafter collectively "Plaintiffs"), by and through their attorneys, bring this complaint against Defendants United States Department of Health and Human Services, Kathleen Sebelius, United States Department of the Treasury, Timothy F. Geithner, United States Department of Labor, Hilda L. Solis, and their successors in office (hereafter collectively "Defendants"). In support thereof, Plaintiffs allege the following based on information and belief:

INTRODUCTION

1. Plaintiffs seek judicial review concerning Defendants' violations of Plaintiffs' constitutional and statutory rights in connection with Defendants' promulgation and implementation of certain regulations adopted under the Patient Protection and Affordable Care Act of 2010 (hereafter "Affordable Care Act"), specifically those regulations mandating that non-exempt employers include in employee health benefit plans coverage of certain goods and services, regardless of whether the provision of such coverage violates the employer's religious beliefs and moral values.

2. Plaintiffs ask this court for declaratory and injunctive relief from the operation of a rule promulgated by Defendants in or about February 2012 mandating that employee health benefit plans include coverage, without cost sharing, "all Food and Drug

Administration ["FDA"]-approved contraceptive methods, sterilization procedures and patient education and counseling for all women with reproductive capacity" in plan years beginning on or after August 1, 2012 (hereafter "the Mandate"). 45 C.F.R. § 147.130(a)(1)(iv), as confirmed at 77 Fed. Reg. 8725 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration Guidelines[1] found at http://www.hrsa.gov/womensguidelines (last visited Jan. 21, 2013).

3. Plaintiffs Francis A. Gilardi, Jr. and Philip M. Gilardi are adherents of the Catholic faith and hold to the Catholic Church's teachings regarding the immorality of artificial contraceptives, sterilization, and abortion. They are the sole owners of Plaintiffs Fresh Unlimited, Inc., d/b/a Freshway Foods, and Freshway Logistics, Inc. with each holding 50% of the corporate shares. As the two owners with controlling interests in the two corporations, they conduct their businesses in a manner that does not violate their sincerely-religious beliefs or moral values, and they wish to continue to do so.

4. For approximately the last ten years, Plaintiffs' employee health benefit plan specifically has excluded contraceptives, abortion, and sterilization, pursuant to Plaintiffs' religious beliefs and moral values.

5. Plaintiffs Francis A. Gilardi, Jr. and Philip M. Gilardi have concluded that complying with the

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[1] The Health Resources and Services Administration is an agency that is part of Defendant United States Department of Health and Human Services.

Mandate would require them to violate their religious beliefs and moral values because the Mandate requires them and/or the corporations they own and control to arrange for, pay for, provide, and facilitate contraception methods, sterilization procedures, and abortion because certain drugs and devices such as the "morning-after pill," "Plan B," and "Ella" come within the Mandate's and the Health Resources and Services Administration's definition of "Food and Drug Administration-approved contraceptive methods" despite their known abortifacient mechanisms of action.

6. Plaintiffs contend that the Mandate pressures them to either (1) comply with the Mandate and violate their religious beliefs and moral values or (2) incur ruinous fines and penalties if they choose to continue to conduct their businesses consistent with their religious beliefs and moral values.

7. Plaintiffs contend that the Mandate violates their rights under the Religious Freedom Restoration Act and the First Amendment to the United States Constitution and that it also violates the Administrative Procedure Act.

JURISDICTION AND VENUE

8. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(4), and 1346(a)(2) because it is a civil action against agencies and officials of the United States based on claims arising under the Constitution, laws of the United States, and regulations of executive departments and it seeks equitable or other relief under an Act of Congress, and also pursuant to 28

U.S.C. § 1361, as this court may compel officers and agencies of the United States to perform a duty owed Plaintiffs.

9. This court has jurisdiction to render declaratory and injunctive relief pursuant to 5 U.S.C. § 702, 28 U.S.C. §§ 2201-2202, 42 U.S.C. § 2000bb-1, and Federal Rules of Civil Procedure 57 and 65.

10. Venue is appropriate in this district pursuant to 28 U.S.C. § 1391(e) because Defendants reside in this district and a substantial part of the acts giving rise to Plaintiffs' claims occurred in this district.

11. This court has the authority to award Plaintiffs their costs and attorneys' fees pursuant to 28 U.S.C. § 2412 and 42 U.S.C. § 1988.

PLAINTIFFS

12. The Plaintiffs to this action are Francis A. Gilardi, Jr., Philip M. Gilardi, Fresh Unlimited, Inc., d/b/a Freshway Foods, and Freshway Logistics, Inc. Hereafter in this complaint, Plaintiffs Francis A. Gilardi, Jr. and Philip M. Gilardi will be referred to as "Francis Gilardi," "Philip Gilardi," or "Francis and Philip Gilardi"; Plaintiff Fresh Unlimited, Inc., d/b/a Freshway Foods will be referred to as "Freshway Foods"; and Plaintiff Freshway Logistics, Inc. will be referred to as "Freshway Logistics."

13. Francis and Philip Gilardi are individuals and citizens of the State of Ohio and the United States of America.

14. Francis and Philip Gilardi each hold a 50% ownership stake in Freshway Foods and Freshway

Logistics, and, therefore, together they own the full and controlling interest in both companies.

15. Francis Gilardi is the Chief Executive Officer and Treasurer of Freshway Foods and Freshway Logistics and Philip Gilardi is the President and Secretary. They are the only Directors of the two corporations, and together they set the policies governing the conduct of all phases of the two corporations.

16. Freshway Foods is a closely-held and family owned fresh produce processor and packer serving twenty-three states for over twenty-four years. It has approximately 340 full-time employees.

17. Freshway Logistics is a closely-held and family owned for-hire carrier of mainly refrigerated products serving twenty-three states since 2003. It has approximately fifty-five full-time employees.

18. Freshway Foods and Freshway Logistics are both located at 601 North Stolle Avenue, Sidney, Ohio, which is in Shelby County. Both entities are Subchapter S corporations and are incorporated under the laws of the State of Ohio.

DEFENDANTS

19. Defendant United States Department of Health and Human Services (hereafter "HHS") is an agency of the United States and is responsible for the administration and enforcement of the Mandate.

20. Defendant Kathleen Sebelius is Secretary of HHS and is named as a party only in her official capacity.

21. Defendant United States Department of the Treasury is an agency of the United States and is responsible for the administration and enforcement of the Mandate.

22. Defendant Timothy F. Geithner is Secretary of the Treasury and is named as a party only in his official capacity.

23. Defendant United States Department of Labor (hereafter "DOL") is an agency of the United States and is responsible for the administration and enforcement of the Mandate.

24. Defendant Hilda L. Solis is Secretary of DOL and is named as a party only in her official capacity.

FACTUAL ALLEGATIONS

25. Francis and Philip Gilardi hold to the teachings of the Catholic Church regarding the sanctity of human life from conception to natural death. They sincerely believe that actions intended to terminate an innocent human life by abortion are gravely sinful.

26. Francis and Philip Gilardi also sincerely believe in the Catholic Church's teaching regarding the immorality of artificial means of contraception and sterilization.

27. Francis and Philip Gilardi manage and operate Freshway Foods and Freshway Logistics in a way that reflects the teachings, mission, and values of their Catholic faith, and they desire to continue to do so.

28. Examples of how Plaintiffs further their religious beliefs and moral values include the following:

a. For approximately the last ten years, Francis and Philip Gilardi have affixed to the back of the trucks they own through a separate company, but which bear the name of Freshway Foods, a sign stating, "It's not a choice, it's a child," as a way to promote their pro-life views to the public;

b. Francis and Philip Gilardi strongly support financially and otherwise their Catholic parish, schools, and seminary;

c. In or about 2004, Francis and Philip Gilardi drafted a values statement listing values by which their companies would be run. They listed "Ethics" first since it is their primary business value: "Ethics: Honest, Trustworthy and Responsible to: - Each Other; - Our Customers; - Our Vendors. Non-negotiable - Supersedes everything";

d. Freshway Foods makes annual monetary and/or in-kind donations, primarily food, to many community non-profit charitable organizations, including Agape, Compassionate Care, the YMCA, Holy Angel's Soup Kitchen, United Way, Habitat for Humanity, American Legion, Bill McMillian's Needy Children, Elizabeth's New Life Center, and local schools;

e. Freshway Logistics donates a trailer for use by the local Catholic parish for its annual picnic. Freshway Logistics also uses its trucks to deliver the food donated by Freshway Foods to food banks outside the Sidney, Ohio, area;

f. During the Monthly Associate Appreciation Lunches, Plaintiffs provide alternative foods for

their employees to accommodate the types of foods their employees are allowed to eat pursuant to their religious beliefs; and

g. Plaintiffs provide their Muslim employees with space to pray during breaks and lunches. During Ramadan, Plaintiffs adjust break periods to allow their Muslim employees, pursuant to their religion, to eat after sundown.

29. Moreover, Freshway Foods and Freshway Logistics provide their full-time employees with a self-insured employee health benefits plan that provides employees with health insurance and prescription drug insurance through a third-party administrator and stop loss provider. Employees of the two corporations may choose a basic option or a premier option from the plan. The plan is renewed on April 1.

30. For approximately the last ten years, Plaintiffs have specifically excluded coverage of all contraceptives, abortion, and sterilization, because paying for such services as a part of an employee health benefits plan would violate Plaintiffs' sincerely-held religious beliefs and moral values.

31. Like other non-cash benefits provided to employees, Plaintiffs consider the provision of employee health insurance an integral component of furthering their mission, values, and religious beliefs.

32. Plaintiffs cannot arrange for, pay for, provide, or facilitate employee health plan coverage for contraceptives, sterilization, abortion, or related education and counseling without violating their sincerely-held religious beliefs and moral values.

APPLICABLE PROVISIONS OF THE MANDATE

33. Under the Mandate being challenged herein and related Affordable Care Act provisions, an employer of fifty or more full-time employees, such as Plaintiffs, must offer, unless exempted, a group health plan to employees that includes coverage for all FDA-approved contraceptive methods, sterilization procedures, and related education and counseling.

34. The Mandate does not apply to employers of fewer than fifty full-time employees unless those employers choose to offer their employees health insurance.

35. "Grandfathered" health plans are exempted from the Mandate. Such plans were in existence as of the enactment of the Affordable Care Act on or about March 23, 2010, and have not since been materially changed.

36. Plaintiffs' group health plan is not "grandfathered" as it has been materially changed since on or about March 23, 2010, for example, by increasing doctor visit co-pays by $10 and $15 for the basic option and the premier option respectively.

37. Permanently exempt from the Mandate are "religious employers," as defined at 45 CFR § 147.130(a)(1)(A) and (B). Temporarily exempted from the Mandate are non-profit employers with religious objections to covering contraceptive services, 77 Fed. Reg. 8725 (Feb. 15, 2012), and employers who satisfy the criteria of the "temporary enforcement safe harbor" do not have to comply with the Mandate until at least August 1, 2013. "Guidance on the Temporary Enforcement Safe Harbor for Certain Employers" (Aug.

15, 2012), http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf. (last visited Jan. 24, 2013).

38. Plaintiffs do not qualify as "religious employers" under 45 C.F.R. § 147.130(a)(1)(A) and (B), nor can they take advantage of the "temporary enforcement safe harbor" because of their for-profit status.

39. Accordingly, the Mandate applies to Plaintiffs as they employ fifty or more full-time employees and are not otherwise exempted from the Mandate.

40. The Mandate went into effect on August 1, 2012, for non-exempt for-profit employers, such as Plaintiffs, and the Mandate applies to the first health insurance plan-year starting after August 1, 2012.

41. Plaintiffs wish to renew health insurance coverage for their full-time employees on April 1, 2013, while, at the same time, continuing to exclude coverage for all FDA-approved contraceptive methods, including injectable contraceptives, abortion, sterilization procedures, and related patient education and counseling, as they have been doing for the past several years.

42. Under the terms of the Mandate and absent relief from this court, Plaintiffs will be required to violate their religious beliefs and moral values by providing their full-time employees with coverage of goods, services, activities, and practices that Plaintiffs consider sinful and immoral and which are currently excluded from their existing health plan.

43. Failure to comply with the Mandate will subject Plaintiffs to incur significant fines and penalties.

44. Failure to provide health insurance that complies with the Mandate may result in fines and penalties of $100 per day for each employee not properly covered, 26 U.S.C. § 4980D, as well as potential enforcement lawsuits, 26 U.S.C. §§ 1132, 1185d.

45. Should Francis Gilardi, Philip Gilardi, and Freshway Foods, pursuant to their sincerely-held religious beliefs and moral values, not provide health insurance that complies with the Mandate for their approximately 340 full-time employees, they would be subjected to daily fines and penalties of about $34,000, totaling over $12.4 million annually.

46. Should Francis Gilardi, Philip Gilardi, and Freshway Logistics, pursuant to their sincerely-held religious beliefs and moral values, not provide health insurance that complies with the Mandate for their approximately fifty-five full-time employees, they would be subjected to daily fines and penalties of about $5,500, totaling over $2 million annually.

47. Non-exempt employers with fifty or more full-time employees that fail to provide any employee health insurance plan are subjected to annual fines and penalties of $2,000 for each full-time employee, not counting thirty of them. 26 U.S.C. § 4980H.

48. The Mandate pressures Plaintiffs into choosing between complying with the Mandate's requirements in violation of their religious beliefs and moral values or paying ruinous fines and penalties that

would have a crippling impact on their ability to survive economically. The Mandate, therefore, imposes a substantial burden on Plaintiffs' religious exercise.

49. Any alleged interest Defendants have in providing free FDA-approved contraceptives, abortifacients, sterilization procedures, and related education and counseling services, without cost sharing, is not compelling as applied to Plaintiffs. In addition, any such interest can be advanced by Defendants through other more narrowly tailored means that would not require Plaintiffs to pay for and otherwise support coverage of such items through their employee health care plan in violation of their religious beliefs and moral values.

50. Plaintiffs lack an adequate or available administrative remedy.

51. Plaintiffs lack an adequate remedy at law.

CAUSES OF ACTION

COUNT I

Violation of the Religious Freedom Restoration Act

52. Plaintiffs repeat and re-allege the allegations in paragraphs 1 through 51 above and incorporate those allegations herein by reference.

53. Plaintiffs' sincerely held religious beliefs prevent them from arranging for, paying for, providing, or facilitating coverage for contraceptive methods, sterilization procedures, abortion, and patient education and counseling related to such procedures.

54. The Mandate, by requiring Plaintiffs to provide such coverage, imposes a substantial burden on Plaintiffs' free exercise of religion by coercing Plaintiffs to choose between continuing to conduct their businesses in accordance with their religious beliefs and moral values or paying substantial annual fines and penalties to the government.

55. The Mandate furthers no compelling governmental interest, nor is it necessary to prevent any concrete harm to such an interest.

56. The Mandate is not narrowly tailored to furthering any compelling interest.

57. The Mandate is not the least restrictive means of furthering Defendants' stated interests.

58. The Mandate and Defendants' threatened enforcement of the Mandate violates rights secured to Plaintiffs by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq*.

59. Absent injunctive and declaratory relief against the Mandate, Plaintiffs will suffer irreparable harm, and they request the relief set forth below in their prayer for relief.

COUNT II

Violation of the First Amendment's Free Exercise Clause

60. Plaintiffs repeat and re-allege the allegations in paragraphs 1 through 51 above and incorporate those allegations herein by reference.

61. Plaintiffs' sincerely held religious beliefs prevent them from arranging for, paying for, providing, or facilitating coverage for contraceptive methods, sterilization procedures, abortion, and patient education and counseling related to such procedures.

62. The Mandate, by requiring Plaintiffs to provide such coverage imposes a substantial burden on Plaintiffs' free exercise of religion by coercing Plaintiffs to choose between continuing to conduct their businesses in accordance with their religious beliefs and moral values or paying substantial annual fines and penalties to the government.

63. The Mandate is neither neutral nor generally applicable.

64. The Mandate furthers no compelling governmental interest, nor is it necessary to prevent any concrete harm to such an interest.

65. The Mandate is not narrowly tailored to furthering any compelling interest.

66. The Mandate is not the least restrictive means of furthering the Defendants' stated interests.

67. The Mandate and Defendants' threatened enforcement of the Mandate violates Plaintiffs' rights to the free exercise of religion as guaranteed by the First Amendment to the United States Constitution.

68. Absent injunctive and declaratory relief against the Mandate, Plaintiffs will suffer irreparable harm, and they request the relief set forth below in their prayer for relief.

COUNT III

Violation of the First Amendment's
Free Speech Clause

69. Plaintiffs repeat and re-allege the allegations in paragraphs 1 through 51 above and incorporate those allegations herein by reference.

70. The First Amendment protects organizations as well as individuals from being compelled to speak and, in many circumstances, from being compelled to subsidize the speech of others.

71. Expenditures of money are a form of protected speech.

72. The Mandate compels Plaintiffs to arrange for, pay for, provide, and facilitate coverage for education and counseling related to contraception, sterilization, and abortion, which is speech to which Plaintiffs' morally object.

73. Plaintiffs believe that the aforementioned services, activities, and practices covered by the Mandate are contrary to their sincerely-held religious beliefs.

74. The Mandate compels Plaintiffs to subsidize goods, services, activities, practices, and speech that Plaintiffs believe to be immoral and, thereby, violates Plaintiffs' right to be free from uttering, subsidizing, or supporting compelled speech with which Plaintiffs disagree on religious and moral grounds.

75. The Mandate and Defendants' threatened enforcement of the Mandate violates Plaintiffs' free

speech rights as guaranteed by the First Amendment to the United States Constitution.

76. Absent injunctive and declaratory relief against the Mandate, Plaintiffs will suffer irreparable harm, and they request the relief set forth below in their prayer for relief.

COUNT IV

Violation of the Administrative Procedure Act

77. Plaintiffs repeat and re-allege the allegations in paragraphs 1 through 51 above and incorporate those allegations herein by reference.

78. The Affordable Care Act expressly delegates to the Health Resources and Services Administration, which is an agency that is part of Defendant United States Department of Health and Human Services, the authority to establish "preventive care" guidelines that a group health plan and health insurance issuer must abide by.

79. Given this express delegation, Defendants were obliged to engage in formal notice and comment rulemaking as prescribed by law before Defendants issued the guidelines that group health plans and insurers must abide by.

80. Proposed regulations were required to be published in the Federal Register and interested persons were required to be given a chance to take part in the rulemaking through the submission of written data, views, or arguments.

81. Defendants promulgated the "preventive care" guidelines without engaging in the formal notice

and comment rulemaking as prescribed by law. Defendants delegated the responsibilities for issuing "preventive care" guidelines to a non-governmental entity, the Institute of Medicine, which did not permit or provide for broad public comment otherwise required by the Administrative Procedure Act.

82. Defendants also failed to engage in the required notice and comment rulemaking when Defendants issued the interim final rules and the final rule that incorporates the "preventive care" guidelines.

83. The Mandate violates Section 1303(b)(1)(A) of the Affordable Care Act, which provides that "nothing in this title" "shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits for any plan year." 42 U.S.C. § 18023(b)(1)(A)(i) (codification of Section 1303 of the Affordable Care Act).

84. The Mandate violates the Religious Freedom Restoration Act as set forth in this complaint.

85. The Mandate violates the First Amendment to the United States Constitution as set forth in this complaint.

86. Defendants, in promulgating the Mandate, failed to consider the constitutional and statutory implications of the Mandate on for-profit employers such as Plaintiffs.

87. The Mandate and Defendants' actions are arbitrary and capricious, not in accordance with law or required procedure, and contrary to constitutional right, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

88. Absent injunctive and declaratory relief against the Mandate, Plaintiffs will suffer irreparable harm, and they request the relief set forth below in their prayer for relief.

PRAYER FOR RELIEF

89. Plaintiffs repeat and re-allege all allegations made above and incorporate those allegations herein by reference, and Plaintiffs request that this court grant them the following relief and enter final judgment against Defendants and in favor of Plaintiffs:

A. Enter a declaratory judgment that the Mandate and Defendants' enforcement of the Mandate against Plaintiffs violates the Religious Freedom Restoration Act;

B. Enter a declaratory judgment that the Mandate and Defendants' enforcement of the Mandate against Plaintiffs violates the Free Exercise Clause of the First Amendment to the United States Constitution;

C. Enter a declaratory judgment that the Mandate and Defendants' enforcement of the Mandate against Plaintiffs violates the Free Speech Clause of the First Amendment to the United States Constitution;

D. Enter a declaratory judgment that the Mandate and Defendants' enforcement of the Mandate against Plaintiffs violates the Administrative Procedure Act;

E. Enter preliminary and permanent injunctions prohibiting Defendants, their officers, agents, servants, employees, successors in office, attorneys, and those acting in active concert or participation with them, including any insurance carriers or third party

insurance plan administrators with whom Plaintiffs may contract for employee health benefits, from applying and enforcing against Plaintiffs the Mandate and any related regulations, rules, statutes, laws, penalties, fines, or assessments;

F. Award Plaintiffs their costs and attorney's fees associated with this action; and

G. Award Plaintiffs any further relief this court deems equitable and just.

Respectfully submitted on this 24th day of January, 2013,

/s/ Colby M. May
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* Pro hac vice applications forthcoming

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1:13-cv-00104-RBW

[Filed February 8, 2013]

FRANCIS A. GILARDI, JR., et al., Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., Defendants.

DECLARATION OF PLAINTIFF
FRANCIS A. GILARDI, JR.

I, Francis A. Gilardi, Jr., an adult resident of the State of Ohio and a plaintiff in the above-captioned case, make the following declaration, pursuant to 28 U.S.C. § 1746 and LCvR 11.2, based on my personal knowledge, unless otherwise noted:

1. My brother, Philip M. Gilardi, and I are the sole owners of Fresh Unlimited, Inc., d/b/a Freshway Foods, (hereafter "Freshway Foods"), and Freshway Logistics, Inc. (hereafter "Freshway Logistics"). We each hold a 50% ownership stake in Freshway Foods and Freshway

Logistics and, therefore, together own the full and controlling interest in both corporations.

2. I am the Chief Executive Officer and Treasurer of Freshway Foods and Freshway Logistics and Philip Gilardi is the President and Secretary. We are the only Directors of the two corporations, and together we set the policies governing the conduct of all phases of the two corporations.

3. Freshway Foods is a closely-held and family owned fresh produce processor and packer serving twenty-three states for over twenty-four years. It has approximately 340 full-time employees. Freshway Logistics is a closely-held and family owned for-hire carrier of mainly refrigerated products serving twenty-three states since 2003. It has approximately fifty-five full-time employees.

4. Freshway Foods and Freshway Logistics are both located at 601 North Stolle Avenue, Sidney, Ohio, which is in Shelby County. Both entities are Subchapter S corporations and are incorporated under the laws of the State of Ohio.

5. I hold to the teachings of the Catholic Church regarding the sanctity of human life from conception to natural death. I sincerely believe that actions intended to terminate an innocent human life by abortion are gravely sinful. I also sincerely believe in the Catholic Church's teaching regarding the immorality of contraception and sterilization.

6. I manage and operate Freshway Foods and Freshway Logistics in a way that reflects the teachings, mission, and values of my Catholic faith, and I desire to continue to do so.

7. Examples of how I further my religious beliefs and moral values through the two corporations include the following: (a) For approximately the last ten years, I have directed that on the back of the trucks I own with my brother, Philip, through a separate company, but which bear the name of Freshway Foods, that a sign be affixed stating, "It's not a choice, it's a child," as a way to promote my pro-life views to the public. Attached as Exhibit A-1 is a true and correct copy of a recent photograph of the back of one of our trucks with the pro-life sign on the lower, right-hand side of the rear door of the truck; (b) I strongly support financially and otherwise my Catholic parish, schools, and seminary; (c) In or about 2004, my brother, Philip, and I drafted a values statement listing values by which all our companies would be run. We listed "Ethics" first since that is our primary business value: "Ethics: Honest, Trustworthy and Responsible to: - Each Other; - Our Customers; - Our Vendors. Non-negotiable - Supersedes everything"; (d) At my direction, Freshway Foods makes annual monetary and/or in-kind donations, primarily food, to many community non-profit charitable organizations, including Agape, Compassionate Care, the YMCA, Holy Angel's Soup Kitchen, United Way, Habitat for Humanity, American Legion, Bill McMillian's Needy Children, Elizabeth's New Life Center, and local schools; (e) At my direction, Freshway Logistics donates a trailer for use by the local Catholic parish for the annual parish picnic and uses its trucks to deliver the food donated by Freshway Foods to food banks outside the Sidney, Ohio, area; (f) At my direction, during our Monthly Associate Appreciation Lunches, we provide our Freshway Foods and Freshway Logistics employees with alternative foods to accommodate the types of foods our employees

are allowed to eat pursuant to their religious beliefs; and (g) At my direction, Freshway Foods and Freshway Logistics provide our Muslim employees with space to pray during breaks and lunches, and, during Ramadan, break periods are adjusted to allow our Muslim employees, pursuant to their religion, to eat after sundown.

8. Moreover, Freshway Foods and Freshway Logistics provide our full-time employees with a self-insured employee health benefits plan that provides employees with health insurance and prescription drug insurance through a third-party administrator and stop loss provider. Employees of the two corporations may choose a basic option or a premier option from the plan. The plan is renewed on April 1. I understand that it takes us about sixty days to complete the process of obtaining health insurance coverage and enrolling our employees in that coverage.

9. For approximately the last ten years, and at my brother's and my direction, we have specifically excluded coverage of all contraceptives, abortion, and sterilization from our employee health insurance plan because paying for such services as a part of a health plan would violate my sincerely-held religious beliefs and moral values. Attached as Exhibit A-2 are true and correct copies of the benefits summary sheets for our current plan, which specifically excludes coverage of contraceptives, sterilization, and abortion as noted by the "Xs" in the margins of the attachment.

10. I consider the provision of employee health insurance to be an integral component of furthering the mission and values of my corporations and of my religious beliefs and moral values.

11. My sincerely-held religious beliefs and moral values do not allow me to direct, or allow, Freshway Foods and Freshway Logistics to arrange for, pay for, provide, or facilitate employee health plan coverage for contraceptives, sterilization, abortion, or related education and counseling without violating my sincerely-held religious beliefs and moral values.

12. I understand that the Defendants in this lawsuit promulgated and implemented a mandate that requires Freshway Foods and Freshway Logistics to obtain and pay for employee health insurance coverage, without cost sharing, for "all Food and Drug Administration-approved contraceptive methods, sterilization procedures and patient education and counseling for all women with reproductive capacity" in plan years beginning on or after August 1, 2012. (hereafter "Mandate".) I also understand that FDA-approved contraceptive methods include abortion-inducing drugs.

13. I understand that the Mandate applies to Freshway Foods and Freshway Logistics because they each employ fifty or more full-time employees and are not exempt from the Mandate. In particular, I understand that my corporations do not fall within the "religious employer" exemption, as that term is defined by the Mandate, and they do not fall within any "temporary enforcement safe harbor" provided by Defendants to certain non-profit entities. I also understand that the employee health benefit plan for Freshway Foods and Freshway Logistics is not considered "grandfathered," and thus not exempt from the Mandate because since March 2010 the plan has undergone material changes, such as an increase in

doctor visit co-pays of $10 for the basic option and $15 for the premier option.

14. To operate and manage Freshway Foods and Freshway Logistics consistent with my Catholic faith and values, I want to continue to be able to provide high quality, broad coverage health insurance for my full-time employees that excludes coverage for things I believe are morally wrong for me and my corporations to arrange for, pay for, provide, facilitate, or otherwise support.

15. I understand that by April 1, 2013, which is the renewal date for our employee health benefit plan, the Mandate will require me to direct Freshway Foods and Freshway Logistics, contrary to my religious beliefs and moral values, to arrange for, pay for, provide, facilitate, or otherwise support a health plan that includes contraceptives, including abortion-inducing drugs, sterilization, and related patient education and counseling and will prevent me and my corporations from obtaining an employee health benefit plan that comports with our religious beliefs and moral values.

16. I understand that if Freshway Foods and Freshway Logistics fail to comply with the Mandate or drop employee group health coverage entirely, then they could incur significant annual fines and/or penalties payable to the federal government that would have a crippling impact on their ability to survive economically and, by extension, would harm me financially.

17. In addition to fines and penalties, stopping all health coverage for our full-time employees would

have a severe impact on our ability to compete with other companies that do offer health coverage and would have severe consequences for our employees who would have to find expensive individual policies in the private marketplace.

18. In my view, the Mandate requires me and Freshway Foods and Freshway Logistics to choose between (a) complying with the Mandate and violating our religious beliefs and moral values and (b) not complying with the Mandate and having to pay annual fines and penalties in order to conduct business consistent with our religious beliefs and moral values.

19. In my view, the Mandate prevents me from following the dictates of my Catholic faith in the operation and management of Freshway Foods and Freshway Logistics, violates the religious-based principles by which Freshway Foods and Freshway Logistics are run, and will continue to violate my rights and those of my corporations unless we obtain relief from this court by April 1, 2013.

I declare under penalty of perjury that the above statements are true and correct to the best of my knowledge. Executed on January 23, 2013, in Sidney, Ohio.

/s/Francis A. Gilardi, Jr. [1]
Francis A. Gilardi, Jr.

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[1] The declaration electronically filed with the court bears the scanned original signature of Francis A. Gilardi, Jr. The original declaration, bearing the original signature, is being retained by his counsel in this action and is available for review on request by the court and defense counsel. LCvR 5.4(b)(5).


Case 1:13-cv-00104-EGS Document 21-2 Filed 02/08/13 Page 7 of 12
Freshway FOODS
Your fresh produce solution.
Our passion.
www.freshwayfoods.com
937.498.4664
"It's not a choice, it's a child."
KIRK
EXHIBIT A-1
Case No. 1:13-cv-00104-RBW

Freshway Foods
SuperMed Plus
(Premier Plan)
Effective 04/01/12 - NGF

EXHIBIT A-2

Benefits	**Network**	**Non-Network**
Benefit Period	January 1st through December 31st	
Dependent Age Limit	26 Removal upon End of Calendar Year	
Blood Pint Deductible	0 Pints	
Pre-Existing Condition Waiting Period	None	
Annual Benefit Period Maximum	Unlimited	
Benefit Period Deductible – Single/Family[1]	$500 / $1,000	$1,000 / $2,000
Coinsurance	80%	60%
Coinsurance Out-of-Pocket Maximum (Excluding Deductible) – Single/Family	$4,500 / $10,000	$9,000 / $20,000
Physician/Office Services		
Office Visit (Illness/Injury) (PCP)[2]	$25 copay, then 100%	60% after deductible
Office Visit (Illness/Injury) (Specialist)[2]	$50 copay, then 100%	60% after deductible

	Benefits	Network	Non-Network
	Urgent Care Office Visit[2]	$50 copay, then 100%	60% after deductible
	Surgical Services in Physician's Office	$50 copay, then 100%	60% after deductible
	All Immunizations (Unlimited)	100%	60% after deductible
	Therapeutic Injectables, Drugs and Biologicals and Administration (excludes Contraceptive Injectables) (Unlimited)	100%	60% after deductible
X	Contraceptive Injectables	Not Covered	Not Covered
	Allergy Testing and Treatment	100%	60% after deductible
	Preventative Services		
	Preventative Services, in accordance with state and federal law[3]	100%	60% after deductible
	Routine Physical Exams (Age 21 and over; Unlimited)	100%	60% after deductible
	Well Child Care Services including Exam, Routine Vision and Routine Hearing Exams, Immunizations and Laboratory Tests (Birth to age 21)	100%	60% after deductible
	Routine Mammogram (One per benefit period)	100%	60% after deductible

Benefits	Network	Non-Network
Routine Pap Test (One per benefit period)	100%	60% after deductible
Routine Laboratory, X-Rays and Medical Tests (All ages)	100%	60% after deductible
Routine Endoscopic Services (All ages)	100%	60% after deductible
Outpatient Services		
Surgical Services (other than a physician's office)	80% after deductible	60% after deductible
Diagnostic /Therapeutic Services (CT Scans, MRIs and Nuclear Medicine	80% after deductible	60% after deductible
Diagnostic Services (Laboratory, X-rays and Medical Test)	80% after deductible	60% after deductible
Outpatient Professional Diagnostic Colonoscopy, Sigmoidoscopy, Proctosignoidoscopy, Anoscopy	80% after deductible	60% after deductible
Physical Therapy – Professional and Facility (24 visits per benefit period)	80% after deductible	60% after deductible
Occupational Therapy – Professional and Facility (20 visits per benefit period)	80% after deductible	60% after deductible

Benefits	Network	Non-Network
Speech Therapy – Facility and Professional (20 visits per benefit period)	80% after deductible	60% after deductible
Chiropractic Therapy – Professional Only (12 visits per benefit period)	80% after deductible	60% after deductible
Cardiac Rehabilitation - Facility and Professional	80% after deductible	60% after deductible
Accident Emergency in Emergency Room[4]	$200 copay, then 100%	
Medical Emergency in Emergency Room[4]	$200 copay, then 100%	
Non-Emergency use of an Emergency Room[4]	$200 copay, then 80% after deductible	$200 copay, then 60% after deductible
Inpatient Facility		
Semi-Private Room and Board	80% after deductible	60% after deductible
Diagnostic Services (Laboratory, X-Rays and Medical Test)	80% after deductible	60% after deductible
Professional Services	80% after deductible	60% after deductible
Maternity	80% after deductible	60% after deductible

Benefits	Network	Non-Network
Skilled Nursing Facility (180 days per benefit period)	80% after deductible	60% after deductible
Additional Services		
Ambulance (Unlimited)	80%	80%
Dental (Accident Only)	80% after deductible	80% after deductible
Diabetic Education and Training	100%	60% after deductible
Durable Medical Equipment including Prosthetic Appliances and Orthotic Devices (Unlimited)	80% after deductible	60% after deductible
Home Healthcare (100 visits per benefit period)	80% after deductible	60% after deductible
Hospice	80% after deductible	60% after deductible
Organ Transplants	80% after deductible	60% after deductible (Unlimited)
Weight Loss Surgical Services	Not Covered	Not Covered
Private Duty Nursing ($25,000 lifetime maximum)	80% after deductible	60% after deductible
TMJ Services	80% after deductible	60% after deductible

	Benefits	Network	Non-Network
X	Sterilization and Abortion	Not Covered	Not Covered
	Mental Health and Substance Abuse – Federal Mental Health Parity		
	Inpatient Mental Health and Substance Abuse Services	**Benefits paid based on corresponding medical benefits**	
	Outpatient Mental Health and Substance Abuse Services		

Note: Services requiring a copayment are not subject to the single/family deductible.

Non-Contracting and Facility Other Providers will pay the same as Non-Network.

Deductible expenses incurred for services by a network provider will only apply to the network deductible limits. Deductible expenses incurred for services by a non-network provider will only apply to the non-network deductible limits.

Coinsurance expenses incurred for services by a network provider will only apply to the network coinsurance out-of-pocket limits. Coinsurance expenses incurred for services by a non-network provider will only apply to the non-network coinsurance out-of-pocket limits.

[*Continued on next page*]

Benefits will be determined based on Medical Mutual's medical and administrative policies and procedures.

In certain instances, Medical Mutual's payment may not equal the percentage listed above, However, the covered person's coinsurance will always be based on the lesser of the provider's billed charges or Medical Mutual's negotiated rate with the provider.

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[1] Maximum family deductible. Member deductible is the same as single deductible. 3-month carryover applies.

[2] The office visit copay applies to the cost of the office visit only.

[3] Preventive Services include evidence-based services that have a rating of "A" or "B" in the United States Preventive Services Task Force, routine immunizations and other screenings, as provided in the Patient Protection and Affordable Care Act.

[4] Copay is taken on the room charge and waived if admitted.

Freshway Foods
SuperMed Plus
(Basic Plan)
Effective 04/01/12 - NGF

Benefits	Network	Non-Network
Benefit Period	January 1st through December 31st	
Dependent Age Limit	26 Removal upon End of Calendar Year	
Blood Pint Deductible	0 Pints	
Pre-Existing Condition Waiting Period	None	
Annual Benefit Period Maximum	Unlimited	
Benefit Period Deductible – Single/Family[1]	$1,000 / $3,000	$2,000 / $6,000
Coinsurance	80%	60%
Coinsurance Out-of-Pocket Maximum (Excluding Deductible) – Single/Family	$4,000 / $8,000	$8,000 / $16,000
Physician/Office Services		
Office Visit (Illness/Injury) (PCP)[2]	$30 copay, then 100%	60% after deductible
Office Visit (Illness/Injury) (Specialist)[2]	$60 copay, then 100%	60% after deductible

	Benefits	Network	Non-Network
	Urgent Care Office Visit[2]	$50 copay, then 100%	60% after deductible
	Surgical Services in Physician's Office	$60 copay, then 100%	60% after deductible
	All Immunizations (Unlimited)	100%	60% after deductible
	Therapeutic Injectables, Drugs and Biologicals and Administration (excludes Contraceptive Injectables) (Unlimited)	100%	60% after deductible
X	Contraceptive Injectables	Not Covered	Not Covered
	Allergy Testing and Treatment	100%	60% after deductible
	Preventative Services		
	Preventative Services, in accordance with state and federal law[3]	100%	60% after deductible
	Routine Physical Exams (Age 21 and over; Unlimited)	100%	60% after deductible
	Well Child Care Services including Exam, Routine Vision and Routine Hearing Exams, Immunizations and Laboratory Tests (Birth to age 21)	100%	60% after deductible
	Routine Mammogram (One per benefit period)	100%	60% after deductible

Benefits	Network	Non-Network
Routine Pap Test (One per benefit period)	100%	60% after deductible
Routine Laboratory, X-Rays and Medical Tests (All ages)	100%	60% after deductible
Routine Endoscopic Services (All ages)	100%	60% after deductible
Outpatient Services		
Surgical Services (other than a physician's office)	80% after deductible	60% after deductible
Diagnostic /Therapeutic Services (CT Scans, MRIs and Nuclear Medicine	80% after deductible	60% after deductible
Diagnostic Services (Laboratory, X-rays and Medical Test)	80% after deductible	60% after deductible
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Accident Emergency in Emergency Room[4]	$200 copay, then 100%	
Medical Emergency in Emergency Room[4]	$200 copay, then 100%	
Non-Emergency use of an Emergency Room[4]	$200 copay, then 80% after deductible	$200 copay, then 60% after deductible
Inpatient Facility		
Semi-Private Room and Board	80% after deductible	60% after deductible
Diagnostic Services (Laboratory, X-Rays and Medical Test)	80% after deductible	60% after deductible
Professional Services	80% after deductible	60% after deductible
Maternity	80% after deductible	60% after deductible

Benefits	Network	Non-Network
Skilled Nursing Facility (180 days per benefit period)	80% after deductible	60% after deductible
Additional Services		
Ambulance (Unlimited)	80%	80%
Dental (Accident Only)	80% after deductible	80% after deductible
Diabetic Education and Training	100%	60% after deductible
Durable Medical Equipment including Prosthetic Appliances and Orthotic Devices (Unlimited)	80% after deductible	60% after deductible
Home Healthcare (100 visits per benefit period)	80% after deductible	60% after deductible
Hospice	80% after deductible	60% after deductible
Organ Transplants	80% after deductible	60% after deductible (Unlimited)
Weight Loss Surgical Services	Not Covered	Not Covered
Private Duty Nursing ($25,000 lifetime maximum)	80% after deductible	60% after deductible
TMJ Services	80% after deductible	60% after deductible

	Benefits	Network	Non-Network
X	Sterilization and Abortion	Not Covered	Not Covered
	Mental Health and Substance Abuse – Federal Mental Health Parity		
	Inpatient Mental Health and Substance Abuse Services	**Benefits paid based on corresponding medical benefits**	
	Outpatient Mental Health and Substance Abuse Services		

Note: Services requiring a copayment are not subject to the single/family deductible.

Non-Contracting and Facility Other Providers will pay the same as Non-Network.

Deductible expenses incurred for services by a network provider will only apply to the network deductible limits. Deductible expenses incurred for services by a non-network provider will only apply to the non-network deductible limits.

Coinsurance expenses incurred for services by a network provider will only apply to the network coinsurance out-of-pocket limits. Coinsurance expenses incurred for services by a non-network provider will only apply to the non-network coinsurance out-of-pocket limits.

[*Continued on next page*]

Benefits will be determined based on Medical Mutual's medical and administrative policies and procedures.

In certain instances, Medical Mutual's payment may not equal the percentage listed above, However, the covered person's coinsurance will always be based on the lesser of the provider's billed charges or Medical Mutual's negotiated rate with the provider.

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[1] Maximum family deductible. Member deductible is the same as single deductible. 3-month carryover applies.

[2] The office visit copay applies to the cost of the office visit only.

[3] Preventive Services include evidence-based services that have a rating of "A" or "B" in the United States Preventive Services Task Force, routine immunizations and other screenings, as provided in the Patient Protection and Affordable Care Act.

[4] Copay is taken on the room charge and waived if admitted.

Freshway Foods
Prescription Drug Program
Effective 04-01-12

	Benefits	Copay	Day Supply
	Benefit Period	January 1st through December 31st	
	Dependent Age Limit	26 Removal upon End of Calendar Year	
X	**Formulary Retail Program (No Contraceptive Coverage or Sexual Dysfunction Coverage)**		
	Generic Copayment	$15	30
	Formulary Copayment	$30	30
	Non-Formulary Copayment	50% (Min. $50; Max. $300)	30
	Diabetic Supplies[1]	$0	30
	Asthmatic Supplies[2]	$0	30
X	**Formulary Mail Order Program (No Contraceptive Coverage or Sexual Dysfunction Coverage)**		
	Generic Copayment	$30	90
	Formulary Copayment	$70	90

Benefits	Copay	Day Supply
Non-Formulary Copayment	$200	90
Diabetic Supplies[1]	$0	90
Asthmatic Supplies[2]	$0	90

Note: In an effort to continue our commitment to quality care and help contain the increasing cost of prescription drug coverage, a formulary feature is included in your prescription drug benefit. A formulary drug is a FDA approved prescription medication reviewed by an independent Pharmacy and Therapeutics Committee brought together by Medco Health Solutions, Inc. Formulary drugs can assist in maintaining quality care while meeting your plan's cost containment objectives.

Benefits will be determined based on Medical Mutual's medical and administrative policies and procedures.

This document is only a partial listing of benefits. This is not a contract of insurance. No person other than an officer of Medical Mutual may agree, orally or in writing, to change the benefits listed here. The contract or certificate will contain the complete listing of covered services.

[1] Includes over-the-counter items, as well as insulin, syringes and needles, glucose monitors, meters or glucowatch

[2] Includes Replacement bags, Peak Flow Meters and Inhalation Spacers only.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1:13-cv-00104-RBW

[Filed February 8, 2013]

FRANCIS A. GILARDI, JR., et al., Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., Defendants.

DECLARATION OF PLAINTIFF PHILIP M. GILARDI, JR.

I, Philip Gilardi, Jr., an adult resident of the State of Ohio and a plaintiff in the above-captioned case, make the following declaration, pursuant to 28 U.S.C. § 1746 and LCvR 11.2, based on my personal knowledge, unless otherwise noted:

1. My brother, Francis A. Gilardi, and I are the sole owners of Fresh Unlimited, Inc., d/b/a Freshway Foods, (hereafter "Freshway Foods"), and Freshway Logistics, Inc. (hereafter "Freshway Logistics"). We each hold a 50% ownership stake in Freshway Foods and Freshway

Logistics and, therefore, together own the full and controlling interest in both corporations.

2. I am the President and Secretary of Freshway Foods and Freshway Logistics and Francis is the Chief Executive Officer and Treasurer. We are the only Directors of the two corporations, and together we set the policies governing the conduct of all phases of the two corporations.

3. Freshway Foods is a closely-held and family owned fresh produce processor and packer serving twenty-three states for over twenty-four years. It has approximately 340 full-time employees. Freshway Logistics is a closely-held and family owned for-hire carrier of mainly refrigerated products serving twenty-three states since 2003. It has approximately fifty-five full-time employees.

4. Freshway Foods and Freshway Logistics are both located at 601 North Stolle Avenue, Sidney, Ohio, which is in Shelby County. Both entities are Subchapter S corporations and are incorporated under the laws of the State of Ohio.

5. I hold to the teachings of the Catholic Church regarding the sanctity of human life from conception to natural death. I sincerely believe that actions intended to terminate an innocent human life by abortion are gravely sinful. I also sincerely believe in the Catholic Church's teaching regarding the immorality of contraception and sterilization.

6. I manage and operate Freshway Foods and Freshway Logistics in a way that reflects the teachings, mission, and values of my Catholic faith, and I desire to continue to do so.

7. Examples of how I further my religious beliefs and moral values through the two corporations include the following: (a) For approximately the last ten years, I have directed that on the back of the trucks I own with my brother, Francis, through a separate company, but which bear the name of Freshway Foods, that a sign be affixed stating, "It's not a choice, it's a child," as a way to promote my pro-life views to the public; (b) I strongly support financially and otherwise my Catholic parish, schools, and seminary; (c) In or about 2004, my brother, Francis, and I drafted a values statement listing values by which all our companies would be run. We listed "Ethics" first since that is our primary business value: "Ethics: Honest, Trustworthy and Responsible to: - Each Other; - Our Customers; - Our Vendors. Non-negotiable - Supersedes everything"; (d) At my direction, Freshway Foods makes annual monetary and/or in-kind donations, primarily food, to many community non-profit charitable organizations, including Agape, Compassionate Care, the YMCA, Holy Angel's Soup Kitchen, United Way, Habitat for Humanity, American Legion, Bill McMillian's Needy Children, Elizabeth's New Life Center, and local schools; (e) At my direction, Freshway Logistics donates a trailer for use by the local Catholic parish for the annual parish picnic and uses its trucks to deliver the food donated by Freshway Foods to food banks outside the Sidney, Ohio, area; (f) At my direction, during our Monthly Associate Appreciation Lunches, we provide our Freshway Foods and Freshway Logistics employees with alternative foods to accommodate the types of foods our employees are allowed to eat pursuant to their religious beliefs; and (g) At my direction, Freshway Foods and Freshway Logistics provide our Muslim employees with space to

pray during breaks and lunches, and, during Ramadan, break periods are adjusted to allow our Muslim employees, pursuant to their religion, to eat after sundown.

8. Moreover, Freshway Foods and Freshway Logistics provide our full-time employees with a self-insured employee health benefits plan that provides employees with health insurance and prescription drug insurance through a third-party administrator and stop loss provider. Employees of the two corporations may choose a basic option or a premier option from the plan. The plan is renewed on April I. I understand that it takes us about sixty days to complete the process of obtaining health insurance coverage and enrolling our employees in that coverage.

9. For approximately the last ten years, and at my brother's and my direction, we have specifically excluded coverage of all contraceptives, abortion, and sterilization from our employee health insurance plan because paying for such services as a part of a health plan would violate my sincerely-held religious beliefs and moral values.

10. I consider the provision of employee health insurance to be an integral component of furthering the mission and values of my corporations and of my religious beliefs and moral values.

11. My sincerely-held religious beliefs and moral values do not allow me to direct, or allow, Freshway Foods and Freshway Logistics to arrange for, pay for, provide, or facilitate employee health plan coverage for contraceptives, sterilization, abortion, or related

education and counseling without violating my sincerely-held religious beliefs and moral values.

12. I understand that the Defendants in this lawsuit promulgated and implemented a mandate that requires Freshway Foods and Freshway Logistics to obtain and pay for employee health insurance coverage, without cost sharing, for "all Food and Drug Administration-approved contraceptive methods, sterilization procedures and patient education and counseling for all women with reproductive capacity" in plan years beginning on or after August 1, 2012. (hereafter "Mandate".) I also understand that FDA-approved contraceptive methods include abortion-inducing drugs.

13. I understand that the Mandate applies to Freshway Foods and Freshway Logistics because they each employ fifty or more full-time employees and are not exempt from the Mandate. In particular, I understand that my corporations do not fall within the "religious employer" exemption, as that term is defined by the Mandate, and they do not fall within any "temporary enforcement safe harbor" provided by Defendants to certain non-profit entities. I also understand that the employee health benefit plan for Freshway Foods and Freshway Logistics is not considered "grandfathered," and thus not exempt from the Mandate because since March 2010 the plan has undergone material changes, such as an increase in doctor visit co-pays of $10 for the basic option and $15 for the premier option.

14. To operate and manage Freshway Foods and Freshway Logistics consistent with my Catholic faith and values, I want to continue to be able to provide

high quality, broad coverage health insurance for my full-time employees that excludes coverage for things I believe are morally wrong for me and my corporations to arrange for, pay for, provide, facilitate, or otherwise support.

15. I understand that by April 1, 2013, which is the renewal date for our employee health benefit plan, the Mandate will require me to direct Freshway Foods and Freshway Logistics, contrary to my religious beliefs and moral values, to arrange for, pay for, provide, facilitate, or otherwise support a health plan that includes contraceptives, including abortion-inducing drugs, sterilization, and related patient education and counseling and will prevent me and my corporations from obtaining an employee health benefit plan that comports with our religious beliefs and moral values.

16. I understand that if Freshway Foods and Freshway Logistics fail to comply with the Mandate or drop employee group health coverage entirely, then they could incur significant annual fines and/or penalties payable to the federal government that would have a crippling impact on their ability to survive economically and, by extension, would harm me financially.

17. In addition to fines and penalties, stopping all health coverage for our full-time employees would have a severe impact on our ability to compete with other companies that do offer health coverage and would have severe consequences for our employees who would have to find expensive individual policies in the private marketplace.

18. In my view, the Mandate requires me and Freshway Foods and Freshway Logistics to choose between (a) complying with the Mandate and violating our religious beliefs and moral values and (b) not complying with the Mandate and having to pay annual fines and penalties in order to conduct business consistent with our religious beliefs and moral values.

19. In my view, the Mandate prevents me from following the dictates of my Catholic faith in the operation and management of Freshway Foods and Freshway Logistics, violates the religious-based principles by which Freshway Foods and Freshway Logistics are run, and will continue to violate my rights and those of my corporations unless we obtain relief from this court before April 1, 2013.

I declare under penalty of perjury that the above statements are true and correct to the best of my knowledge. Executed on January 24, 2013, in Sidney, Ohio.

/s/Philip M. Gilardi [1]
Philip M. Gilardi

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[1] The declaration electronically filed with the court bears the scanned original signature of Philip M. Gilardi. The original declaration, bearing the original signature, is being retained by his counsel in this action and is available for review on request by the court and defense counsel. LCvR 5.4(b)(5).