No. 13-354

In the Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

HOBBY LOBBY STORES, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: SEPT. 19, 2013
CERTIORARI GRANTED: NOV. 26, 2013

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Docket No. 12-6294

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

v.

KATHLEEN SEBELIUS, SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES, HILDA SOLIS, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF DEPARTMENT OF THE TREASURY, AND UNITED STATES DEPARTMENT OF THE TREASURY, DEFENDANTS

DOCKET ENTRIES

DATE	PROCEEDINGS
11/20/12	[10020725] Civil case docketed. Preliminary record filed. DATE RECEIVED: 11/20/2012 * * * .
	* * * * *
11/20/12	[10021229] Motion filed by Appellants Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc. for injunction pending appeal. * * *

DATE	PROCEEDINGS
	* * * * *
11/28/12	[10023101] Supplemental authority filed by Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc. * * *
11/30/12	[10023484] Response filed by Timothy Geithner, Kathleen Sebelius, Hilda Solis, United States Department of Health and Human Services, United States Department of Labor and United States Department of the Treasury to Appellants' Motion For Injunction Pending Appeal. * * *
	* * * * *
12/3/12	[10024305] Reply filed by Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc.. * * *
	* * * * *
12/19/12	[10029616] Supplemental authority filed by Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc.. * * *
12/20/12	[10029966] Order filed by Judges Lucero and Ebel denying motion for injunction pending appeal filed by Appellants Mr. Steve Green,

DATE	PROCEEDINGS
	Barbara Green, Mr. David Green, Hobby Lobby Stores, Inc., Mardel, Inc., Mart Green and Darsee Lett. * * *
	* * * * *
1/10/13	[10034786] Motion filed by Appellants Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc. for initial en banc hearing. * * *
	* * * * *
1/24/13	[10038471] Opposition filed by Timothy Geithner, Kathleen Sebelius, Hilda Solis, United States Department of Health and Human Services, United States Department of Labor and United States Department of the Treasury to Petition for Initial Hearing En Banc. * * *
	* * * * *
2/11/13	[10043982] Appellant/Petitioner's brief filed by Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc.. * * *
	* * * * *
2/12/13	[10044486] Appendix filed by Appellants Barbara Green, Mr. David Green, Mart

DATE	PROCEEDINGS
	Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc..
	* * * * *
3/15/13	[10053599] Appellee/Respondent's brief filed by Timothy Geithner, Kathleen Sebelius, Hilda Solis, United States Department of Health and Human Services, United States Department of Labor and United States Department of the Treasury. * * *
	* * * * *
3/29/13	[10057912] Order filed by Judges Briscoe, Kelly, Lucero, Hartz, O'Brien, Tymkovich, Gorsuch, Matheson and Bacharach granting appellants' petition for initial hearing en banc, granting the request to expedite oral argument and denying request to set this appeal and the Newland matter before the same panel. The parties will be advised promptly of the hearing date. Please see attached order for details. * * *
3/29/13	[10058025] Appellant/Petitioner's reply brief filed by Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc.. * * *
4/1/13	[10058387] Order filed by Judges Briscoe, Kelly, Lucero, Hartz, O'Brien, Tymkovich, Gorsuch, Matheson and Bacharach directing

DATE	PROCEEDINGS
	appellants and appellees to file simultaneous supplemental briefing addressing the issues set forth in the attached order. (Supplemental briefs due 04/15/2013 for Timothy Geithner, Barbara Green, David Green, Mart Green, Steve Green, Hobby Lobby Stores, Inc., Darsee Lett, Mardel, Inc., Kathleen Sebelius, Hilda Solis, United States Department of Health and Human Services, United States Department of Labor and United States Department of the Treasury.) * * *
4/3/13	[10059018] Order filed by Judges Briscoe, Kelly, Lucero, Hartz, O'Brien, Tymkovich, Gorsuch, Matheson and Bacharach setting case for oral argument for May 23, 2013 at 2:00 p.m. * * * .
	* * * * *
4/22/13	[10064177] Appellee/Respondent's supplemental brief filed by Timothy Geithner, Kathleen Sebelius, Hilda Solis, United States Department of Health and Human Services, United States Department of Labor and United States Department of the Treasury. * * *
	* * * * *
4/22/13	[10064469] Appellant's supplemental brief filed by Barbara Green, Mr. David Green,

DATE	PROCEEDINGS
	Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc.. 12 paper copies to be provided to the court. Served on 04/22/2013. * * *
5/1/13	[10067611] Supplemental authority filed by Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc.. * * *
5/7/13	[10069628] Supplemental authority filed by Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc.. * * *
	* * * * *
5/23/13	[10075445] Case argued by Stuart Duncan for Appellant and by Alisa Klein for the Appellee; Submitted to Judges Briscoe, Kelly, Lucero, Hartz, Tymkovich, Gorsuch, Matheson and Bacharach. * * *
	* * * * *
6/26/13	[10085533] Supplemental authority filed by Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc.. * * *
6/27/13	[10085720] Response filed by Timothy Geithner, Kathleen Sebelius, Hilda Solis, HHS,

DATE	PROCEEDINGS
	United States Department of Labor and United States Department of the Treasury to appellants' 28j letter of June 26, 2013. * * *
6/27/13	[10085854] Reversed and Remanded with instructions. Terminated on the merits after oral hearing. Written, signed, published. Judges Briscoe (concurring in part and dissenting in part), Kelly (concurring), Lucero (concurring in part and dissenting in part), Hartz (concurring), Tymkovich (authoring), Gorsuch (concurring), Matheson (concurring in part and dissenting in part) and Bacharach (concurring). * * * .
6/27/13	[10085872] The order of the district court is reversed and remanded with instructions. [12-6294]
6/27/13	[10085874] Mandate issued. * * *
9/20/13	[10110122] Petition for writ of certiorari filed by Kathleen Sebelius on 09/19/2013 and placed on the docket 09/19/2013 as Supreme Court Number 13-354. * * *
11/26/13	[10128482] Supreme court order dated 11/26/2013 granting certiorari filed. The petition for a writ of certiorari in 13-356 (3rd Circuit) is granted. The cases are consolidated. * * *

* * * * *

UNITED STATES COURT DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil Docket No. 5:12-cv-01000-HE

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

v.

KATHLEEN SEBELIUS, SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES, HILDA SOLIS, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF DEPARTMENT OF THE TREASURY, AND UNITED STATES DEPARTMENT OF THE TREASURY, DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET ENTRY NO.	PROCEEDINGS
9/12/12	1	COMPLAINT against All Defendants filed by Steve Green, David Green, Darsee Lett, Mardel Inc, Barbara Green, Hobby Lobby Stores Inc, Mart Green. (Attachments: # 1 Civil Cover

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		Sheet) (pw) (Entered: 09/12/2012)
		* * * * *
9/12/12	6	MOTION for Preliminary Injunction *and Opening Brief in Support* by All Plaintiffs. (Attachments: # 1 Exhibit 1—Order [Dkt#30] USDC Colorado) (Geister, Charles) (Entered: 09/12/2012)
		* * * * *
9/28/12	18	MOTION to Expedite by All Plaintiffs. (Baxter, Eric) (Entered: 09/28/2012)
		* * * * *
10/4/12	27	RESPONSE to Motion re 18 MOTION to Expedite filed by All Defendants. (Bennett, Michelle) (Entered: 10/04/2012)
		* * * * *
10/4/12	29	ENTER ORDER . . . setting plaintiffs' motion 6 for preliminary injunction for hearing on 10/24/2012 @ 10:00 a.m., in Courtroom No. 304

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		before Honorable Joe Heaton; Defendants' response to plaintiffs' motion 6 is due for filing on 10/22/2012. Signed by Honorable Joe Heaton on 10/04/2012. (lam) (Entered: 10/04/2012)
10/9/12	30	UNOPPOSED MOTION to Continue *hearing on motion for preliminary injunction* by All Defendants. (Bennett, Michelle) (Entered: 10/09/2012)
10/10/12	31	ORDER granting 30 the government's unopposed motion for continuance . . . the hearing on plaintiffs' motion for preliminary injunction 6 is CONTINUED to 10/30/2012 @ 9:00 a.m., in Courtroom No. 304. Signed by Honorable Joe Heaton on 10/10/2012. (lam) (Entered: 10/10/2012)
10/10/12	32	CORRECTED ORDER continuing hearing on plaintiffs' motion 6 for preliminary injunction to: 11/1/2012 @ 09:00 AM in Courtroom 304

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		before Honorable Joe Heaton. Signed by Honorable Joe Heaton on 10/10/2012. (lam) (Entered: 10/10/2012)
		* * * * *
10/22/12	41	RESPONSE in Opposition re 6 MOTION for Preliminary Injunction *and Opening Brief in Support* filed by All Defendants. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (Bennett, Michelle) (Entered: 10/22/2012)
10/29/12	42	REPLY by Plaintiffs Barbara Green, David Green, Mart Green, Steve Green, Hobby Lobby Stores Inc., Darsee Lett, Mardel Inc re 41 Response in Opposition to Motion filed by All Plaintiffs. (Duncan, Stuart) (Entered: 10/29/2012)
11/1/12	43	Minute Entry for proceedings held before Honorable Joe Heaton . . . hearing held on plaintiffs' motion for preliminary injunction 6; arguments from counsel heard;

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		court to enter written order. (Court Reporter Jeanne Ring) (lam) (Entered: 11/01/2012)
		* * * * *
11/19/12	45	ORDER denying 6 plaintiffs' motion for preliminary injunction . . . see order for specifics. Signed by Honorable Joe Heaton on 11/19/2012. (lam) (Entered: 11/19/2012)
11/19/12	46	NOTICE OF APPEAL as to 45 Order on Motion for Preliminary Injunction by All Plaintiffs. Filing fee $ 455. (Duncan, Stuart) (Entered: 11/19/2012)
		* * * * *
11/30/12	51	UNOPPOSED MOTION for Extension of Time *to Respond to Complaint by* All Defendants. (Bennett, Michelle) (Entered: 11/30/2012)
		* * * * *
12/03/12	53	ORDER granting 51 defendants' unopposed motion for extension of time . . .

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		defendants shall file their answer or other responsive pleading to plaintiffs complaint not later than 12/13/2012. Signed by Honorable Joe Heaton on 12/03/2012. (lam) (Entered: 12/03/2012)
12/10/12	54	JOINT MOTION to Stay Case *Pending Appeal* by All Defendants. (Bennett, Michelle) (Entered: 12/10/2012)
12/12/12	55	ORDER granting 54 the parties' motion to stay . . . further proceedings in this case are stayed pending resolution of plaintiff's appeal to the Tenth Circuit Court of Appeals or further order of the court. Signed by Honorable Joe Heaton on 12/12/2012. (lam) (Entered: 12/12/2012)
12/20/12	56	ORDER of USCA—The motion for an injunction pending appeal is denied as to 46 Notice of Appeal filed by Mart Green, Hobby Lobby Stores Inc., Steve Green, Barbara

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		Green, Mardel Inc., David Green, Darsee Lett (pw) (Entered: 12/20/2012)
		* * * * *
6/27/13	65	USCA OPINION Reversed and Remanded to District Court of Western District of Oklahoma as to 46 Notice of Appeal filed by Mart Green, Hobby Lobby Stores Inc., Steve Green, Barbara Green, Mardel Inc., David Green, Darsee Lett (Attachments: # 1 Attachment Letter from Tenth Circuit Court of Appeals) (pw) (Entered: 06/27/2013)
6/27/13	66	USCA JUDGMENT Reserved and Remanded to US District Court of Western District of Oklahoma as to 46 Notice of Appeal filed by Mart Green, Hobby Lobby Stores Inc., Steve Green, Barbara Green, Mardel Inc., David Green, Darsee Lett (pw) (Entered: 06/27/2013)

DATE	DOCKET ENTRY NO.	PROCEEDINGS
6/27/13	67	MANDATE ISSUED From USCA 46 Notice of Appeal filed by Mart Green, Hobby Lobby Stores Inc, Steve Green, Barbara Green, Mardel Inc, David Green, Darsee Lett (pw) (Entered: 06/27/2013)
6/27/13	68	EMERGENCY MOTION for Preliminary Injunction by All Plaintiffs. (Duncan, Stuart) (Entered: 06/27/2013)
6/28/13	69	ORDER granting 68 plaintiffs' emergency motion for temporary restraining order pending hearing on plaintiffs' motion for preliminary injunction; party seeking leave to offer additional evidence shall do so by motion and brief by 07/03/2013 . . . any response to such motion shall be filed by 07/10/2013; hearing on plaintiffs' for preliminary injunction is set 07/19/2013 at 9:00 a.m., in Courtroom No. 304 before the Honorable Joe Heaton. Signed by Honora-

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		ble Joe Heaton on 06/28/2013. (lam) (Entered: 06/28/2013)
		* * * * *
7/19/13	75	Minute Entry for proceedings held before the Honorable Joe Heaton . . . hearing held on plaintiffs' emergency motion 68 for preliminary injunction; counsel for the parties present; court hears oral argument; plaintiffs' motion 68 is granted and this proceeding is STAYED until 10/01/2013; written order to follow. (Court Reporter Jeanne Ring) (lam) (Entered: 07/19/2013)
7/19/13	76	ORDER granting 68 plaintiffs' motion for issuance of a preliminary injunction . . . defendants, their agents, officers and employees are enjoined and restrained from any effort to apply or enforce as to plaintiffs, the substantive requirements imposed in 42:300gg-12(a)(4) and at issue in this case, or the penalties

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		related thereto until further order of the court; as agreed by the parties further proceedings in this case are stayed until 10/01/2013 . . . see order for further specifics. Signed by Honorable Joe Heaton on 07/19/2013. (lam) (Entered: 07/19/2013)
		* * * * *
9/17/13	79	NOTICE OF APPEAL as to 76 Order on Motion for Order, by All Defendants. (Bennett, Michelle) (Entered: 09/17/2013)
		* * * * *
9/20/13	82	PETITION FOR WRIT OF CERTIORARI re Supreme Court Number: 13-354 (pw) (Entered: 09/20/2013)
9/23/13	83	JOINT MOTION to Stay Case by All Defendants. (Bennett, Michelle) (Entered: 09/23/2013)
9/24/13	84	ORDER granting 83 the parties' joint motion to extend the stay previously entered based

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		on the government's filing of a petition for writ of certiorari that seeks Supreme Court review of the 10th Circuit's 06/27/2013 en bac decision . . . this case is STAYED pending the Supreme Court's disposition of the government's petition. Signed by Honorable Joe Heaton on 09/24/2013. (lam) (Entered: 09/24/2013)
9/26/13	85	ORDER of USCA granting Unopposed Motion to Hold Appeal in Abeyance. See order for specifics. (pw) (Entered: 09/26/2013)
11/26/13	86	ORDER of USCA as to 79 Notice of Appeal—Order filed by Clerk of the Court (DEC) continuing abatement. Status report(s) due 05/12/2014 by Hobby Lobby Stores, Inc., et al. and Kathleen Sebelius, et al. However, if there are any developments in the Supreme Court that would affect the need for continued abatement of this case, the parties are

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		under an obligation to advise the court as soon as reasonably possible. (kw,) (Entered: 11/27/2013)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case Number: CIV-12-1000-HE

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

v.

KATHLEEN SEBELIUS, SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES, HILDA SOLIS, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF DEPARTMENT OF THE TREASURY, AND UNITED STATES DEPARTMENT OF THE TREASURY, DEFENDANTS

Nov. 1, 2012

TRANSCRIPT OF HEARING ON MOTION FOR PRELIMINARY INJUNCTION

APPEARANCES:

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FOR THE DEFENDANTS:

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[3]

(The following was had in open court on November 2, 2012:)

THE COURT: Well, good morning. We're here on Hobby Lobby stores versus Sebelius and others, Civil Case 12-1000. If counsel would make your appearances for the record.

MR. DUNCAN: Yes, Your Honor. Stuart Kyle Duncan for the plaintiffs.

THE COURT: All right.

MR. BAXTER: Good morning, Your Honor. Eric Baxter also here for Hobby Lobby.

MR. ENSMINGER: Derek Ensminger, also on behalf of the plaintiff, Your Honor.

THE COURT: All right.

MS. BENNETT: Good morning, Your Honor. Michelle Bennett from the Department of Justice on behalf of the defendants.

THE COURT: All right.

Well, let's see. Some of you who are here as counsel, I understand, had kind of a breathless experience earlier this week on figuring out whether you were going to get here or not, so I'm glad to see that you were able to dodge the hurricane and make it in for this.

Let me ask just by way of background here, the briefs that you've submitted make reference to two other cases that are addressing similar issues in a similar factual context, the Colorado decision and the Missouri decision that are attached [4] to the briefs. Are those the only cases that counsel are aware of that really address this particular factual circumstance?

MR. DUNCAN: If I may, Your Honor. Last night at about 11 o'clock we received an order in a case from the Eastern District of Michigan involving a Catholic-owned business called Weingartz Supply Company. This is a case—we don't—Becket Fund does not represent the plaintiffs in that case, but we were aware of that case, and last night we received an order from counsel in that case that the judge issued a preliminary injunction with the mandate on behalf of

the company. And so we looked at the order, we have copies of the order for the court. We have copies for the government as well. The government was already aware of the case. And so we're aware of a third case now.

THE COURT: All right. If you would submit that. Ms. Bennett, do you know of any others beyond that one?

MS. BENNETT: Your Honor, there are no other cases where there have been decisions issued, but there are several other—probably four or five additional cases where there are motions for preliminary injunction pending, they've either been fully briefed or not, argued or not.

THE COURT: And they are private company cases as—

MS. BENNETT: Yes.

THE COURT: —opposed to churches or religious schools or something of that sort?

[5]

MS. BENNETT: That's right, Your Honor. Obviously, we have many nonprofits as well, but there are about, I think, a total of seven or eight for-profit companies.

THE COURT: All right.

MR. DUNCAN: That sounds right.

THE COURT: All right.

Let's first talk about the standard that I'm to apply here. Before we get to that, let me just ask, what are the parties' expectations in terms of the hearing today? Do you anticipate offering evidence on disputed fact questions or not?

MR. DUNCAN: No, Your Honor, we don't.

THE COURT: You do not?

MS. BENNETT: We don't either, Your Honor. Just argument.

THE COURT: I take it, Ms. Bennett, from your brief that there is no dispute here as to the sincerity of the religious beliefs—

MS. BENNETT: No.

THE COURT: —asserted on the part of the Greens?

MS. BENNETT: That's right, Your Honor. We don't dispute that.

THE COURT: All right. Well, let me ask then, in light of that, let's first address the question of what the legal standard is in connection with the preliminary injunction that's sought here.

[6]

Mr. Duncan, why don't we start with you. The briefs make reference to—I guess maybe the first question is whether or not this is a disfavored sort of injunction based on whether it does or doesn't disturb the status quo. And I gather that is related princi-

pally to this issue of the coverage at some point of this Plan B and Ella drug that at some later point was removed.

MR. DUNCAN: That's correct, Your Honor.

THE COURT: Why don't you tell me what you understand the facts to be as it relates to that, and your views on the favored or disfavored status aspect of this.

MR. DUNCAN: Yes, Your Honor. So this injunction, the plaintiffs are seeking to maintain the status quo. What the status quo means is the freedom of the plaintiffs to continue to exclude the mandated drugs from their policies. That's the status quo. The mandate does not go into effect against the plaintiffs until January 1st. So the injunction seeks to maintain the status quo.

As for the prior coverage, the plaintiffs' insurance policies have always explicitly excluded pregnancy-terminating drugs. When they discovered in a chemical formulary in their plan, two of the chemical names corresponded to abortion-inducing drugs, they realized that recently, they immediately excluded the drugs because those drugs are inconsistent with the explicit terms of their policy, [7] pregnancy-terminating drugs. And more importantly, inconsistent with their religious faith, which forbids them from participating in the provision of abortion, abortion-inducing drugs.

So as to the standard, this injunction is not disfavored because it seeks to preserve the status quo. Status quo means plaintiffs can exclude them from the

policy without incurring fines, and the mandate has not yet applied. So the injunction is not disfavored.

Now, we would point out as well, that's the standard that the *Newland* court used in the Colorado case; however, plaintiffs believe that they would meet either standard. So this would be similar to the *Awad versus Ziriax* case that went to the Tenth Circuit in which there was an argument about the standard, and the Tenth Circuit said, well, look, the plaintiffs meet either standard. So in other words, the normal standard, which is likelihood of success on the merits or the lower standard.

So we believe we meet either standard here as a strict question of the technical standard, the injunction is not disfavored because it seems—

THE COURT: I think you've kind of moved to a second question there.

MR. DUNCAN: Sorry.

THE COURT: But in terms of the status quo aspect of [8] this, what was the point at which the existence of these two drugs on the formulary list was discovered?

MR. DUNCAN: It was discovered very recently, Your Honor. Very recently.

THE COURT: All right.

MR. DUNCAN: And so it's important to note that looking at the insurance policy, the insurance policy doesn't say it covers abortion-inducing drugs, it

doesn't say it covers Plan B. It simply says we cover these drugs, we don't cover a pregnancy termination. And so the plaintiffs have been very candid with the court and with the government, this controversy over the mandate has caused plaintiffs, along with presumably millions of other Americans, to say, well, what is this going to make me do in my insurance policies. So this is a very complicated matter and it requires going back and looking through very detailed chemical formularies and long chemical names and—

THE COURT: Do these two drugs that you focused on, do they have any purpose other than pregnancy termination?

MR. DUNCAN: No. As far as we know, as far as the government's own FDA-approved birth control guide says, the purpose of these drugs is emergency contraception. In other words, a back-up contraception. And of course, the government's own guide says they may work by preventing implantation in the womb. So that's the only purpose we're [9] aware of. In other words, there's no purpose for these drugs that we're aware of that would be to treat some other medical condition. Certainly we're not aware of it.

THE COURT: All right.

Ms. Bennett, why don't we hear from you on this status quo issue here. We'll kind of chop these issues up to keep both of you off your stride here for the first hour or so.

MS. BENNETT: Sure, Your Honor. Thank you.

Although counsel for the plaintiff didn't indicate exactly when plaintiffs discovered this coverage, it appears as being very recently that it was after the government promulgated its regulation requiring coverage of contraception, which was August 1st of 2011. After that, plaintiff then changed their insurance coverage.

So our position is that effectively the status quo that plaintiffs were providing this coverage to their over 13,000 employees, we don't know for how long, but they were providing it. And now they are attempting to change the coverage, or attempting to get this court to enjoin them from going back to that. So, Your Honor, I think—

THE COURT: Well, is there any dispute that, as Mr. Duncan suggests, that the restriction itself has not yet gone into effect?

MS. BENNETT: It's true that it does not affect these plaintiffs until January 1st, because that's when their plan [10] year starts. But the regulations were promulgated and became effective generally on August 1st of 2011.

I would also just note, Your Honor, and I think you are going to ask more questions about the preliminary injunction standards later, so I'll save that other information. But plaintiffs indicated that—or Your Honor asked the question do these drugs serve another purpose or it's just to terminate pregnancy. It's the government's position that they do not terminate pregnancy, which again, is not an issue here. But I'm

unaware of any other purpose that they serve. And we argue again the fact that plaintiffs didn't monitor their health plan—

THE COURT: The government's position is that the drugs prevent a pregnancy from occurring?

MS. BENNETT: From occurring. Yes, Your Honor.

THE COURT: All right.

MS. BENNETT: As I said, I don't think that's an issue this court needs to get into.

But the government also thinks that setting aside the issue of the status quo, that the fact that plaintiffs covered these services before, basically the finding of irreparable harm from the fact that they might have to cover them in the future.

THE COURT: Well, do you have any reason to disbelieve the explanation that they just discovered it?

[11]

MS. BENNETT: I don't, Your Honor. But I think that based on the allegation in their complaint, they go out of their way to, for example, make sure that their store doesn't sell greeting cards that are inconsistent with their religious faith, there are many ways in which they monitor their activities to make sure they are consistent with their faith. Our position is just that to the extent that they haven't—weren't monitoring their health insurance policy closely weighs against the finding of irreparable harm.

THE COURT: Of course, I'm guessing that most of us don't spend a lot of time poring over our homeowners policies or our fire policies or our car policies looking for all the exceptions either.

MS. BENNETT: That's probably true, Your Honor. But I just think in this case, as I said, where they made allegations that they want to make their business consistent with their faith in all aspects of their life, the fact that they didn't do it here, also note that they didn't begin looking until, as they allege in their complaint, this controversy arose. So we think that weighs against a finding of irreparable harm.

THE COURT: While you're up there, let's move to kind of the second question as it relates to the standard, and that is, assuming that this is not a disfavored motion, what standard then applies in terms of the requirements for finding of preliminary injunction. And in particular I'm interested in [12] what the standard is on likelihood of success and whether this relaxed standard does or doesn't apply here.

MS. BENNETT: Yes, Your Honor. It's the government's position that the plaintiffs do have to show a likelihood of success on the merits of their claims for several reasons. First of all, that's the most recent—that's the standard articulated by the Supreme Court most recently in *Winter*. In that case, the court didn't suggest that there was any sort of weighing or modifying of standards. In fact, it explicitly rejected that idea and said that a plaintiff must satisfy all four factors.

As we indicated in our brief, the Tenth Circuit hasn't really addressed the effect of *Winter*. Some other circuits have, but we think that the Tenth Circuit also hasn't applied the relaxed standard since *Winter*, which suggests that perhaps *Winter*, the Supreme Court's most recent guidance, is the standard.

In addition, Your Honor, there's case law in the Tenth Circuit saying that the modified test does not apply when plaintiffs—when a PI seeks to stay government action in the public interest. An action taken pursuant to a statutory scheme is presumed to be in the public interest.

So we think here, as we've indicated in our brief, that the goal of these regulations is to improve the health of women and newborn children and to promote general equality, that [13] these are regulations promulgated pursuant to a statute of congress and they are in the public interest; and, therefore, the modified standard should not apply.

An additional reason, Your Honor, is that plaintiffs' irreparable harm argument is based on the idea, the allegation of violation of their First Amendment rights. In that context, the Tenth Circuit, and specifically this district in *Isbell v. City of Oklahoma*, said that the merits of the claim and the likelihood of irreparable harm sort of merged. In other words, a plaintiff can't show irreparable harm just based on the possibility of a violation of his First Amendment rights. He has to actually show that he's likely to succeed on that claim,

because if there's no violation of First Amendment rights, there's no irreparable harm.

That's one of the ways in which, Your Honor, we think that the *Newland* court erred by finding irreparable harm based on the possibility of a violation of First Amendment rights, and never actually deciding whether plaintiffs were likely to succeed on the merits of their claims.

Your Honor, so for those reasons we think that plaintiffs do—must show a likelihood of success on the merits.

THE COURT: All right.

Mr. Duncan.

MS. BENNETT: Thank you.

MR. DUNCAN: Thank you, Your Honor.

[14]

So as to the precise standard. The *Heideman* case, which is what the government is referring to, says these things about public interest and statutory scheme. The *Heideman* case involves a different kind of First Amendment challenge, however. That case involves a facial challenge to a public ordinance. In other words, knock it out altogether. This case involves a plaintiff-specific challenge under RFRA to—in other words, asking for an exemption with respect to a single plaintiff, not to knock out an entire scheme. And that's a means of distinguishing that case.

Also that case, the *Heideman* case, which involved nude dancing, the court in that case said this involves a minimal, marginal First Amendment interest. Without getting into the details too much, it involved whether dancers had to wear minimal clothing or not. And Judge McConnell in that case said, well, this is a minimal First Amendment interest, and so it applied this sort of more restrictive standard.

Here, what we have are core First Amendment and RFRA claims about not being coerced to violate your faith. And we have a targeted action seeking an exemption. And I might add, in contrast to the *Newland* case, and in contrast to this Michigan case that just came out, plaintiffs here are seeking an exemption with respect to only a small subset of the drugs. They are not—they already cover almost all FDA contraceptives. They already cover all the other preventive [15] services, or they will cover them on January 1st. They are seeking an exemption for a small subset of drugs.

The government has already exempted millions of people and plans from covering a whole range of FDA-approved contraceptives. So it's difficult to understand how the public interest means plaintiffs here can't get an exemption for a small subset of the drugs.

Having said all that, the Tenth Circuit still talks about disfavored versus favored, right? So the disfavored injunctions don't apply to this case because they are not seeking to change the status quo, we're not seeking government—to force the government to do

anything, so it's a favored injunction. So, you know, by government law and the Tenth Circuit, the lower standard applies. We think they meet either one.

THE COURT: Well, but that's really combining two different things, isn't it? You've got one set of—I think they now recognize, at least in an explicit sense, three kinds of injunctions that they say are disfavored.

MR. DUNCAN: Right.

THE COURT: And then you've got the further question if it's not a disfavored injunction, then you've got the further issue of how it is you go about proving likelihood of success on the merits. That's not the same thing, is it?

MR. DUNCAN: Well, you're likely right, Your Honor. [16] It is a confusing set of standards in the Tenth Circuit, unfortunately. That's why our ultimate position is that the plaintiffs meet likelihood of success on the merits, or substantial likelihood of success on the merits, for the reasons that we'll go through.

THE COURT: Well, with respect to—and I'm not so concerned at the moment about counsel's reference to this merging of issues, or whatever it is. But the circuit has said on three or four occasions that if the injunction that is sought challenges a statutory scheme of some sort, that the relaxed standard does not apply. Now, I'm assuming for sake of this discussion that this later Supreme Court case still leaves that as potentially an applicable distinction.

But I guess as I read those cases, I'm having difficulty seeing where the circuit has ever recognized the kind of distinction you're talking about, about whether the exception that's sought is narrow or broad, or what.

MR. DUNCAN: Well, what those cases are looking at is the public interest. They are saying if you have a legal scheme that proceeds from a regulatory framework that's in the public interest, then we, you know, have to be especially cautious, I guess, about substantial likelihood on the merits. All we're saying is that—

THE COURT: But, I mean, isn't that present here?

MR. DUNCAN: Well, we do have a challenge to a [17] regulation, but by the federal government. All we're saying is we're seeking an exemption from a specific part of the regulation, we're not seeking to overturn the regulation altogether. We're seeking a plaintiff-specific injunction under the Religious Freedom Restoration Act.

The cases don't make those kinds of distinctions, but we think it's a legitimate one to make, because those cases involve facial challenges. Having said all that, we meet the *Winter* test, which is the Supreme Court decision from 2008, substantial likelihood of success on the merits here. The plaintiffs meet that and we believe in a compelling way if you go through the RFRA—

THE COURT: Well, that may well be, but for purposes of the standard, though, I guess the thing I'm particularly interested in is the—I think Judge Kane essentially said in applying the relaxed standard that he thought that it applied, and that this challenge to a statute standard didn't because the exceptions or the extent of the exceptions that were present here.

MR. DUNCAN: That's correct.

THE COURT: And I'm having trouble seeing how that follows.

MR. DUNCAN: I think it works this way, Your Honor, that the government is saying, look, the public interest requires that we apply this. The public interest requires [18] this, but through grandfathering provisions, through the various religious employer exemptions, through the small employer exemptions, through the various delays that the government has given to nonexempt religious organizations, the government has essentially told over 100 million people you don't have to comply with this thing either permanently or for a while, for a year. And so the idea that the public interest means that we have this paramount public interest in applying this law right now to these plaintiffs, I think that doesn't work.

THE COURT: Well, but isn't it true for purposes of the injunction standard that it doesn't matter whether it's a compelling interest or any of the things that we might apply when we're looking at the substantive issue, it's just a question of whether there's a public interest advanced by the scheme, isn't it?

MR. DUNCAN: Well, Your Honor, if the standard is unclear, but look, if that's the standard, then we have—then we have to meet the regular. If that is in fact the prevailing standard in the Tenth Circuit, that simply if you're challenging something that comes out of a regulation you have to meet the regular injunction standard, then, yes, it's true, that's—that's—we have to meet it. We don't think it's that clear in light of the court's—the Tenth Circuit's distinction between favored and disfavored injunctions.

[19]

It's a slightly different issue, but they are really connected. Let me give an example. In the *Gonzalez* case that—the *Gonzalez versus O Centro* case, which is sort of the premier RFRA case that the Supreme Court decided. That case came up through the Tenth Circuit, right? So in that case that was a disfavored injunction. Why was it a disfavored injunction? Because the law was already in effect as to that church. And so the church was saying, hey, government, we need you to stop enforcing the narcotics laws against us. And so it's difficult to tell, but the en banc decision in the Tenth Circuit in that case said, okay, it's a disfavored injunction.

Here—and this goes back to the status quo issue. Here, the law hasn't even gone into effect as to the plaintiffs. It's very, very clear when the mandate became effective—when mandate was promulgated in August 2011, the law required them to build in at least a year before it affected anyone, right? And so what

the law says is it's not going to affect you until the insurance year that starts after August 1st, 2012. So there's no question that the law is not in effect as to the plaintiffs. There is simply no question about that. So again, compared to *Gonzalez*, which is a RFRA case, this is a—not a disfavored injunction, it's a favored injunction.

So we do think that the lower standard is available. Again, we are happy to meet the regular standard as well.

THE COURT: Let me ask, it's actually a separate [20] question, but I think it kind of has some common factual questions here as to a couple of things we've already touched on. That has to do with this exemption for—the grandfathering exemption.

MR. DUNCAN: Correct.

THE COURT: Your complaint says that Hobby Lobby didn't seek it or didn't elect it or something. Is that because it wasn't potentially available to them because of this change in drug coverage, or they simply elected not to try?

MR. DUNCAN: They elected not to go with grandfathering. Grandfathering involves kind of an economic calculus about do we keep the status, do we do things to our plan that changes that makes us lose the status. So it's an economic decision, and Hobby Lobby, a significant time ago, made the decision not to do—not to do grandfathering, which is a perfectly legitimate thing to do. And the government has, in numerous cases, including this case, as I understand

their position, the government said, look, if you voluntarily elect not to be grandfathered, you're not grandfathered.

But that decision was quite separate and apart from any question about the mandate. That's an economic decision about, well, you know, does our plan work under the grandfathering rules or do we need to go forward into the world of the Affordable Care Act. So—

THE COURT: I'm not sure I understand that. You're [21] saying that Hobby Lobby had the option to simply keep its existing plan in place, but elected not to?

MR. DUNCAN: I think what Hobby Lobby did is they made an economic decision that we're not going —understand, Your Honor, grandfathering means that you're in a sort of a—it's sort of a straight-jacket. You can—you can only change your plan so much. And companies, you know, often have to make changes to their plans and they may lose grandfathering status. And the government recognizes that, that it just may be because of just basic financial considerations in your—in your coverage you have to change—

THE COURT: Well, I guess that's what I'm not understanding. If the finances of it worked for the plan last year, or the year before that, and we're talking about continuing the same plan on a grandfathered basis into the future, what's different about the financial circumstances?

MR. DUNCAN: Because the grandfathering requirements mean that you can't make a whole menu

of changes to your plan that involve things like the amount of co-pays, the amount of co-insurance, deductibles, that sort of thing. And so if you look at the menu of changes you say, wow, just because of economic realities, our plan has to shift over time. I mean, insurance plans, as everyone knows, shifts over time.

So they are looking at that and they are saying, well, you know, we can't freeze our plan in place this way, so we can't [22] really—we can't claim grandfather status just as a practical financial means. So they have to make the changes—

THE COURT: And that's because the finances were driving you to change something in terms of copayments or some other aspect—

MR. DUNCAN: That's correct, Your Honor.

THE COURT: —of the finances of the plan?

MR. DUNCAN: That's correct. And, look, we don't plead the details of that because the—because the government has been very clear that if you don't claim the grandfather status in your notice, it's just not an issue, you're just not grandfathered, which means you're subject to all the provisions of the Affordable Care Act.

THE COURT: Is grandfathering yet an option today?

MR. DUNCAN: Not in our understanding. No, it's not something you can go back and get, again, nor is it something that, you know, Hobby Lobby

would consider because quite apart from the mandate, I mean, it made the financial decision a long time ago we're not going to be grandfathered.

I have to say the government's—

THE COURT: Well, I guess the reason I ask is that, you know, against the context of these—this suggestion of irreparable harm and, you know, the extent of the problem that's caused if there is no injunction granted, I guess my question essentially is, do you have an alternate way to fix [23] that?

MR. DUNCAN: No, not in our understanding, Your Honor. The grandfathering provisions are very clear. Hobby Lobby is not grandfathered, it wasn't grandfathered, you know, long before this lawsuit was brought. Hobby Lobby is subject to the law and there's really no way we know, no way the law says you can just go back. But consider it this way: Suppose the issue were—

THE COURT: Well, I mean, is there some regulation that says if you're going to seek grandfathered status you have to do it by a certain date or do it in a certain way?

MR. DUNCAN: That's correct. You have to do it in a certain way. You have to include certain notices with your plan materials, and those notices have never been included, again, because Hobby Lobby made this decision to do it. I mean, that—so it's not available to them, they are not grandfathered. But I would say this. Suppose it were conceivable, although it's not, suppose it were conceivable that at this

late date Hobby Lobby could say, okay, we'll go back and get grandfather status just so we can avoid the mandate. I mean, Hobby Lobby is still burdened. They are still having to make decisions with this mandate hanging over its head. In other words, the financial decisions that the company is making are being driven by this idea of the mandate hanging over their head.

[24]

THE COURT: Well, I don't think there would be much question about that.

MR. DUNCAN: Right.

THE COURT: I mean, there's still potentially some burden. But as I say, in weighing these temporary injunction factors of how big an emergency is this—

MR. DUNCAN: Yeah.

THE COURT: —whether it's a, you know, a $26 million emergency or whatever the number is that you've suggested would be the penalty—

MR. DUNCAN: Right.

THE COURT: —in certain circumstances versus something less maybe makes a difference.

MR. DUNCAN: Well, consider it this way, Your Honor. So on January 1st—I mean, Hobby Lobby is having to make these decisions right now. I mean, that's why we're in court, to have this decision, this burden taken off us. But Hobby Lobby is staring at

January 1st and saying, okay, on January 1st our current policies are out of compliance with federal law. They are clearly not complying with the mandate. They don't include any of the mandated emergency contraceptives, right? They include the FDA-approved contraceptives other than that, they will include all the women's preventive services, right? But they are looking at we're not going to be in compliance with federal law.

[25]

And so there's really no other option at this point. You know, I might—I might mention, as far as irreparable harm, the idea that the government says that we waited too long to sue. Look, first of all, it's no small matter to go and sue the federal government. It's not something that Hobby Lobby or any other company really wants to do. Secondly, for the last year or so we have heard the government talk about potential compromises, potential accommodations. You know, you don't know what's going to come out next as far as a delay or some kind of promised accommodation. It turns out those accommodations don't include for-profit businesses.

And the other practical aspect of that is that the Affordable Care Act was within one vote of being struck down altogether, which would have removed the problem of mandate. You know, it didn't happen. But Hobby Lobby sued four months before the mandate takes effect against us as a last resort. And so

the idea that it's waited too long, I don't think that's fair to the company.

THE COURT: Well, I'm not so concerned with the timeliness of it either. I don't think that makes a whole lot of difference here.

Anything else you want to add on the standard before we move to a new area?

MR. DUNCAN: No, Your Honor.

THE COURT: Ms. Bennett, anything you want to add on [26] the injunction standard?

MS. BENNETT: No, Your Honor.

THE COURT: All right. Mr. Duncan, while you're up there let's just move forward with you.

MR. DUNCAN: Very good.

THE COURT: As I understand it, in the plaintiffs' complaint you've alleged seven or eight different claims, but as I understand it, you're relying on only two—

MR. DUNCAN: That's correct.

THE COURT: —as the basis for the preliminary injunction that you're seeking. Let's talk first about the constitutional claim.

MR. DUNCAN: Very good.

THE COURT: I take it there is no disagreement that the constitutional standard that's applicable here is the *Smith* case.

MR. DUNCAN: That's correct.

THE COURT: And—

MR. DUNCAN: And the *Lukumi* case.

THE COURT: I'm sorry?

MR. DUNCAN: And the sort of companion to the *Smith* case, which is the *Lukumi* case.

THE COURT: Right. Right. So essentially, so long as the law involved here is neutral and of general applicability, it's constitutional?

[27]

MR. DUNCAN: That's correct, Your Honor.

THE COURT: Let me ask, in terms of application of that constitutional standard, have you—are you aware of any authority where a court has concluded that a general corporation or a for-profit corporation like Hobby Lobby, and for present purposes I want to concentrate on the corporation as plaintiffs.

MR. DUNCAN: Corporation only.

THE COURT: Are you aware of any situation where a court has said that a for-profit corporation has free exercise constitutional rights?

MR. DUNCAN: Only—you know, the answer is, yes, there are many cases that say corporations generally have First Amendment rights. Those cases are typically in the free speech arena, though. So there's—

THE COURT: Well, that's the reason for my question. I have looked in the same spots under the same key notes and I haven't found any—

MR. DUNCAN: Right.

THE COURT: —that suggest that you get outside the First Amendment, or the free speech context, and I'm not finding any.

MR. DUNCAN: Well—

THE COURT: There are situations potentially where a corporation or an association may be in a position to assert [28] some individual's rights, but as far as having a corporate right to the free exercise of religion, I'm not finding it.

MR. DUNCAN: There are some—there are—it's true that most of the cases are in the free speech context, but there are—there are cases clearly recognizing that you've got equal protection rights, you've got due process rights, right, obviously, a corporation has a takings, right against takings. So there's a menu of rights that have long been recognized.

I mean, the *Citizens United* case is really the most dramatic recent example, but look at *New York Times v. Sullivan*, for example. There, you've got a corporation, New York Times, that is asserting a free speech right in connection with a paid advertisement. In other words, somebody paid them to run the advertisement. So you've got corporate, you've got First Amendment, free speech, and you've got a commercial transaction. And you know, that case is celebrated

for recognizing the rights of the New York Times corporation to bring a free speech claim.

THE COURT: Well, but you've also got a pretty good string of cases that say things like compulsory self-incrimination and various privacy-related rights and so on don't apply to corporations.

MR. DUNCAN: Sure. Not all of them apply, right? Compulsory self-incrimination does not apply.

[29]

THE COURT: And as I read those, they seem to say, well, that's because some of these rights are particularly personal with the individual. I mean, isn't—isn't a religious exercise or a religious faith issue almost uniquely personal to the individual?

MR. DUNCAN: Well, we think no more than a free speech right. So what we think you need to look at is the facts of this particular case. Obviously, not every corporation is going to have any kind of religious exercise right. That's clear. But what about the ones before this court, right? Hobby Lobby and Mardel exercise religion in very open and obvious and deliberate ways through the way the companies are run. I mean, the most obvious example is closing on Sundays at a loss of millions of dollars in profits. But you've also got the chaplains provided, you've got the Christian conciliation provided, you've got giving millions in profits to fund ministries, you've got—

THE COURT: I was particularly worried about that part that I can't buy a shot glass there.

MR. DUNCAN: Well, so that goes to show you that's a very specific kind of religious exercise. That's avoiding participating in activities that their religion says we don't want to participate in. The more dramatic example is we won't backhaul beer for a beer company and lose—and let our facilities be associated with—

[30]

THE COURT: Well, you know, I appreciate that it does those things, but I guess my question is, in terms of the legal analysis, are we really evaluating an exercise of a constitutional right by the corporation as opposed to exercise of a constitutional right that the individuals unquestionably have, and the question of how and whether that can be exercised through a corporation?

MR. DUNCAN: I think the answer is both. Admittedly, though, the easier way to get there is individuals exercising their rights through a closely-held family corporation. You have cases directly on point saying, yes, you can do that. The *Stormans* case, the *Townley* case from the Ninth Circuit. And not only that—I mean, those are for-profit cases.

So you've got scores of cases from the Supreme Court and lower courts in which the courts have said a corporation can exercise its own rights. I mean, *Lukumi*, the case I just mentioned, a case like that is *Lukumi*, the Lukumi Church—it's got a long complicated name, but the Lukumi Church, Inc. Take the *Gonzalez* case. So the *Gonzalez* case—

THE COURT: Well, I appreciate that. And that's why I asked, you know, if you knew of any where we were talking about essentially a general business corporation. I mean, certainly there is with churches or I guess maybe unincorporated associations of various types, but—

MR. DUNCAN: But the reason those cases are important [31] is the government is saying the corporate forum sort of insulates the conscience of the owners from it, and those cases never say anything like that. They have a corporation and its president or its principals suing, right? So there's no—this idea of a corporate forum somehow divorcing these rights from these rights over here, there's no case that says that. The only cases that address it say, look, you've got a closely-held family business. These people are operating their religion in the—they're exercising their religion in the operation of their business. And, you know, that's what—that's what the cases say.

There's no case that says a nonprofit or a for-profit corporation is somehow so separate and distinct from the owners or the proprietors of a corporation that it cuts off their right to give—to exercise religion.

I might add one thing. I know we're talking about free exercise, but look at RFRA. Look at the Religious Freedom Restoration Act. All it says is a person exercises religion—

THE COURT: Well, let's stick with the constitutional standards at this point.

MR. DUNCAN: Okay. Sure.

THE COURT: We'll get to that.

MR. DUNCAN: Okay.

THE COURT: But most of the cases out there generally—I say most of them, at least a good many of them apply in [32] circumstances just like we've got here where you've got a corporation among the plaintiffs and you've got individuals who unquestionably have free exercise rights.

MR. DUNCAN: We do have that here.

THE COURT: And most of the cases end up not—just like the Ninth Circuit case you were saying, we'll assume it and go on down the road because it doesn't matter here. But it occurs to me that when you get into evaluating and applying some of these other standards, the neutrality and all the other aspects of the test, and particularly when you do get over into the balancing under RFRA—

MR. DUNCAN: Right.

THE COURT: —that whether you're talking about the individuals' rights exercised in a certain way versus some independent right of the corporation, maybe makes a difference. That's why I ask.

MR. DUNCAN: We don't think it does in this case, but we're happy to address that when we talk about the balancing under RFRA. Yes.

THE COURT: All right.

MR. DUNCAN: Can I add one other thing, Your Honor?

THE COURT: Sure.

MR. DUNCAN: You do have cases—this idea that commercial activity sort of divorces you from religion, look at the *Lee* case, that's the Amish carpenter. Look at the [33] *Braunfeld* case, that's the Orthodox—

THE COURT: But the Lee case itself says precisely that, doesn't it?

MR. DUNCAN: No. The—

THE COURT: When you go out and engage in commercial activity, you potentially trigger a different set of considerations than if it was purely a personal exercise.

MR. DUNCAN: The *Lee*—the *Lee* case says that in terms of the strict scrutiny analysis. There's another section in the *Lee* case at the beginning, Section A of the opinion, that says this employer clearly has religious liberty rights in refusing to pay the tax. The court is crystal clear about that.

THE COURT: But the employer was an individual.

MR. DUNCAN: The employer was—the employer—all the—it's difficult to tell from the case. All the lower court—

THE COURT: It describes him as an Amish carpenter, slash, farmer.

MR. DUNCAN: Okay. But he had employees and he was having to pay the Social Security tax for them.

But look at *Braunfeld*, for example. So *Braunfeld* is the Orthodox Jewish business owners who were complaining about the Sunday closing law. You look in the lower cases there and it is retail business owners who are selling clothing and [34] furniture, right? And the Supreme Court clearly said, you've got a religious liberty right.

All we're saying here—

THE COURT: Well, but I did look at that case with that question in mind, and I don't find anything there that suggests they were incorporated.

MR. DUNCAN: It doesn't say so. In the lower court cases—in the lower court opinions there it says they're operating a retail clothing and furniture business. I think the point is, it doesn't matter if they are incorporated or not, they are in commercial business, right? They are exercising their rights through a commercial business, which is exactly what you have in *Stormans* and exactly what you have in *Townley*.

In other words, the distinctions the government is making, well, they are interesting abstract theoretical distinctions, but I don't see them anywhere in any case. They are just nowhere in the cases.

Anything else, Your Honor?

THE COURT: I sense that Ms. Bennett doesn't agree with you on some of that. Let's give her a chance to talk here.

MS. BENNETT: Thank you, Your Honor.

First of all, plaintiffs' counsel indicated that there are cases recognizing that corporations can exercise First [35] Amendment rights, due process rights, other rights. But as Your Honor noted, there is—we have not found, and plaintiffs have not cited, any case recognizing that a for-profit secular, or as Your Honor said, a general commercial corporation can exercise religion within the meaning of the First Amendment or RFRA. We think in *First National Bank v. Belotti* the Supreme Court indicated that the analysis of whether a corporation can exercise various rights is sort of an individual analysis. You have to take it right by right. It's just not the case that corporations broadly can exercise all rights that individuals can.

I would also note, Your Honor, that the cases that plaintiffs cite that involve corporations that have been —that are exercising religion, *O Centro*, *Lukumi*, those deal with religious organizations, actually churches. But even if not, religious organizations, not general commercial or secular corporations like we have here. And we think that that distinction makes a difference.

Plaintiffs' counsel indicated that those religious organizations, because they are incorporated, may have owners behind them, and they are really exercising their rights through a religious organization. We

think that's not the case. We think actually religious organization, the church, is exercising the religion, it's the church's rights that you look at. Where you're talking about a for-profit secular company, [36] it can't exercise religion and, therefore, it doesn't have First Amendment or RFRA rights.

And we think the Supreme Court's most recent juris prudence in *Hosanna-Tabor*, which didn't address this exact question, is relevant. There, the court says that although First Amendment protections like the freedom of association and freedom of speech apply to religious and secular groups alike, the free exercise clause gives special solicitude to the rights of religious organizations.

And in *Hosanna-Tabor* the court cites numerous cases going back decades for this proposition, and we also cite them in our brief. So we think that this distinction between secular and religious is not a new idea.

The cases that plaintiffs cite, *Stormans* and *Townley*, as Your Honor recognized, they explicitly declined to decide whether a for-profit corporation can exercise religion.

And in the context of—we've offered an analysis, Your Honor, in the context of Title VII where the congress gave an exemption for religious organizations as opposed to secular organizations. And we think the idea that a secular organization could exercise religion would basically wipe this Title VII exemption off the map.

If you imagine, for example, plaintiffs—I know the Greens allege that they don't discriminate based on religion in their hiring. But assume that they or someone else decided to [37] do so, they wanted to hire a personal assistant, for example, that shared their religious views. Title VII would prohibit them from doing so because they are not a religious organization.

And, in fact, plaintiffs don't claim that they would satisfy the Title VII exemption. Yet, under plaintiffs' analysis, they could come in under RFRA or the First Amendment and obtain such an exemption and hire someone that satisfies or that agrees with their religious views. We think that that, like I said, would wipe Title VII off the map. And congress clearly didn't intend to do that through RFRA.

Moving on a little bit, and I understand, Your Honor—

THE COURT: Well, let's move here to the question of whether there's a substantive—I guess a likelihood of success of establishing a substantive constitutional violation.

Mr. Duncan, I think it probably makes sense for you to lay it out first why you think that's present. However this issue gets resolved, it's at least clear that the Greens have free exercise rights that are potentially violated here. So why don't you address that, if you would, please.

And as I say, at this point, I'm interested in the constitutional standard—

MR. DUNCAN: Constitutional—

THE COURT: —as opposed to RFRA.

MR. DUNCAN: Free exercise as versus RFRA.

[38]

THE COURT: Yes.

MR. DUNCAN: I do—I do sort of reserve time later to respond to the Title VII argument, but I won't do that right now.

So—

THE COURT: Nobody is keeping a time record here.

MR. DUNCAN: Right.

So the specific question is substantial burden; is that right, Your Honor?

THE COURT: Yes. My question is, or my suggestion is that you address essentially the *Smith* standard—

MR. DUNCAN: Oh. I understand.

THE COURT: —as to whether the mandate involved here violates the constitutional standard in terms of neutrality and those things.

MR. DUNCAN: Right. So the question is, is the mandate neutral and generally applicable?

THE COURT: Yes.

MR. DUNCAN: Right. So what neutrality means is, do you treat religions evenly. Do you—or do you notice religious characteristics of certain groups and say we'll privilege you, and other groups that have different religious characteristics, we won't privilege you.

So what do you have here? We have a mandate that makes a religious employer exemption based on the internal religious [39] characteristics of the organization. So it's not—it's not an exemption like Title VII where it just says, well, if you're a religious corporation you get an exemption. It looks at the internal characteristics of the organization and says, who do you serve, what's the purpose of your organization, do you inculcate religious values or not, who do you primarily hire, and what's your treatment under the tax code.

Our position is, is that when the law takes that kind of intrusive look at religions, what it's doing is acting in a nonneutral way with respect to religion. In other words, what *Smith* is about, you've read *Smith*—

THE COURT: Well, but isn't that almost inherent, though, in any effort to draw a line at all? I mean, if the government in any statutory scheme carves out an exception for a conscience exception or religious exception, it's got to define the parameters of it some way.

MR. DUNCAN: It does, but it can't—

THE COURT: So there's necessarily going to be some in it and some out of it.

MR. DUNCAN: That's true. But look at the way this one has been defined. Who do you serve? So do you serve people who agree with your religious tenets or do you serve people who don't agree with your religious tenets? That's an unusual kind of exemption in the law. It's intruding into the internal characteristics of religious organizations. And what [40] that means for *Smith* purposes is it's not neutral.

So take the *Lukumi* case, which is the animal sacrifice case that came after *Smith*. In that case you had a law saying, well, we're going to prohibit animal sacrifices, but then there were all these weird distinctions in the law that said, well, animal sacrifice is prohibited, but maybe not hunting and maybe not kosher butchers, maybe not this, maybe not that. And so you have this sort of patchwork. And the court said, well, that's not really neutral with respect to religion, that looks like it's sort of playing favorites. And our argument is that the mandate is playing favorites with respect to exempted religious organizations.

I might also add, the Affordable Care Act as a whole makes exemptions for religious organizations who have specific objections to insurance coverage per se, right? The so-called Amish exemption from the ACA, and also the Health Care Sharing Ministries. That shows you that government knows how to sort of identify groups that have problems with insurance coverage. Those groups have problems with insurance coverage wholesale.

Over here you have plaintiffs who have problems with a specific kind of insurance coverage, and the law leaves those people out. So that's not neutral.

As far as general applicability, that looks at—the government has an interest. Is it pursuing that interest across the board, or does it leave large swaths of the [41] population unregulated? And here we say that that's what the government is doing. They are exempting out people from having to comply with the mandate, the grandfathered.

By 2014, the government has estimated that there will still be over 50 million people, that's the mid-range estimate, that will not have to comply with the mandate. By 2014, over 50 million people, 50 million plans that covered those individuals won't have to comply.

So the government is leaving huge swaths of the population unregulated. And all we're saying is, that doesn't look like a generally applicable law.

Now, we're not saying that the law is as bad as it was in *Lukumi*, right? In *Lukumi*, literally the law had targeted a specific religious group and said, you're out. You know, we're going to drive you out of town, the Santeria folks.

Here, that's not what's happening. We're not saying the government has just gone and targeted a specific religious group, but the government hasn't come up with a scheme of regulation that is generally applicable. And so all that does, for free exercise purposes, Your Honor, is it triggers strict scrutiny. That's all

it does. And so if the law is not an across-the-board requirement, it triggers strict scrutiny.

You know, admittedly, we already get to strict scrutiny with RFRA, right? So we get there on RFRA, regardless. But we wanted to include the free exercise claim now because it shows [42] that the law is not—it's not treating all religions and all religious people equally, which is a really big problem when it comes to religious exercise.

THE COURT: Ms. Bennett.

MS. BENNETT: Thank you, Your Honor.

First, I would just note that there are already three courts that have rejected these exact First Amendment arguments. The Supreme Courts of New York and California in the context of state laws that were very similar, almost identical to this one, and that had religious employer exceptions that are identical to this one, and then the *O'Brien* court, which, if Your Honor looks at *O'Brien*, basically addresses the same arguments that plaintiffs make here.

With respect to neutrality, a law is neutral if it doesn't target religiously motivated conduct and if it has as its purpose something other than the disapproval of a particular religion or of religion in general.

We've presented lots of evidence, Your Honor, through the IOM Report that the purpose of these regulations is to promote the health of women and newborn children, and to further gender equality by increasing access to and utilization of contraception.

The recommendations in the regulations are based on a study by the Institutes of Medicine, which is an independent organization that conducted a science-based study. The [43] regulations have absolutely nothing to do with religion.

The regulations are also generally applicable.

THE COURT: Well, let me ask you about that. In terms of the factual, I guess, the reach of these exemptions and so on. I think in the Colorado decision, Judge Kane's decision, he reached some conclusion that at least in the short-term there were—I think the number was 150 million or 190 million or something like that, that were exempted from this scheme because of the cumulative effect of the various exemptions. Do you factually dispute that?

MS. BENNETT: Your Honor, we dispute the number; I don't actually know where that number came from, the 190 million. We don't dispute that there are entities that do not have to provide this coverage for periods of time after the rules go into effect.

THE COURT: Do you have a sense on a percentage basis or other basis what the impact, for example, of the grandfathering provision is for next year?

MS. BENNETT: Your Honor, I mean, obviously, it's hard to predict, but the agencies did an analysis on various assumptions, and they determined by 2013 that the majority of plans, I believe it was 51 percent was the mid-range value, would lose their grandfather

status by 2013. And, of course, going forward, more and more plans would do so.

THE COURT: And the reason for that is that —what? [44] The economics of the marketplace are going to force them to change the coverage in such a way that they would no longer qualify?

MS. BENNETT: That's right, Your Honor. And also, I guess, different choices. Your Honor, the regulations on grandfathering set forth a list of the happenings that would cause someone to lose grandfather status. For example, if they eliminate all or substantially all of coverage to treat or diagnose a particular condition, if they increase a percentage cost-sharing requirement, if they increase a fixed amount co-payment by a certain amount, or if they decrease a contribution rate by employees or employer organization.

So the idea is that based on just the changes in the market that over time more and more companies will be required to make changes in their health plans, and so they'll lose grandfather status.

THE COURT: Do you disagree with what Mr. Duncan said in terms of the availability of the grandfathering exception to Hobby Lobby?

MS. BENNETT: Yes, Your Honor. Because they—I think—I don't know if I agree specifically with the reasons. I don't know that we know enough facts based on the complaint to—

THE COURT: Well, for one thing he says it's no longer available. Do you agree with that?

[45]

MS. BENNETT: That's right, Your Honor. In other cases we have argued where a plaintiff makes a decision and doesn't give an injury-based reason for it to just lose grandfather status, to establish jurisdiction or whatever, that that's an injury that they create themselves and so it doesn't satisfy the standing requirements. That doesn't appear to be the case here.

I would say in addition, plaintiffs, as you know, dropped coverage for certain contraceptive services. So we think that would also cause them to lose grandfather status. So we don't dispute that they—

THE COURT: You think simply taking two of the drugs off of a formulary, if the policy otherwise excluded contraception, would be a significant enough change to deny grandfather status?

MS. BENNETT: Your Honor, I guess I don't know that for sure, I don't think the agencies have spelled that out specifically. But I do think that combined with their counsel's representations here, as I said, it wasn't necessarily in the complaint, but that because of various market forces, their financial condition, they were required to do that or it made good business sense for them to do so. We don't dispute that they have lost grandfather status, and there is no mechanism to sort of revive that status.

THE COURT: All right.

[46]

MS. BENNETT: Moving on, Your Honor, with respect to general applicability. A law is not—or a law is generally applicable if it does not selectively impose burdens only on conduct motivated by religion. And that is the case here. These regulations apply to all health plans that don't meet the exceptions that Your Honor referred to, not just those that are affiliated with a particular religion.

The Tenth Circuit has made clear in numerous cases—and I would note, Your Honor, Judge Kane did not actually address the First Amendment question, so all of his concerns about grandfathering, the small employer exemption, were in the context of compelling interest.

So the Tenth Circuit has made clear that objectively defined categories of exemptions do not destroy general applicability. And we think *Lukumi*, for the reasons plaintiff said, is not at all relevant here. I mean, there the legislature made a specific—had a specific intent to target a specific church, and made sacrifice of animals illegal for that church, but for no other purpose. And that's clearly not what these regulations do. They don't target religion, they apply to everyone that doesn't qualify for an exemption.

With respect to the idea that the religious employer exemption somehow interferes with internal governance. First of all, Your Honor, I would note that that's not a claim that plaintiffs have pressed in this PI, that's more of an [47] establishment clause claim

which they left out. They do state it in their reply, but we think that it's a different claim.

But in any event, for the reasons Your Honor noted, that doesn't violate the First Amendment either. Any time the government accommodates religion, it has to draw a line. So the religious employer exemption is an attempt to accommodate religion.

The Supreme Court in *Walz* upheld a similar exemption that applied to organizations that were organized solely for religious purposes, and that carried out—and carried out only religious purposes. I think that's similar to the sort of exemption that the government has created here. And to the extent that Your Honor is thinking of the establishment clause, we just refer you to *O'Brien* where Judge Jackson addressed that claim and rejected the same argument that plaintiffs are making here.

And so, Your Honor, for those reasons, we think this is a neutral and generally applicable law and doesn't violate the First Amendment.

THE COURT: Anything you want to add on that, Mr. Duncan? That's always a dangerous thing to ask a lawyer; you've always got something you want to add.

MR. DUNCAN: Only sort of on the issue of grandfathering that we've addressed now again. Hobby Lobby can't get grandfather status back. They made a grandfathering [48] decision based on an economic decision, doesn't have anything to do with the mandate. But all that means is right now they are

subject to the ACA, to the Affordable Care Act, and there's no going back on that. So that's just—it's just a fact and the government, I hear them admitting again, as they've admitted in other cases, if you make that decision, you don't include the notices, grandfathering is no longer an issue.

THE COURT: All right.

Why don't we take about a ten-minute break and reconvene at 10:15, and we'll take up the issues under the Religious Restoration Act. We'll be in recess.

(A recess was had, after which the following was had in open court:)

THE COURT: Let's shift the focus to the Religious Freedom Act. Mr. Duncan, why don't you address that, if you would.

MR. DUNCAN: Thank you, Your Honor.

You know, the Religious Freedom Act, or RFRA, is an exceedingly important law to protect.

The key case here, and frankly, the case that shows a clear path to preliminary injunction for my clients, is the *Gonzalez* case, the *Gonzalez versus O Centro* case, and so I'll refer to that case repeatedly.

So RFRA requires the *movants here, the plaintiffs, to show that they have a sincere exercise of religion, which the [49] government has certainly conceded the sincerity of their religion, and the plaintiffs have to show that the law burdens, substantially burdens that exercise of religion.

Then the burden shifts to the government at the preliminary injunction phase, as well as the ultimate trial on the merits, to demonstrate a compelling interest in not exempting these plaintiffs from the scheme, and also that they've chosen the least restrictive means of furthering their interests.

So as to our burden, the exercise of religion and substantial burden. First, let me deal with exercise of religion. It's very straightforward. Many cases have held that plaintiffs, religious plaintiffs have a religious exercise right in not participating in objectionable acts. For example, the *Thomas* case. This is the Jehovah's Witness who said I cannot participate in the manufacture of tanks; the *Sherbert* case, I cannot work on a Sabbath; the *Yoder* case, Amish cannot send our children of a certain age to high school. So this decision not to participate is a common religious objection, it's religious exercise within the broad definition of religious exercise that RFRA lays down, which includes any exercise of religion.

Here, the specific action—the plaintiffs have many different ways of exercising religion through their businesses, which I can list and we've already talked about some of them. [50] The specific one here is not participating, not allowing their property, their insurance policies to be used for something that they find objectionable. And here that is, as we talked about, their insurance policy explicitly excludes abortion—pregnancy-terminating drugs and abortion-causing drugs like the ones mandated.

So before I go to substantial burden, I want to say the government has offered essentially two arguments that I will address on why this is not an exercise of religion. And as we've discussed at length, and I hope we discuss more, the government says through operating a secular business a person cannot, an individual even, cannot exercise religion, and the government has also offered the *O'Brien* case, which in our view clearly goes against *Thomas* by rewriting the plaintiffs' religious beliefs. So that's exercise of religion.

Substantial burden is also very straightforward. The standard in this circuit, and it's similar to other circuits, is the *Abdulhaseeb* case, which is a RLUIPA case, but it's equally applicable to RFRA. Sorry about all the acronyms.

So what that says is, the law here substantially burdens in two distinct ways. One, if the law tells you you must participate in an activity that's forbidden by your faith, then that by definition is a substantial burden, right? You saw that, for example, in the *Yoder* case as well. That's the Amish case where the law said you're going to send your children over [51] a certain age to high school, right? So that's an affirmative compulsion by the law. It's a substantial burden.

The second way is by saying, if you don't do that, we're going to fine you. We're going to make certain financial consequences occur that impact you and your business if you don't comply.

So again, let's take a look at the *Sherbert* case. The *Sherbert* case is the unemployment compensation case where the Supreme Court said if you put someone in the position of having to choose between following their faith and getting unemployment benefits, that pressures them to choose one or the other, and it's the mere pressure that causes the burden.

Take the *Yoder* case. The *Yoder* case is both an affirmative compulsion, you have to send your kids to school, and if you don't we'll fine you. In that case, the fine was five dollars. The court said this is an affirmative compulsion to violate your religion. So we have a clear-cut case of substantial burden.

What the government offers against that is the *O'Brien* case. The *O'Brien* case from Missouri says this isn't a burden because there's no difference in your belief between offering the drugs in an insurance policy and paying the salary of an employee who might turn around and buy the drugs. The Supreme Court has already said that courts and the government may not engage in this kind of rewriting of the beliefs.

[52]

It's very, very clear from the complaint here that the belief here of the plaintiffs is not only that they themselves don't use the drugs, but also that they don't want to be involved in handing them out and providing them through insurance and subsidizing the drugs. They don't want them in the policy. Just like the plaintiff in *Thomas* said, look, I can work on—

THE COURT: Well, I suppose the government would say all the plaintiff—all Hobby Lobby is doing here is writing the check anyway, right?

MR. DUNCAN: Well, they may say that, but what Hobby Lobby is being forced to do is to include specific drugs in the policy and subsidize them. In other words, Hobby Lobby is being asked to participate in a real way that their faith says we can't do it. Just like they can't cover abortions, just like they can't cover pregnancy-terminating drugs. You know, if—I have to say, this isn't a case about surgical abortions, but imagine if the law said you have to cover surgical abortions. Well, you know, that would clearly be a burden, a violation of the plaintiffs' religious beliefs.

Here you have drugs, you know, that cause early abortions. It's really just a difference in degree, not a difference in kind. But the important point here is, the government can't say we're going to sort of reorganize your belief so that you don't really have a burden. We believe that's what the *O'Brien* [53] court did. The *Thomas* case, *Thomas versus Review Board*, clearly says the government can't do that.

The *Lee* case also says that. The government made the same argument in *Lee* and said, well, it really doesn't violate religious Amish beliefs to pay the Social Security tax. And the court said, no, they say that it does. We accept them. We're not going to redraw their religious beliefs.

So those are the two steps here for our burden, for the plaintiffs' burden. Religious exercise, substantial burden.

As we've discussed, what the government seems to be saying is, is because the individuals are participating in a, quote unquote, secular business, which I take it to mean a business that makes a profit, then for some reason that excludes the ability of the plaintiffs to exercise religion in operating their business. There is no case that says that, with respect to individuals, the proprietors of a closely-held family business, which you have here. There's no case that says that.

As we've discussed, the *Stormans* and the *Townley* case hold, in order to avoid the question of does the corporation itself have the rights, the *Stormans* and *Townley* case says we recognize that these individuals are exercising religion through their business. Keep in mind, what was the business in *Stormans*? It's pharmacy. It wasn't anything religious about it. What was the business in *Townley*? Mining equipment. Nothing religious about it.

[54]

We would say, we do say that the religious exercise here is far clearer than the religious exercise in any case that we've seen, including *Stormans* and *Townley*, because what you have here are plaintiffs who, yes, they engage in the arts and crafts business, but that doesn't exhaust their business, right?

This business is a closely-held family business managed by a trust document. In other words, the documents give the family, or the family gives themselves this ability to manage everything that happens in the company according to their faith. They have to take a statement of faith and a trust commitment based on faith to even be officers of the business that they founded. And so you see—

THE COURT: Well, let me ask you, and I guess it goes to the broader question of the consequence, if any, of the corporate entity being involved here. But it appears to be clear factually in this case that all of the individual plaintiffs who are owners are of one mind—

MR. DUNCAN: Correct.

THE COURT: —in terms of their religious beliefs as applied to what's challenged here.

MR. DUNCAN: That's correct.

THE COURT: But in your view of the law, and the legal standard that you're relying on, how would it be different if we were talking about a wholly-owned general business [55] corporation where, let's say Cousin Bob, who had five percent of the company, didn't agree with the 95 percent? Where does that lead you?

MR. DUNCAN: Into far more difficult questions than we have here. Because—well, first thing I would say is it leads us to a factual question. It leads us to a factual question about the actual exercise of

religion by a business. If there is a very difficult factual record about whether the business is exercising religion at all, then as a factual matter, the result might be, well, look, they don't exercise religion, it's just not clear that they do, so they haven't met the first prong of RFRA, right?

You have no cases on that. The only cases you have are closely-held family businesses like the one here. All I'm saying is, is that RFRA—this is an important point about RFRA. RFRA says let's look at the claimant before us. Let's not worry about all the other claimants who might come, a slippery slope, right, or the bureaucrat argument that the court knocks down in *Gonzalez*.

It says you can't make the argument, the government can't make the argument, look, we can't give you an exemption because look at all these other people who are lined up for exemptions. The government can't make that argument. We have to focus—RFRA requires courts to focus on the people before it. The people before it. And the people before this court are of one [56] mind, as you point out, they have carefully structured their business so that it is a reflection of the religion that they practice in numerous ways.

You know, Your Honor, this is not a case where you've got a business that's set up and the owner just says, I'm a religious person. I really care about my religion. There may be a lot of businesses like that. This is a case where a family has said, we have a faith commitment to doing business, and in doing business

in a certain way, and we've worked that out very carefully. So that's the facts in this case.

As far as the idea that it's going to—

THE COURT: Well, but it does seem to me, though, that at some point you have to take into account how a particular accommodation of religious beliefs plays out against the overall regulatory framework. I mean, you've referred to the *Lee* case, which essentially applied the compelling standard that's the RFRA standard.

MR. DUNCAN: That's correct.

THE COURT: Part of what they talk about there is, you know, I guess the practicalities of how you run a tax system and the practicalities of how you run a Social Security system or whatever. And so you can't totally—it would seem to me you can't totally exclude the practical consequences of saying if we grant relief here, then assuming we apply the same standard to other people, you know, it's going to have a [57] broader impact.

MR. DUNCAN: That's correct, Your Honor. But it goes to the government's burden of compelling interest in the least restrictive means. So let me explain why. *Gonzalez* makes this very clear with respect to *Lee* and with respect to *Braunfeld*. So moving away from that—

THE COURT: Well, I appreciate it may be their burden—

MR. DUNCAN: Okay.

THE COURT: —I'm just responding to your suggestion that because of the language in *Gonzalez* they just can't make that argument. That's the bureaucrat argument.

MR. DUNCAN: That's what *Gonzalez* says. But may I respond directly to the practicalities argument?

So what *Gonzalez* says is, here's what *Lee* and *Braunfeld* mean. You ask yourself, is the scheme that the government set up, if you grant an exemption to it, does it make the scheme impossible to work? Does it completely undermine the regulatory scheme? In *Lee*, the government said, yes, because it was the Social Security tax system, and mandatory participation the court said was indispensable to that system.

Apply that question to this case. Ask yourself, is mandatory participation with no religious exemptions indispensable to the way the mandate works? We say the answer is obviously no because the government has already created a [58] number of different exemptions structured in different ways.

It's clear that this is a regulatory scheme that can accommodate exemptions. And that's all that *Gonzalez* was asking. It was asking—consider this. *Gonzalez* was saying, and this—again, this goes to the government's burden. But *Gonzalez* said, look, the government is saying they have a compelling interest in uniform application of the narcotics laws, Schedule I narcotics.

I remember as a law student when I was reading—no, I wasn't a law student. I remember reading *Gonzalez* the first time it came out. And I said to myself, wow, Schedule I narcotics, the government has got to have an important interest in that. I mean, that's the narcotics trade.

THE COURT: Why were you so interested in drugs in those days?

MR. DUNCAN: Yes. It was the law, Your Honor.

And so what did the court say? It unanimously said that this so-called overriding interest in the narcotics trade doesn't win out. Why? Because the government didn't demonstrate that the scheme that they had set up would not admit of an exemption. They gave an exemption to the Native American tribes.

So the question is, do we have a scheme like that here? And we submit the answer is clearly no, the government has not set up a closed system here. The government has set up a [59] system that can give targeted exemptions, general exemptions, that can delay. The government mentioned all the nonprofit cases. There are a lot of nonprofit cases. We represent a few plaintiffs in those as well. The government has delayed and been somewhat flexible about when the thing applies.

This is a scheme that can admit of exemptions, and all the plaintiffs are saying here is that RFRA compels

that the plaintiffs here get an exemption too, for a small subset of contraceptives.

May I address very quickly the Title VII argument, because that goes to substantial burden?

THE COURT: Sure. Go ahead.

MR. DUNCAN: The government is saying, and I'm paraphrasing, that allowing a RFRA claim here will blow up Title VII, the exemption. In other words, you'll have a flood of claims in here by religious employers to say I have a religious right to fire people.

Several things about that. First of all, this isn't an employment discrimination case. Hobby Lobby doesn't discriminate on the basis of religion. If it brought a claim like that, which it's not doing, we would have the *Townley* case. The *Townley* case, the Ninth Circuit, there was such a claim. The mining corporation said we have a religious right to, you know, essentially discriminate on the basis of religion in hiring.

[60]

And what did the Ninth Circuit say? It said Title VII meets strict scrutiny. The government has a compelling interest in combatting that. So Title VII survived that challenge, and there's reason to think it wouldn't survive otherwise.

The other thing is, is that the carefully worked out exemption in Title VII is done with congressional language. Religious corporation, religious association. That's been on the books for a long time.

When congress passed RFRA, they deliberately defined religion, they just said a person, right, didn't qualify it. A person, and under federal law that means people or corporations, a person, but it certainly means people.

THE COURT: Unless the context otherwise—

MR. DUNCAN: Unless the context otherwise —and there's nothing in the context that says it. It just—

So, but another thing that RFRA said is RFRA said if there's any conflict with federal law, RFRA applies. In other words, you know, RFRA applies to some hypothetical conflict between Title VII and RFRA, but that—we don't have that case here. That's a case for some other day and we've seen how the Ninth Circuit dealt with it. The Ninth Circuit said there's—that Title VII won out in that case.

So there is no Title VII issue. It is another example of this kind of slippery slope argument, where the government says [61] allow this one and look what's going to happen. *Gonzalez* says that's not the analysis under RFRA.

Anything else, Your Honor?

THE COURT: Thank you.

MS. BENNETT: Thank you, Your Honor.

In the context of the First Amendment, we previously addressed the corporation Hobby Lobby and whether it can exercise religion in the context of the

First Amendment. Respectfully, Your Honor, we think the analysis is the same under RFRA, so unless Your Honor has specific questions about the corporation, I won't repeat that.

With respect to the Greens. First of all, the government—it's not the government's position that the Greens as individuals can't exercise religion, nor do we say—the Greens are free to manifest their religion through their business in a number ways. Our argument here boils down to the fact that the regulations don't impose any obligations on the Greens, the regulations apply to a legally separate entity. In fact, a legally separate entity that's twice removed, the corporation's group health plan, which under ERISA law is a legally separate entity. Under corporate law, corporations are separate from the individuals.

In the cases that plaintiff—

THE COURT: Well, but here is there any dispute that this is a self-funded plan? I mean, as I understand it, it's [62] self-administered or self—it's not like there's a third-party entity administering the plan here.

MS. BENNETT: Your Honor, they don't have a third-party insurer, it's self-insured, but I'm not clear whether they have a—many self-insured plans used a third-party administrator to actually administer the claims. I don't know, with respect to plaintiffs, whether they do that. Many self-insured entities also have a stop loss plan where they go through an insurance—if their claims reach a certain amount, then

they have insurance for those. And I don't know—in the facts of this case, I don't believe it's set forth in the complaint.

THE COURT: All right.

MS. BENNETT: In the context of distinguishing plaintiffs' reference to *Sherbert* and *Thomas* and *Yoder*, those all involved cases where the law that was challenged applied directly to the individual. Here, as I said, that's not the case. The law applies to the corporation's group health plan. The Greens chose to organize Hobby Lobby as a corporation, in a sense separating the owners from the entity. And that's the very purpose of incorporation, so that the owners don't become liable for the corporation's debts so that they are separate.

And even—under Oklahoma law, even a family corporation like this one, the corporation is a separate and distinct legal entity from the shareholders. The Greens cannot ignore—

[63]

THE COURT: Would RFRA be violated here if the Greens had chosen to operate their business as a family partnership or if one of them could operate a sole proprietorship?

MS. BENNETT: Your Honor, I think a sole proprietorship would raise a very difficult—a very different question. There, Your Honor, you're right, there is no legal separation between the owner and the corporation, so a duty on the corporation is in a sense a

duty on the owner. We still—the argument I'll get to, I think we would still have the argument that the court adopted in *O'Brien*, that the burden is too attenuated. But I do think with respect in this argument about the legal separation, it would be a much more difficult argument to make.

Here, however, there is a corporation, it is separate, and the burden applies to the corporation, not to the individuals. And having established this corporation and intentionally separating themselves from the corporation, the Greens can't ignore that separation to avoid a general commercial law designed to improve the health and well being of Hobby Lobby's employees, and to impose their religious beliefs on their employees. If it were otherwise, any secular organization has precisely the same rights as a religious organization.

And as Your Honor indicated, it would be difficult to administer. What would we do with public corporations? If a majority of the shareholders of a public corporation voted that [64] they wanted their corporation to run in a manner consistent with a specific faith, would that be sufficient? Even for a closely-held corporation, what if there was disagreement? You mentioned Cousin Bob, how would that play out?

And the reason that the corporate entity was set up was to separate the owners from the corporation, and the Greens can't eliminate that separation in this context to deny their employees the protections of federal law.

And, Your Honor, this is nothing—nothing new. I think we cite this in our brief, but I think the language from *McClure*, which is a Minnesota Supreme Court case, is very instructive. It says:

> "By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs. When appellants entered into the economic arena and began trafficking in the marketplace, they have subjected themselves to standards the legislature has prescribed, not only for the benefit of prospective and existing employees, but also for the benefit of the citizens of the state as a whole in an effort to eliminate pernicious discrimination."

So, Your Honor, you can't collapse this separation that [65] the law creates in this context. And I think plaintiffs mentioned a few cases where they argue that individuals that set up businesses were allowed to exercise their religion or were allowed to make a claim of religion with respect to a burden that was imposed on their company. But none of those cases conclude that the legal requirement on a corporation imposes a substantial burden on the religious exercise of its owners.

Plaintiffs mentioned *Lee*. As Your Honor pointed out, that case didn't involve a corporation, it involved an individual who had a farm and a carpentry shop and hired a couple of people to help him in those. He was not a corporation. *Braunfeld*, the Sunday closing law

at issue there, aside from Your Honor mentioned it's not clear from the case that it was incorporated, the law that was at issue there imposed criminal liability on the owners of a business that stayed open on Sundays, it didn't impose it on the company. Therefore, that's very different from the case we have here where the legal obligation and any fines that follow from that are imposed on the corporation's group health plan, not on the individual owners of the corporation.

Stormans and *Townley* are also not on point, Your Honor. Those cases, when they talk about the corporation and the individual being one and the same, were doing it in the context of standing. They were addressing the question of whether a [66] corporation can assert the rights of its owners. It's a very different question than what we're asking about here. If it were true that standing merged with substantial burden, then courts would never need to address substantial burden. Once they addressed Article III standing, they would say, okay, we assume a burden.

So we don't think that the analysis about how the individual and the corporation sort of merge in *Stormans* and *Townley* is relevant here. And indeed, neither of those cases address the question we have here, which is whether there is a substantial burden. In *Stormans*, the court was looking at the First Amendment, so it looked at neutrality and general applicability analysis. In *Townley*, the court sort of skipped over the substantial burden analysis and went on to compelling interest.

Your Honor, also—I'm sure Your Honor has not had a chance to read it, but when you do, *Legatus*, the case the plaintiffs mentioned this morning where the decision came out last night, in that case as well the court does not address the argument of illegal separation between a corporation and its individuals and how that impacts the substantial burden analysis, nor does the court find that the for-profit company in that case could exercise religion.

And, Your Honor, as plaintiffs indicated, as we indicated in the brief, we make an alternative argument which is [67] essentially the argument that the *O'Brien* court adopted, which is that any burden imposed by these regulations is too attenuated to constitute a substantial burden. In there—*O'Brien* explained that the word "substantial" in RFRA has to mean something, otherwise, congress wouldn't have put it there.

And the court held that:

> "RFRA does not protect, in other words, there is no substantial burden, against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own."

THE COURT: Of course, RFRA says that if you have—essentially says, I guess, that so long as there are no questions of the sincerity of the religious beliefs, that whether or not a particular aspect of that is central to a religion or peripheral to it doesn't matter.

MS. BENNETT: Right, Your Honor. That's correct. It doesn't have to be a central tenet. And, Your Honor, we do not challenge the sincerity. But plaintiffs' argument basically boils down to that plaintiffs, the way they define their beliefs, is sort of dispositive for purposes of the substantial burden analysis. But that can't be the case. And in fact, Your Honor, to—once you read *Legatus*, the court actually [68] said that. There's language in there where the court says:

> "Courts often simply assume that a law substantially burdens a person's exercise of religion when that person so claims."

That's not a test. That takes meaning out of the word "substantial," which the *O'Brien* court said you can't do.

> "It can't be that the manner in which a plaintiff defines their religious beliefs is determinative of whether there's a substantial burden."

And so although, as we said, it doesn't have to be the central—the centrality, the court does have some role to come in and say is it a substantial burden. And as we say, and as the *O'Brien* court said, it's not here.

> "If the financial support of which plaintiffs complain was in fact substantially burdensome, secular companies owned by individuals objecting on religious grounds to all modern medical care could no longer be required to provide health care to their employees."

And, Your Honor, in addition to *O'Brien*, the DC Circuit has also had a similar holding in a case challenging the minimum coverage provision of the Affordable Care Act. As Your Honor is probably aware, that provision requires most individuals starting in 2014 to obtain health insurance or pay [69] a penalty. In *Seven-Sky v. Mead* the plaintiff brought a claim saying that her religion prohibited her from purchasing insurance because she believed that God would provide for her medical care. The district court, and the DC Circuit affirmed, held that there was no substantial burden in that case.

And that case is a stronger case than this one because there the obligation was imposed directly on the individual, individuals had to purchase coverage.

THE COURT: Let me ask in connection with that, you're talking about the requirement on individual policies, and this is, I think, frankly, a different question than what we're talking about here, but I'm just curious about it. The plaintiffs' complaint asserts one claim suggesting that this mandate requirement is contrary to the Act itself because it refers to some provision of the Act that I think says—maybe the difference is it's not a group policy, but it says policies will not be required to cover abortion or contraception for purposes of whatever that requirement is. What is that? I'm unclear on—does that have any application here and what is it?

MS. BENNETT: Sure, Your Honor. That's a provision of the—if you'll hold on a second, let me grab

my other binder, I can read that specific language for you.

Just to be clear, Your Honor, plaintiffs don't raise that claim here. But it—

[70]

THE COURT: Well, I agree they don't, that's why I'm a little hesitant to bring it up. I'm not trying to get off the track here.

MS. BENNETT: That's right, Your Honor. I believe I have the language right here, in very small font, unfortunately.

Basically, the provision says that certain types—group health insurance issuers and another entity, which I can't remember the name of at the moment, cannot be required to provide coverage for abortions.

Plaintiff is neither a group health insurance issuer nor this other entity, which I'm sorry, Your Honor, but I can't remember what it is. And, therefore, we would argue initially that they lack prudential standing.

THE COURT: Well, it seemed to me like, maybe it was *O'Brien* or one of the opinions tied it to the insurance exchanges or something, but I'm fuzzy on how all that fits together.

MS. BENNETT: In *O'Brien*, the court addressed—basically, the *O'Brien* court found what I'm saying now, is that the plaintiff in that case was not a group health insurance issuer, and therefore, the

court lacked prudential standing. It basically applies to—it does apply to policies offered on the exchange, so it would apply to any insurance company. It would apply to—it could potentially apply to plaintiffs [71] depending on how they organize their plan, I think beginning after 2017. But as of now, it doesn't.

And I think more importantly, Your Honor, it's the government's position that the contraceptive coverage requirement, which requires plans to cover all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling, does not constitute an abortion as that term is defined in federal law; therefore, that provision does not apply. That's a legal question.

THE COURT: Okay. Assuming, then, that we get past the question of whether or not there's a substantial burden on exercise here, that then puts the burden on the government to show a compelling interest and least restrictive means. Why don't you address that.

MS. BENNETT: Sure, Your Honor.

I don't think plaintiffs dispute that the interests that we've offered are compelling interests. In fact, the case law clearly establishes that improving public health, in this case women and children, and promoting gender equality are compelling government interests.

Plaintiffs mostly take note with the idea that the government has shown a compelling interest with respect to all contraception, but hasn't shown it with respect to the three types of contraceptives that they

object to. And they argue that the government must make a compelling interest showing [72] just with respect to those. And, Your Honor, we disagree.

First of all—

THE COURT: Let me ask one question in that regard. I recall in your discussion of compelling interest that at some point in the brief that you had made the suggestion that the lack of contraceptive use has proven in many cases to have negative health consequences for both the woman and the developing fetus.

MS. BENNETT: Uh-huh.

THE COURT: With respect to the developing fetus, that seems a little counterintuitive to me. What are you talking about there?

MS. BENNETT: Well, Your Honor, the studies show that when the—lack of access to contraception results in unplanned pregnancies, and when pregnancies aren't planned or when they are not appropriately spaced, women are less likely to get the prenatal care they need, they're more likely to engage in risky behaviors, which then affects a developing fetus. So the idea is that if access to contraceptives is eliminated, there will be fewer unplanned pregnancies which improves the health of the pregnancies that do come to term.

THE COURT: That's a little problematic for some of the others.

MS. BENNETT: I'm sorry, Your Honor?

THE COURT: I say, it's a little problematic, I [73] suppose, for some of the others that don't come to term.

MS. BENNETT: What's problematic, Your Honor? I'm sorry.

THE COURT: Well, let's not get off into that. I mean, I'm not trying to reopen the whole abortion discussion here today in terms of policy issues. But it does seem to me that, at least to the extent you're suggesting that the availability of contraception somehow is in the interest of a fetus which is aborted, that's a hard—that's a hard case to make.

MS. BENNETT: Your Honor, let me be clear. The regulations cover all forms of FDA-approved contraception; the regulations do not require abortion. And the government's position is that when women have access to contraception, when barriers to contraception are eliminated, women have access to contraception, they can plan their pregnancies, and that has been shown to have positive effects for children.

THE COURT: But I think you're right, there's no need for this case to resolve whatever factual dispute may exist as to whether a particular contraceptive at issue here is or is not an abortion.

MS. BENNETT: I think that's right, Your Honor.

THE COURT: You don't disagree with that, do you, Mr. Duncan?

MR. DUNCAN: Your Honor, this case does not need to [74] resolve that question.

THE COURT: All right. Go ahead.

MS. BENNETT: So, Your Honor, as I indicated, the compelling government interest that, to the extent that plaintiffs object to it, they object on the basis that they only—they only are opposed to several types of contraception and not all types of contraception. But the government's—

THE COURT: How do you respond to, I guess essentially Judge Kane's conclusion that—maybe I'm misstating it, but I think the essence of what he said was, how can it be compelling if 150 million Americans are exempted from it. I mean, if it was truly that compelling wouldn't the exemptions be more limited?

MS. BENNETT: Well, your Honor, first of all, I take issue with 150 million.

THE COURT: Well, 190 or whatever it was. I don't recall.

MS. BENNETT: Your Honor, his—that decision was based on the exceptions, which I would like to talk a little bit about, but first with respect to grandfathering. Grandfathering is not—plaintiffs here are asking for a permanent exemption. Grandfathering is not a permanent exemption, it's a temporary exception to the rule for certain plans. And it was an effort by the government to balance competing interests, which the government is—

[75]

THE COURT: Well, but Judge Kane says, and I think it's right, in terms of the temporariness of the grandfathering exemption, there's no time limit on it, is there?

MS. BENNETT: There no explicit time limit on the statute, Your Honor, but the—

THE COURT: So that conceivably a company, if it was otherwise able to do it based on the financial considerations, could maintain a common policy indefinitely into the future under the grandfathering provision.

MS. BENNETT: Your Honor, I think it's conceivable as a nonpractical matter, but I think as plaintiffs indicated earlier when they were talking about their decision to forego grandfather status, that it's very likely that as time goes on more and more plans will lose grandfather status. I can't give Your Honor a number because we're predicting into the future, but I don't expect that it's possible that a company in perpetuity would be able to maintain grandfather status.

So it is a phase-in, and that's what congress intended it as. As I said, congress was attempting to balance competing interests, the one providing for preventative services without cost sharing and, two, to develop or to implement all of the provisions of the Affordable Care Act in a manner that would allow it to exist within the existing employer-based scheme.

Most people in this country currently obtain their insurance through their employer and congress didn't want to [76] upend that whole system, congress wanted

to work within that system, and determined that the best way to do that was to allow employers to ease into the system.

THE COURT: Well, let me—and I asked this a second ago, and maybe the answer is we just don't know. But in terms of percentages, does anybody know what the—if you give effect to all the exemptions here, exemptions and safe harbors and so on, what percentage of employees in this country, or employers, I don't know which would be exactly the pertinent focus, what's the percentage of those that are covered by the requirement or subject to it versus those that aren't? I mean, it would seem clear if the 150 or 190 million is even ball park close that it must be something in excess of 50 percent that are not covered by it.

MS. BENNETT: Your Honor, I think with respect to—I don't think we have the numbers with respect to all of them, or at least I don't at this moment, with respect to grandfathering. As I said, the government expects that 51 percent of plans will lose grandfather status by 2013. I think the government did a study and said that by 2012 it's expected that about 67 million employees will be on a grandfathered plan. And as I said, that number will decrease as time goes on.

And, Your Honor, there's nothing about—and plaintiffs cite no cases that say to—for interests to be compelling [77] that the government must pursue it immediately and all at once, that the government can't transition into it. And in fact, in *Legatus*, which was de-

cided, although the court did enter a preliminary injunction, the court said that:

> "Grandfathering seems to be a reasonable plan for instituting an incredibly complex health care law while balancing competing interests."

Which is the argument that the government is making here.

Your Honor, with respect to the small employer exception. First of all, and I don't have the specific numbers on that, Your Honor, but it's not an exemption from the preventative services coverage requirement.

THE COURT: It's an exception from the law generally?

MS. BENNETT: It's an exception from the requirement—well, it's not an exception at all. Small employers, just like large employers, get to choose whether to provide their employees with health insurance. The only difference is in the government mechanism that the government uses.

With respect to large employers, the government imposes assessable payments if large employers don't provide health insurance. With respect to small employers, the government gives them tax incentives to encourage them to purchase it.

In either case, if a small employer or large employer chooses to purchase health insurance, that policy, if it's not [78] grandfathered, must cover preventative services, including contraceptive services. So it's a difference in the way the government has chosen to

enforce the requirement to cover health insurance generally.

And I note, Your Honor, that for small employers that don't provide health insurance coverage, their employees are still required to obtain health insurance, and they can do that through the exchanges, and all the policies on the exchanges will provide contraceptive coverage.

So, Your Honor, basically, the argument that we're making is that these aren't really exemptions from this requirement. They don't undermine congress's compelling interest, they just show that congress was implementing an incredibly complex statute, it—attempting to balance competing interests, which the Tenth Circuit in *United States v. Wilgus* has said is entirely appropriate, and using various enforcement mechanisms to do so.

So we don't think that these undermine the government's compelling interest. And I think, although it's not entirely clear, and I will admit I was reading it late last night, the court in *Legatus* seemed to agree with that, that the government—it can't be that there are, you know, any exceptions or any phase-in exception undermines—always undermines the government's compelling interest.

Your Honor, with respect to the least restrictive means [79] analysis. The plaintiffs offer a number of sort of ideas about a least restrictive means for the government to pursue its interest. As we indicated in

our brief, these don't satisfy the standard for a least restrictive means.

First of all, all of them are based on establishing entirely new programs. For example, one idea is for the government to create, I assume, a sort of Medicaid-like program for contraceptive coverage. The agencies—plaintiffs don't challenge the Affordable Care Act. The agencies are required to work within that system, which relied on congress's—on the employer-based system that congress created. So agencies just don't have the authority to do that.

Even if they did, the least restrictive means analysis doesn't require the government to sort of refute every conceivable idea. It doesn't require the government, most importantly here, to upend the system that congress decided to rely on. And, Your Honor, we think *United States v. Wilgus* again, which was decided by the Tenth Circuit in 2011, illustrates this point. The court talked about the government not having to, you know, imagine all types of scenarios that are least restrictive. And the alternatives the *Wilgus* court considered were within the existing scheme.

In that case it involved—the law imposed criminal liability on individuals that possessed eagle feathers without a permit. And the permitting system that the court had set up [80] only applied to members of Native—of federally-recognized Native American tribes. And so the plaintiff was a practicer of Native American religion but he was not a member of a tribe. So he brought suit saying, you know, this violates RFRA.

The least restrictive means that the court considered were all within that permitting system. In other words, they could expand it and give a permit to anyone who practices the Native American religion, or they could expand the system where tribe members could give away feathers to other tribe members and allow them to give them away to others.

THE COURT: And so your suggestion is that this is different because this would require a delivery system completely outside the realm of employer provided health care?

MS. BENNETT: Right, Your Honor. And in that case—so, for example, in that *Wilgus* case, I mean, the government could probably set up eagle sanctuaries across the country and start raising, you know, eagles, and they would have more feathers to give to more people and wouldn't need the system. But the court didn't consider that—

THE COURT: That could be a shovel-ready project.

MS. BENNETT: Yes, Your Honor. That's right. Perhaps we should propose that.

But the court didn't consider that. The court considered alternatives within the existing scheme, and we think that that's what the least restrictive means analysis requires.

[81]

In addition, the proposals that the plaintiffs offer would require enormous administrative and financial

cost to the government. And as we cite numerous cases in our brief that talk about that the least restrictive means, there's a practicality component to that. It can't—it has to be practical. It can't—costs are a concern. And we think that the proposals that they offer are simply too costly and too difficult to administer.

We also think, Your Honor, that they wouldn't effectively advance the government's interests. A least restrictive means has to be equally able to advance the government's interests as the scheme that's created. But all of the proposals that plaintiffs offer impose barriers to women's access. In other words, a woman not only has to buy insurance through her employer, but also has to sign up for this government mandated insurance, or she has to go to another provider, she has to file a special tax form to get a subsidy.

Those are additional barriers to obtaining coverage, and what the IOM Report says is that when you impose barriers to coverage, barriers to access, like cost sharing, et cetera, it limits the access. Women are less likely to obtain it, less likely to utilize preventative services when there are barriers to access. So we think that these systems, which impose additional barriers, are not equally effective as the one the government has created here.

[82]

So if Your Honor has no additional questions—

THE COURT: So if you're at a point where you're ready to pause—

MS. BENNETT: Yes.

THE COURT: —let's turn it over to Mr. Duncan and let him respond to the compelling interest and least restrictive option aspects of this.

MR. DUNCAN: Thank you, Your Honor.

We have a deep disagreement with the government on compelling interest and least restrictive means. We do not concede that the government has articulated any compelling interest in this case. Let me be clear and explain why that is. Articulating a compelling interest in the abstract in improving women's health or improving equality simply doesn't cut it under RFRA. RFRA demands a different burden altogether from the government, and they have not even attempted to meet it here. So let me explain that in terms of the *Gonzalez* case.

The compelling interest test that RFRA requires is—this is the question. Why does the government have a compelling interest in not granting an exemption to this plaintiff? Broadly stated interests don't cover it, don't cut it.

So let's take the government at its face value, what it says. It says, okay, our interest here is improve women's health and equality through greater access to preventive services. Preventive services generally, that's not just [83] contraceptives, that's gestational diabetes screening, HPV, HIV, STD screening, all sorts of things that include FDA-approved contraceptives.

Does a broad statement like that cut it under RFRA? Let's look at the cases. Here's what the government said in *Gonzalez*, the drug case. The government said, look, we have a compelling interest in safeguarding the public health through banning Schedule I narcotics. Banning Schedule I narcotics. The court said, that's not even articulating a compelling interest because what we're interested in is do you have a compelling interest in not exempting the plaintiffs from that scheme. That's what the court said. The court found no.

What about *Yoder*, the Amish case? The court said, or the government said, look, we have a compelling interest in educating children by compulsory school laws. It sounds very important in the abstract, but the court said that's not compelling in the circumstances of this case, because you haven't explained why you need to apply that interest and you can't exempt the plaintiffs from it, the Amish who were already educating their children.

What about *Sherbert* and *Thomas*? The government said, compelling interest in preserving the unemployment compensation system and preventing fraud in the employment compensation system. Again, in the abstract who can say that's not really an important interest? Compelling? Who knows. It's really [84] important. But the court said, it doesn't cut it in this case because you haven't shown why you're not exempting these particular religious claimants.

Now, the *Gonzalez* court, the leading RFRA case, has adopted that analysis as the appropriate analysis for a compelling interest. That's the question you have to ask. To use the words of the *Gonzalez* case, the *Gonzalez* case said, look—

THE COURT: Do you see that as being doctrinally different than what the court did in applying the compelling interest test in *Lee*? I mean, I don't recall in *Lee* that there was anything where they said, well, let's think about whether we can exempt this particular guy who's employing two or three people.

MR. DUNCAN: You've anticipated what I was about to say. So here is what the *Gonzalez* court said about the *Lee* case. What does *Lee* mean? *Lee* said, okay, is mandatory participation in the Social Security tax systems indispensable? That's the word they used, is it "indispensable." And the court said, well, yeah, because we're looking at the way that system works and a mandatory buy-in for everybody is really important because otherwise it's just not going to work. It's not going to work to collect the money and distribute the money.

It doesn't work that way, right?

[85]

Ask the same question here. Is mandatory participation in this mandate indispensable to the system that the government has set up? The answer is no. Look at all the exemptions, exceptions, delays that the government has already—

THE COURT: As opposed to, I suppose, other requirements of the Act that require mandatory coverage somewhere, health insurance.

MR. DUNCAN: That's true, Your Honor. Yes, there are things that the law has put in place for everybody with few exceptions. But let's—so that's the question under *Lee*. Let's take what the government says about grandfathering.

So we say, look, the government's own statistics say there are 133 million individuals covered by plans right now that are grandfathered. In 2014, the government's mid-range projection is that 55 percent of those plans will still be grandfathered. So 55 percent of 133 million. That's a lot of people.

But consider this. The Affordable Care Act requires certain Affordable Care Act provisions to apply to grandfather plans. So, for instance, the famous you must cover your 26-year-old children on your health care plan; that applies to grandfather plans. No lifetime limits on coverage; that applies to grandfather plans. Pre-existing condition for minors; that applies to grandfather plans. You know what that means? That means the government said there are certain objectives in the ACA that we feel are really important, maybe [86] compelling. And they've applied them to grandfather plans, but not the mandate.

THE COURT: To get back to our earlier discussion, is it those requirements that have impacted this financial judgment about whether—

MR. DUNCAN: Yes. Those kinds of—those kinds of requirements. I mean, it's a very complicated decision about whether to get into the ACA world or not, and it's a financial decision.

THE COURT: I mean, I suppose the question to keep your existing plan, if it suddenly covers everybody's kids up to 26, is a different set of numbers than you had before.

MR. DUNCAN: It's going to make a lot of difference. All the different bells and whistles in the ACA are going to make a difference. But the point is, is that when the government says there are certain requirements we're even going to make grandfather plans cover in the ACA, and then they leave out the mandate, how can they come and say that it's a compelling interest? How can they say that without an exemption, that an exemption for the mandate will render the system unworkable? It's obviously not unworkable. This is the way the government is set up.

Here's the other point. And we've talked about this in our reply brief because it's—I mean, the government doesn't make it on general interest at all in contraception or women's [87] preventive services. But they haven't even attempted to articulate a compelling interest in emergency contraceptives. Here's what I mean by that. Plaintiffs here already cover, and have no objection for covering, the vast majority of preventive services. Gestational diabetes, STD screening, breast feeding support, well woman visits,

they don't have any problems with covering that. That's going to be covered.

They don't have any problems with covering most FDA-approved contraceptives. Those are going to be covered.

THE COURT: Like what are you talking about?

MR. DUNCAN: The pill. The birth control pill is going to be covered under the plan after January 1. They have no religious objection to that. What they have a religious objection to are the handful of emergency contraceptives. Okay.

So the government needs to articulate a compelling interest in forcing this plaintiff to comply with the mandate. The interests that it has articulated are general with respect to preventive services generally and with respect to FDA-approved contraceptives in some cases. They haven't articulated a single interest about emergency contraceptives.

In other words, the plaintiffs are looking at this law and saying, why can't you just exempt us? We don't want to interfere with the vast majority of contraceptives. We don't want to interfere with most preventive services. Just exempt [88] us. Is there any reason to think that an exemption like that would undermine the system? And the answer is clearly not, because they've given exemptions for all manner of reasons throughout the system.

So the point is not why did they treat small employers differently, why did they treat grandfather plans differently, why did they treat certain religious employers differently. That's not the point. The point is, is that they chose to sort of stagger the coverage across the board, and now they are saying we have a compelling interest in not granting an exemption to these plaintiffs. And these plaintiffs, they don't implicate their interest, no interest I've heard articulated. Where is the interest in emergency contraceptives in the government's briefs? I don't see it anywhere.

So what that means for purposes of this case is compelling interest is very simple. It is highly unlikely that the government can articulate and prove a compelling interest in forcing these plaintiffs to cover these drugs. It's simply highly unlikely at this point. And it's the government's burden to show it even at this phase, and we believe that they have not.

Now moving on to least restrictive means. Let me just say straight out, the plaintiffs are not proposing that the government set up some alternate medical system to deliver these handful of drugs. Here's their burden on least [89] restrictive means. They have to present, quote, hard evidence, that's the *Heideman* case, hard evidence that there's no other plausible way of addressing the precise problem at issue here that is less restrictive of religious liberty. They have to produce hard evidence of that.

So first of all, let's identify what the particular problem is here. The problem is not Hobby Lobby doesn't provide preventive services for women. They do and they will. The problem is not Hobby Lobby does not provide FDA-approved contraceptives. They provide the vast majority of them, and they will.

The problem is they are not going to provide a handful of drugs. So the government's problem here is that—the real problem in this case is not just cost barriers generally to women's health, to preventive services. It's cost barriers to the employees of a company like Hobby Lobby, which is a company that has workers who obviously are already employed, they have generous health benefits. Those benefits cover all the mandated preventive services and the vast majority of FDA-approved contraceptives.

So what means—has the government chosen the least restrictive means to give these employees that additional handful of drugs? And I think the answer is clearly no. They've—in fact, they've chosen the most restrictive means. They've chosen the means of saying you must provide it on pain [90] of penalty to do it. They've chosen the means that's most restrictive of religious liberty.

So another way of saying that is, the means that they have chosen with respect to Hobby Lobby is as over-inclusive as you can imagine. Why is it over-inclusive? Because they are saying, you have to comply with this mandate in order to achieve our interests. And Hobby Lobby says, but we already are in line with

your interests in 99.9 percent of the cases, all we object to is a handful of drugs. That doesn't mean that the government, you know, can meet its burden in a case in which a plaintiff says we won't provide any contraceptives. All it means is we have to address the plaintiff that's before the court today. And they haven't proven or even demonstrated that they are ready to prove—

THE COURT: What do you say about the government's argument that in terms of these alternate delivery systems, essentially, that it would require them to employ something separate or different from the system of employer-provided health care that is the focus of the Act?

MR. DUNCAN: Well, I mean, the government —a very simple answer to that is the government could simply exempt Hobby Lobby, right? That's a means that is less restrictive of Hobby Lobby's freedom, but the government's interests are still being furthered in 99.9 percent of the cases, right? In other words, the government has already set up a system of [91] exemptions.

THE COURT: Well, but I guess we've kind of covered this to some degree, but it does seem to me at some level, doesn't the government have to be in a position not merely to accommodate Hobby Lobby, but also others who are similarly situated?

MR. DUNCAN: Well, yes. We agree that it's others that are similarly situated. So the others that are similarly situated—

THE COURT: So it does overstate it to some extent to say that the only question is just what's involved with these particular parties in a particular case?

MR. DUNCAN: I think that's right, Your Honor. But let's not—let's not understate it, because Hobby Lobby provides—these are employees of Hobby Lobby who have jobs, who have health care benefits, who get almost all of the preventive coverages covered already. That's what's similarly situated, right? We have to look at has the government chosen the least restrictive means of furthering its interests with respect to people like that, right? And so—and you know, frankly, that's different from some of the cases out there.

There are some of the cases out there about not covering contraceptives at all. We don't think the government can meet its burden there. But the answer here is even clearer. You know, all they have to do is exempt Hobby Lobby. Their [92] interests are still furthered, they are just not forcing the coverage of these drugs.

You know, and as far as the alternate systems, look, I think everybody realizes the Affordable Care Act is engaged in a wholesale—a very dramatic restructuring of health insurance and health care in this country. So, for example, the government is having states or the federal government set up health care exchanges right now, right, that will go in effect in 2014. We just heard from the government that it's chosen, with re-

spect to small employers, that if they don't provide any coverage their employees are going to go out on the exchanges.

So the government already has systems in place for providing alternative access to people. Exchanges, you know, all of the exemptions and sort of exceptions in the ACA, but consider this. Just common sense. If they are concerned about one specific subset of drugs to people who are already employed and who already have health benefits, why not give them a tax credit? Why not give them a tax subsidy to provide these minor—this minor sort of aspect of preventive care?

You know, the thing that's difficult about the government's argument, it's a little bit difficult to know how to respond to it. The government is acting as if Hobby Lobby is just saying no preventive care at all for women, we're going to leave them out of the equation. It's simply not the [93] plaintiff that's before the court. What we have here is a refusal on religious grounds to cover a specific subset of—

THE COURT: Let me ask you one question—

MR. DUNCAN: Sure.

THE COURT: —that's also not before us today—

MR. DUNCAN: Okay.

THE COURT: —pertinent to this motion, and I recognize that, but I'm curious about it. You have raised a claim in your amended complaint that had to

do with essentially a compelled expression or a compelled speech-type claim—

MR. DUNCAN: Correct.

THE COURT: —relating to the counseling.

MR. DUNCAN: That's right.

THE COURT: What do you understand to be the requirement of the counseling that's involved here?

MR. DUNCAN: The counseling requirement is unclear. What seems clear to us is that to force someone to subsidize speech that they disagree with on religious grounds violates the free speech clause and the free exercise clause as well. We need to understand better what that counseling requirement is because on the face of the law it's just not clear what that means. But it's enough to raise—

THE COURT: So conceivably, it may not involve any counseling beyond just saying here's what the options are?

MR. DUNCAN: Who knows at this point. The law doesn't [94] specify, but it's enough to raise it in a complaint that it sounds like compelled subsidized speech. So it's a problem, but the problem is most—sort of a—it's most acute right now for the provision of the coverage itself, because that's clearly a violation of religious beliefs and it's mandated right now.

So I have nothing else on that except to say this. You know, the government makes sort of a big deal about saying, look, we've chosen to go through the

employer system to provide this coverage. Well, you know, the fact that it's more convenient for the government doesn't exempt it from complying with RFRA and the First Amendment. After all, RFRA applies to all federal law. The ACA does not exempt itself, or any regulation under it, from the Religious Freedom Restoration Act.

So we are challenging the provision of the Religious Freedom Restoration—of the ACA that results in these preventive services being included. We're not just challenging regulation, we're challenging that ACA provision as applied to the plaintiffs through that regulation. The ACA violates RFRA because it includes this regulation in it.

So the government can't just say, well, the ACA sets up an employer system and so we've got to go through that.

THE COURT: Now, to the extent that your argument is that the ACA itself violates—

[95]

MR. DUNCAN: As applied.

THE COURT: Yeah. I mean, at least at a general theoretical level, seems to me like that's a hard argument to make. I mean, one congress can't bind a future congress.

MR. DUNCAN: Oh, I'm not arguing that, Your Honor. I'm just saying that the ACA has a preventive services requirement. It's been authoritatively interpreted by regulation to mean FDA-approved—to mean

abortion-causing drugs. And so we're challenging both. That's the ACA as applied through the regulation.

Thank you, Your Honor.

THE COURT: Ms. Bennett, I would be particularly interested in your thoughts with respect to the argument that the compelling interest needs to be evaluated only in terms of a compelling interest in not granting this plaintiff an exemption. I'm guessing you see that differently.

MS. BENNETT: Yes, Your Honor, we do. We think it's this plaintiff and all similarly situated plaintiffs, and when we say "similarly situated," we don't think it means that the government has to evaluate how much every employer in America pays their employees, what sort of health insurance every employer in America gives to determine whether an interest is compelling under the specific facts of this case. "Similarly situated" means other employers, for-profit secular employers that have a religious objection to providing contraceptive [96] coverage.

And I don't think, Your Honor, that the government is required to draw distinctions between objecting to all contraceptive coverage versus only certain types of coverage. That would be an impossible standard for the government to meet.

Plus, I would point out, Your Honor, that the IOM Report is based on the need of these services, the range of services, the full range of FDA-approved contraceptive services. The IOM determined that those

were necessary to pursue the government's compelling interests, and basically left it to a woman and her doctor to determine which of those is appropriate for her.

So the idea that the government would have to come in and show, you know, there's a compelling interest with respect to each specific drug in that list is frankly sort of absurd. There's no way—and then not only that, but with respect to each specific employer, that can't be the test, Your Honor.

And so we think the compelling interest applies to this plaintiff and all similarly situated, and by "similarly situated" as I said, we mean for-profit secular companies that have a religious objection to contraceptive coverage.

THE COURT: Mr. Duncan says that the plan that they have no objection to providing, I think his phrase was it covers 99.5 percent of the things that might arguably impact the public health interest here. Do you disagree with that [97] characterization?

MS. BENNETT: Your Honor, I think the IOM Report certainly is not limited to the health benefits or the necessity of preventative care generally for women. The IOM Report goes through specifically each type of recommendation they make. And so the IOM specifically made findings with respect to contraceptive coverage, sterilization procedures, and patient education and counseling. It wasn't just broadly that, you know, here are the—here are the services. So—

THE COURT: Well, I know. But, I mean, in terms of this characterization of what he views as the extent of the exemption he's asking for, he suggests that what Hobby Lobby wants here is an exemption directed to what he terms the emergency drugs.

MS. BENNETT: I mean, Your Honor, my understanding—I don't—I don't think I'm in a position to tell you what percentage of the health care that women of Hobby Lobby want would be these specific drugs versus other drugs or contraception versus other services—

THE COURT: Well, it's an unreasonable question, but I can still ask it.

MS. BENNETT: Well, Your Honor, I do think—I mean, I would note that I don't think their objection is just to emergency contraception, they also object to IUDs, not that it's relevant, but just to be clear, intrauterine devices, [98] which I don't think they define as emergency contraception. But nonetheless, I certainly can't give you a percentage of, you know, what percentage of health care costs that would be. All I can say, Your Honor, is the IOM Report is based on providing the full range of contraceptive coverage so that a woman can, with her doctor, decide which means, which mechanism is appropriate for her.

THE COURT: And I gather, then, that insofar as—if the question is what did congress direct in the ACA itself, what it directed was simply that there be a further judgment made by HHS or somebody as to what to cover and not cover?

MS. BENNETT: Right, Your Honor.

THE COURT: And then HHS in turn hired, or whatever they did—

MS. BENNETT: Right.

THE COURT: —with this entity you're talking about to come up with the specifics.

MS. BENNETT: Right. Yes, Your Honor. The statute refers to preventative services for women as set forth in guidelines adopted by HRSA. I do think, and we cite this in our brief, there's legislative history indicating that at least members of congress had the idea of family planning services generally in mind. But you're right, it adopts whatever—basically the statute leaves it to HRSA to adopt those guidelines, and HRSA in doing so contracted with the [99] Independent Institute of Medicine that, as Your Honor will note from the report, basically does a scientific review of all the literature and determines which services are necessary. And it is specific to contraception. It does look specifically at those services.

Just a few other points, Your Honor, if I could make. With respect to the idea that the government, you know, in showing a least restrictive means it just has to show a least restrictive means with respect to this particular employer, or even ones that are similarly situated in the sense that they, you know, pay a good wage, provide other types of coverage. Again, it's an impossible standard and it would be impossible to administer.

First of all, the plaintiffs suggest that we can just exempt Hobby Lobby. Well, that can't be least restrictive because it doesn't—it doesn't accomplish the government's compelling interests. A least restrictive means also has to accomplish the government's compelling interests. So the idea that the government could set up a system whereby employers could object to some drugs or all drugs based on varying religious beliefs, it would be administratively infeasible, not to mention the agencies wouldn't have authority to do that under the statute.

And then, Your Honor—

THE COURT: Mr. Duncan, while we're at that point, let [100] me ask you, with respect to the suggestion that the fix could be simply to exempt Hobby Lobby. If the concern is how do you get these preventive services to the female employees, a pure exemption doesn't accomplish that. What would you see as the alternate delivery system?

MR. DUNCAN: The question is, Your Honor—I mean, I don't know what the alternative delivery system is. The question is, does exempting Hobby Lobby undermine the government's interest to the extent that it can't do so? That's compelling interest in not exempting them.

Well, exempting Hobby Lobby takes off .5 percent, whatever it is, of the kinds of preventive services that the government is interested in furthering. So the idea that if you just exempt Hobby Lobby and some-

how the government's compelling interests have been undermined, it just doesn't stand up to scrutiny.

THE COURT: Well, but, I mean, even if you focus on Hobby Lobby, assuming the government is able to establish the compelling interest in the delivery of these sorts of preventive services, however defined, presumably that would extend to the workforce of Hobby Lobby. You can solve the religious tension by exempting Hobby Lobby, but you would then have the Hobby Lobby employees without access to the services unless there was some alternate delivery vehicle.

MR. DUNCAN: Well, I'm not sure the government can [101] rely on that premise that there is somehow not access. Of course there's access. These are people who are employed with health care benefits already who have, you know, good wages and good jobs. The idea that they are cut off from access if they don't get the free coverage through the employer health plan, I don't know why the government can rely on that.

And the government doesn't say it's preventing—the government doesn't say that what it's doing is creating access. There's already access. The government is saying it's increasing access by lowering cost barriers. That's all the government is saying here.

The government has admitted in 90 percent of employer health plans, FDA-approved contraceptives are already covered. This is not an access issue. This is an issue of decreasing this barrier to access that the

government has identified through co-pays and deductibles. That's all the government is saying, we're increasing access.

And our response to that is, you can't show that exempting Hobby Lobby undermines this whole increasing access thing. The government has to come forward with evidence that employees, at least in a comparable situation to Hobby Lobby, have some access problem that is solved by forcing their employer to cover these kind of drugs. The government hasn't produced any evidence like that at all.

MS. BENNETT: And, Your Honor, I'll just point out [102] that the IOM Report does show that cost-sharing requirements impose barriers to access, and when cost-sharing is imposed, women are less likely to use preventative care, and specifically less likely to use contraception. So we do think there's certainly evidence to suggest that if the employees of Hobby Lobby don't have access to this cost-free contraception, that they are less likely to use it or less likely to go to the doctor and obtain those sorts of services. So we do have evidence specific to that.

And, Your Honor, the idea that the government would somehow have to evaluate whether the specific employees of Hobby Lobby, we know they have over 13,000 employees, I don't know how many of them are women or how many dependents are covered, but the idea that the government would have to examine each of them, or all of them generally, to determine whether specifically they have access problems that are im-

posed by cost-sharing is not what the compelling interest test required.

The compelling interest test—the government only has to show a compelling interest with respect to plaintiffs and those that are similarly situated generally, meaning for-profit secular employers that object to this coverage. And we believe the IOM Report meets that burden.

Just, if I could address—Your Honor asked the question about the free speech claim. I just want to make clear, as you're aware, it's not an issue in this PI, but the guidelines [103] require coverage of patient education and counseling—I'm quoting, patient education and counseling for all women with reproductive capacity, end quote. Says nothing about the content of the education and counseling. So it's the government's position that this is not compelled speech. There's no ideology involved there. It's between a woman and her doctor what the content of that is, and plaintiffs aren't subsidizing any sort of political or ideological speech.

THE COURT: We'll save that for another day.

MS. BENNETT: Thank you, Your Honor.

THE COURT: We've kind of marched through this based on my questions and my structure here, but we've got time. I mean, is there some other aspect to this that either counsel wants to add that I brushed past?

MR. DUNCAN: No, Your Honor. I think we've covered it.

MS. BENNETT: Same here, Your Honor.

THE COURT: You're both fully exhausted?

MS. BENNETT: Yes, Your Honor.

MR. DUNCAN: Yes indeed.

THE COURT: All right. Well, I appreciate the input from both of you. You're both very knowledgable in terms of this area, and this is a difficult—as some of the cases talk about, it's kind of treacherous terrain when you're trying to figure out the interplay between religious exercise rights and [104] the implementation of other government plans and so on. It's difficult in any event, and, of course, we are here in kind of uncharted territory because, as Mr. Duncan has suggested, this is an area where the government's involvement and the nature of its involvement in the health care system has changed materially based on the ACA. So it raises some problems that are not only difficult but they are kind of new, and there's not a lot of guidance out there for it.

It does seem to me that, in terms of the standard here applicable to the preliminary injunction, I do tend to, at least I'm tentatively of the mind that this is going to require essentially the conventional showing by the plaintiff of the likelihood of success on the merits. Partly I base that on the recent Supreme Court case that at least raises some question in that regard, but more particularly, it seems to me that our circuit has

said in several contexts that the more relaxed standard does not apply where you're challenging an aspect of overall statutory scheme in some sense. And it does seem to me that's what we're involved with here.

I'm not bothered, frankly, by the suggestion that this is disfavored in the sense of trying to alter the status quo. It seems to me that in terms of the effective dates of the Act and so on, that that's not a problem here.

But I do think that the various circuit authorities would make it inappropriate for me to use the relaxed standard, as [105] was the case in the Colorado case. I reach that with some hesitation because it does seem to me that Judge Kane's approach had a lot to commend it just in terms of the good sense of it. I mean, this obviously does raise a lot of new and different issues that have been addressed before, and so it's maybe an area where the more relaxed standard would make some sense. But I think I'm not at liberty to reinvent the standard just based on that.

It does seem to me that the plaintiff is likely to need to show a likelihood of success on the merits in the conventional fashion here, but that, of course, doesn't end the issue. They may well have done that, and I'll try to get that evaluated.

I appreciate that everybody has some time-related constraints here, and I will try to get a decision made as promptly as I can. If the circuit weighs in in the meantime, that may make my task easier, but I suspect that is unlikely to be the case.

MR. DUNCAN: May I just address that very quickly?

THE COURT: Sure.

MR. DUNCAN: Correct me if I'm wrong, but my understanding is that the *Hercules* appeal, which is an appeal by the government from the *Newland* decision, from Judge Kane's decision, the government has asked for a 60-day delay on its briefing. I'm sure it has perfectly good reasons to do that, but that means the briefing won't be done until sometime in [106] 2013, or even—I don't know how the briefing schedule is—the briefing schedule in that case is out. We're looking at a due date, a drop-dead date of January 1st. I just wanted to make sure the court understands that.

THE COURT: And I'm guessing the Tenth Circuit is probably just really wanting to have the benefit of my insights when they try to find a path through the forest anyway.

So anyway, I'll move forward promptly. As I say, I do appreciate the fact that we've got some time constraints here that are practical problems for everybody.

So again, I appreciate your well-done arguments and I'll try to get a decision as quickly as possible.

We'll be in recess.

(End of Proceedings)

* * * * *

REPORTER'S CERTIFICATE

I hereby certify that the aforegoing is a correct transcript from the record of the proceedings in the above-entitled matter.

/s/ B. JEANNE RING
B. JEANNE RING, RDR

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil Action No. CIV-12-1000-HE

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

v.

KATHLEEN SEBELIUS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, HILDA SOLIS, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY, AND UNITED STATES DEPARTMENT OF THE TREASURY, DEFENDANTS

VERIFIED COMPLAINT
JURY DEMANDED

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Plaintiffs Hobby Lobby Stores) Inc., Mardet Inc., David Green, Barbara Green, Steve Green, Mart Green, and Darsee Lett, by and through their attorneys, allege and state as follows:

NATURE OF THE ACTION

1. This is a challenge to regulations issued under the 2010 Patient Protection and Affordable Care Act that would force religiously-motivated business owners

like Plaintiffs to violate their faith under threat of millions of dollars in fines.

2. Plaintiffs David Green, Barbara Green, Steve Green, Mart Green, and Darsee Lett ("the Green family") are committed evangelical Christians. Through various trusts, they own and operate plaintiff Hobby Lobby Stores) Inc. ("Hobby Lobby"), a privately held retail business headquartered in Oklahoma City. Hobby Lobby currently operates over 500 stores in over 40 states and has over 13,000 full-time employees.

3. Through various trusts, the Green family also owns and operates plaintiff Mardel, Inc. ("Mardel"), a privately held bookstore and education company headquartered in Hobby Lobby's Oklahoma City complex that sells a variety of Christian-themed materials. Mardel currently operates 35 stores in 7 states and has 372 full-time employees.

4. Unless context indicates otherwise, "Plaintiffs" refers collectively to the Green family, Hobby Lobby, and Mardel.

5. The Green family believes they are obligated to run their businesses in accordance with their faith. Commitment to Jesus Christ and to Biblical principles is what gives their business endeavors meaning and purpose.

6. The Green family's business practices therefore reflect their Christian faith in unmistakable and concrete ways. For example, they employ full-time chaplains to meet their employees' spiritual and emotional needs. They pay all of their employees well

above the minimum wage and provide them with excellent benefits. They monitor their merchandise, marketing, and operations to make sure all are consistent with their beliefs. They give millions of dollars from their profits to fund missionaries and ministries around the world. And, as is well known, they close all their stores on Sundays, even though they lose millions in annual sales by doing so.

7. The Green family's religious beliefs forbid them from participating in, providing access to, paying for, training others to engage in, or otherwise supporting abortion-causing drugs and devices.

8. The administrative rule at issue in this case ("the Mandate") runs roughshod over the Green family's religious beliefs, and the beliefs of millions of other Americans, by forcing them to provide health insurance coverage for abortion-inducing drugs and devices, as well as related education and counseling.

9. The Mandate illegally and unconstitutionally coerces the Green family to violate their deeply-held religious beliefs under threat of heavy fines, penalties, and lawsuits. The Mandate also forces the Green family to facilitate government-dictated speech incompatible with their own speech and religious beliefs. Having to pay fines for the privilege of practicing one's religion or controlling one's own speech is alien to our American traditions of individual liberty, religious tolerance, and limited government. It is also illegal and unconstitutional.

10. The Mandate does not apply to everyone equally. The government has not required every in-

surance plan in the country to cover these services, but has instead exempted numerous persons and groups, often for reasons of commercial convenience. Millions of employers may escape the mandate because of the age of their plans or because of the number of people they employ. Certain non-profit religious organizations have been exempted from the mandate altogether, and others have been given extra time to comply with it. But the government refuses to give any accommodation whatsoever to families like the Greens, who simply want to run their businesses in accordance with their beliefs.

11. Defendants have no power to determine that businesses and business owners like the Greens deserve third-class protection for their religious faith. Religious freedom is the birthright of every American. It does not belong solely to those organizations Defendants have chosen to favor.

12. Defendants' actions therefore violate Plaintiffs' rights to freedom of religion, speech, and association as secured by the First and Fifth Amendments to the United States Constitution and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb et seq.

13. Furthermore, the Mandate is illegal because it was imposed by Defendants without prior notice or sufficient time for public comment, and otherwise violates the Administrative Procedure Act, 5 U.S.C. § 553.

14. Religious beliefs like those of the Green family concerning abortion are neither obscure nor unknown.

In formulating and finalizing the Mandate, the government acted with full knowledge that the Mandate would run counter to beliefs like theirs, shared by millions of Americans. And yet the government not only refused to exempt objecting business owners like the Greens, but it allowed plans to exclude these services for a wide range of reasons other than religion. The Mandate can therefore be interpreted as nothing other than a deliberate attack on the religious beliefs of the Greens and millions of other Americans.

15. Plaintiffs therefore seek declaratory and injunctive relief against the Mandate.

JURISDICTION AND VENUE

16. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and § 1361. This action arises under the Constitution and laws of the United States. This Court has jurisdiction to render declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 2000bb-l.

17. Venue lies in this district pursuant to 28 U.S.C. § 1391(e). Plaintiffs reside in this district. A substantial part of the events or omissions giving rise to the claim occurred in this district.

IDENTIFICATION OF PARTIES

18. Plaintiff David Green founded Hobby Lobby in 1970 and remains its CEO. He is also a trustee of one or more of the trusts described in paragraphs 2 and 3 of this Complaint. He is a Christian and, from the beginning, has sought to run Hobby Lobby in harmony

with God's laws and in a manner which brings glory to God.

19. Plaintiff Barbara Green is a trustee of one or more of the trusts described in paragraphs 2 and 3 of this Complaint. She is a Christian and, from the beginning, has sought to run Hobby Lobby in harmony with God's laws and in a manner which brings glory to God.

20. Plaintiff Steve Green is the President of Hobby Lobby and a trustee of one or more of the trusts described in paragraphs 2 and 3 of this Complaint. He is a Christian and, from the beginning, has sought to run Hobby Lobby in harmony with God's laws and in a manner which brings glory to God.

21. Plaintiff Mart Green is the Vice CEO of Hobby Lobby and the CEO of Mardel, a chain of education and supply stores providing Christian books and church supplies. He is also a trustee of one or more of the trusts described in paragraphs 2 and 3 of this Complaint. Mart is also founder of several Christian media companies and Chairman of the Board of Oral Roberts University. He is a Christian and, from the beginning, has sought to run Hobby Lobby, Mardel, and his other business ventures in harmony with God's laws and in a manner which brings glory to God.

22. Plaintiff Darsee Lett is Vice-President of Hobby Lobby and trustee of one or more of the trusts described in paragraphs 2 and 3 of this Complaint. She is a Christian and, from the beginning, has sought to run Hobby Lobby in harmony with God's laws and in a manner which brings glory to God.

23. Hobby Lobby is a privately held, for-profit corporation located in Oklahoma City and organized under Oklahoma law. Hobby Lobby is not a church, an integrated auxiliary of a church, or a convention or association of churches as defined by 26 U.S.C. § 6033(a)(3)(A)(i). Hobby Lobby is not a religious order as defined by 26 U.S.C. § 6033(a)(3)(A)(iii). Nor is it a church or a convention or association of churches as defined by 26 U.S.C. § 414(e).

24. Mardel is a privately held, for-profit corporation located in Oklahoma City and organized under Oklahoma law. Mardel is not a church, an integrated auxiliary of a church, or a convention or association of churches as defined by 26 U.S.C. § 6033(a)(3)(A)(i). Mardel is not a religious order as defined by 26 U.S.C. § 6033(a)(3)(A)(iii). Nor is it a church or a convention or association of churches as defined by 26 U.S.C. § 414(e).

25. Defendants are appointed officials of the United States government and United States governmental agencies responsible for issuing the Mandate.

26. Defendant Kathleen Sebelius is the Secretary of the United States Department of Health and Human Services ("HHS"). In this capacity, she has responsibility for the operation and management of HHS. Sebelius is sued in her official capacity only.

27. Defendant HHS is an executive agency of the United States government and is responsible for the promulgation, administration and enforcement of the Mandate.

28. Defendant Hilda Solis is the Secretary of the United States Department of Labor. In this capacity, she has responsibility for the operation and management of the Department of Labor. Solis is sued in her official capacity only.

29. Defendant Department of Labor is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the Mandate.

30. Defendant Timothy Geithner is the Secretary of the Department of the Treasury. In this capacity, he has responsibility for the operation and management of the Department. Geithner is sued in his official capacity only.

31. Defendant Department of Treasury is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the Mandate.

FACTUAL ALLEGATIONS

I. The Green Family and Hobby Lobby.

32. Hobby Lobby began as Greco Products, a decorative frame company. In 1970, David Green started the business with a six hundred dollar bank loan, building hobby frames in a garage and selling them to other retailers.

33. As the business grew, David Green re-named the company Hobby Lobby and opened the first retail store in Oklahoma City in 1972. From the beginning, Hobby Lobby was a family business. David and Bar-

bara worked in the store and packaged and shipped their frames to other retailers. Steve and Mart, in exchange for money to buy baseball cards, glued frames together at the family's kitchen table.

34. The store became successful. The Greens moved to a larger space, and then to an even larger one, and then began to open additional stores. They broadened their offerings to include a variety of art and craft supplies, home décor, and holiday decorations. Today, Hobby Lobby has grown into one of the nation's leading craft store chains, operating 514 stores in 41 states with 13,240 full-time employees.

35. Hobby Lobby has continued to expand and create new jobs, even during the recent economic downturn.

36. Hobby Lobby has always operated as a family business. David and Barbara Green did much of the work themselves in their first stores. As their children Steve, Mart, and Darsee grew older, the Greens introduced them to the business and trained them to run a retail chain. Today, Steve is the President of Hobby Lobby, Darsee is Vice-President, and Matt is Vice CEO.

37. In 1981, Plaintiff Mart Green founded Mardel, a bookstore and educational supply company that specializes in Christian materials, such as Bibles, books, movies, apparel, church and educational supplies, and homeschool curricula. Mardel operates 35 stores in 7 states and has 372 employees.

38. The members of the Green family operate Hobby Lobby and Mardel through a management trust, which owns all of the voting stock of these companies. Each member of the Green family is a trustee of the management trust. By its own terms, this trust exists first and foremost "to honor God with all that has been entrusted" to the Green family and to "use the Green family assets to create, support, and leverage the efforts of Christian ministries." The trustees must sign a Trust Commitment, which among other things requires them to affirm the Green family statement of faith and to "regularly seek to maintain a close intimate walk with the Lord Jesus Christ by regularly investing time in His Word and prayer."

II. The Green Family's Religious Beliefs Related to Abortion-Causing Drugs and Devices.

39. Since the beginning, the Green family has operated Hobby Lobby according to their Christian faith. Christian beliefs and values inform their decisions and form the inspiration for their company. The family members use their profits to support Christian charities and ministries around the world. They believe that God has blessed them so that they might bless others.

40. For example, David and Barbara Green signed the Giving Pledge, agreeing to donate the majority of their wealth to philanthropy. In this pledge, the Greens stated, "We honor the Lord in all we do by operating the company in a manner consistent with Biblical principles. From helping orphanages in faraway lands to helping ministries in America, Hobby Lobby

has always been a tool for the Lord's work. For me and my family, charity equals ministry, which equals the Gospel of Jesus Christ."

41. Hobby Lobby bears the imprint of its owners' faith. As they explain on the company website, "The foundation of our business has been, and will continue to be strong values, and honoring the Lord in a manner consistent with Biblical principles."

42. Hobby Lobby's statement of purpose reads:

> In order to effectively serve our owners, employees, and customers the Board of Directors is committed to:
>
> Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles.
>
> Offering our customers an exceptional selection and value.
>
> Serving our employees and their families by establishing a work environment and company policies that build character, strengthen individuals, and nurture families.
>
> Providing a return on the owners' investment, sharing the Lord's blessings with our employees, and investing in our community.
>
> We believe that it is by God's grace and provision that Hobby Lobby has endured. He has been faithful in the past, we trust Him for our future.

43. Hobby Lobby's Christian underpinnings are apparent to customers shopping in its stores. Among other things, the stores use a carefully managed music playlist which prominently features inspirational Christian songs. They do not stock gruesome or bloody Halloween decorations, nor risqué greeting cards. They carry religiously themed merchandise, particularly in their Christmas and Easter seasonal sections, which occupy a large portion of each store.

44. Furthermore, the Green family's religious beliefs forbid them from facilitating activities they regard as immoral or harmful. For instance, they refuse to sell shot glasses at Hobby Lobby. They once declined an offer from a liquor store to take over one of their building leases, because they did not want to facilitate alcohol use in the neighborhood around the store. Taking the liquor store's offer would have saved them hundreds of thousands of dollars a month. Similarly, the family refused to allow their trucks to "backhaul" beer shipments for a major distributor, even though the profits from doing so would have been substantial.

45. Perhaps the most well-known expression of the Greens' religious beliefs is the decision to close Hobby Lobby stores on Sundays. The Greens believe that employees should not be asked to regularly work on Sundays, so they can enjoy a day of rest and spend the day with their families. They made this decision because they believed it was the right thing to do, even though it initially cost them millions in lost revenues.

46. Consistent with the Green family's religious beliefs, Hobby Lobby stores are open no more than 66 hours per week. They close at 8 p.m. so that employees can spend the evening with their families. Again, the Greens know they might earn more if they stayed open later, but they believe it is more important to respect their employees and their families.

47. Every Christmas and Easter, Hobby Lobby takes out full-page ads in all newspapers in which it advertises. These ads celebrate the religious nature of the holidays and direct readers who would like to learn more, or are in need of spiritual guidance, to a site where they can download a free Bible and to the phone number of an outside ministry which provides spiritual counseling. In recent years, they have also taken out ads on the Fourth of July, celebrating the Christian beliefs of many of our nation's founders. They maintain an archive of those ads on the company website: http://www.hobbylobby.com/holiday-messages/holiday_messages.cfm.

48. Hobby Lobby has always served a diverse customer base, many of whom do not share the owners' religious beliefs. It strives to welcome and show respect to people of all religious faiths, or no faith at all. The Green family and their employees respond respectfully to criticism they have received for their beliefs about faith and business. The Greens believe it would be wrong to erase their faith from the company they operate.

49. Like Hobby Lobby, Mardel is a company run in accordance with the Green family's (and CEO Mart

Green's) religious beliefs. Mardel is a bookstore and educational supply company that specializes in Christian materials, such as Bibles, books, movies, apparel, church and educational supplies, and homeschool curricula. Mardel describes itself as "a faith-based company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support." It gives 10% of its net profits to help print Bibles translated by Wycliffe Bible Translators. Mardel's 372 employees receive their health insurance coverage through Hobby Lobby's self-insured plans.

50. The Green family believes that they have a religious obligation to treat their employees fairly and with respect, and to compensate good work with good wages and benefits. Over the years, they have looked for opportunities to raise wages, and have long provided minimum salaries well above any national or regional minimum wage. Despite the recession, they have increased wages for full-time employees for the last four years in a row. The wages for Hobby Lobby's full-time employees start at 80% above the federal minimum wage.

51. The Green family also employs company chaplains to minister to employees' personal needs. They provide religiously-inspired financial management classes for employees seeking to improve their family finances. They provide an on-site health clinic for their Oklahoma City employees. They provide conflict and dispute resolution classes based on Biblical principles. Employees are also offered an option to resolve employment disputes through various means, including Christian conciliation. Hobby Lobby wel-

comes employees of all faiths or no faith, and seeks to create a positive, family-friendly environment for its workers.

52. As part of their religious obligations, the Green family also provides excellent health insurance coverage to Hobby Lobby's and Mardel's employees through a self-insured plan. As in other aspects of the business, the Greens believe it is imperative that their employee benefits are consistent with their religious beliefs.

53. The Green family's religious beliefs prohibit them from deliberately providing insurance coverage for prescription drugs or devices inconsistent with their faith, in particular abortion-causing drugs and devices.

54. Hobby Lobby's insurance policies have long explicitly excluded—consistent with their religious beliefs—contraceptive devices that might cause abortions and pregnancy-termination drugs like RU-486.

55. Recently, after learning about the nationally prominent HHS mandate controversy, Hobby Lobby re-examined its insurance policies to ensure they continued to be consistent with its faith. During that re-examination, Hobby Lobby discovered that the formulary for its prescription drug policy included two drugs —Plan B and Ella—that could cause an abortion. Coverage of these drugs was not included knowingly or deliberately by the Green family. Such coverage is out of step with the rest of Hobby Lobby's policies, which explicitly exclude abortion-causing contraceptive devices and pregnancy-termination drugs. Hob-

by Lobby therefore immediately excluded the inconsistent drugs from its policies.

56. The Green family also believes it would violate their faith to deliberately provide health insurance that would facilitate access to abortion-causing drugs and devices, even if those items were paid for by an insurer or a plan administrator and not by Hobby Lobby itself.

57. The Greens have no religious objection to providing coverage for non-abortion-causing contraceptive drugs and devices.

58. The Green family and Hobby Lobby have expended significant resources working with Hobby Lobby's insurers and plan administrators to ensure that its health insurance policies reflect their religious beliefs.

59. Before the Mandate was issued, Hobby Lobby made the decision not to retain grandfathered status under the Affordable Care Act. Neither its 2011 nor its 2012 plan materials included a notice of grandfather status. Therefore Hobby Lobby's insurance plan is not grandfathered. *See* 45 C.F.R. § 147.140(a)(1)(i), 26 C.F.R. § 4.9815-1251T(a)(1)(i); 29 C.F.R. §2590.715-1251(a)(1)(i).

III. The Affordable Care Act

60. In March 2010, Congress passed, and President Obama signed into law, the Patient Protection and Affordable Care Act, Pub. L. 111-148 (March 23, 2010), and the Health Care and Education Reconciliation Act, Pub. L. 111-152 (March 30, 2010), collectively known as the "Affordable Care Act."

61. The Affordable Care Act regulates the national health insurance market by directly regulating "group health plans" and "health insurance issuers."

62. The Act does not apply equally to all plans.

63. The Act does not apply equally to all insurers.

64. The Act does not apply equally to all individuals.

65. The Act applies differently to employers with fewer than 50 employees, not counting seasonal workers. 26 U.S.C. § 4980H(c)(2)(A).

66. According to the United States census, more than 20 million individual workers are employed by firms with fewer than 20 employees. http://www.census.gov/econ/smallbus.html. Employers with less than 50 employees would therefore employ an even higher number of workers.

67. Certain provisions of the Act do not apply equally to members of certain religious groups. *See*, *e.g.*, 26 U.S.C. §§ 5000A(d)(2)(a)(i) and (ii) (individual mandate does not apply to members of "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds); 26 U.S.C. § 5000A(d)(2)(b)(ii) (individual mandate does not apply to members of "health care sharing ministry" that meets certain criteria).

68. The Act's preventive care requirements do not apply to employers who provide so-called "grandfathered" health care plans.

69. Employers who follow HHS guidelines may continue to use grandfathered plans indefinitely.

70. HHS has predicted that a majority of large employers, employing more than 50 million Americans, will continue to use grandfathered plans through at least 2014, and that a third of small employers with between 50 and 100 employees may do likewise. http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have.grandfathered.html.

71. The Act is not generally applicable because it provides for numerous exemptions from its rules.

72. The Act is not neutral because some individuals and organizations, both secular and religious, enjoy exemptions from the law, while other religious individuals and organizations do not.

73. The Act creates a system of individualized exemptions.

74. The Department of Health and Human Services has the authority under the Act to grant compliance waivers to employers and other health insurance plan issuers ("HHS waivers").

75. HHS waivers release employers and other plan issuers from complying with the provisions of the Act.

76. HHS decides whether to grant waivers based on individualized waiver requests from particular employers and other health insurance plan issuers.

77. Upon information and belief, thousands of HHS waivers have been granted.

78. The Act is not neutral because some secular and religious groups and individuals have received statutory exceptions while other religious groups and individuals have not.

79. The Act is not neutral because some secular and religious groups and individuals have received HHS waivers while other religious groups and individuals have not.

80. The Act is not generally applicable because Defendants have granted numerous waivers from complying with its requirements.

81. The Act is not generally applicable because it does not apply equally to all individuals and plan issuers.

82. The Act is neither neutral nor generally applicable because Defendants have exempted certain religious employers, but not religious businesses and business-owners like Plaintiffs.

83. The Act is neither neutral nor generally applicable because Defendants have issued a "safe harbor" protecting certain non-exempt non-profit religious objectors from the Mandate, but not religious businesses and business-owners like Plaintiffs.

84. The Act is neither neutral nor generally applicable because Defendants have stated an intention to make certain non-exempt non-profit religious objectors effectively exempt through the ANPRM (described below), but not religious businesses and business-owners like Plaintiffs.

85. Defendants' waiver practices create a system of individualized exemptions.

IV. The Preventive Care Mandate

86. One of the provisions of the Affordable Care Act mandates that health plans "provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration," and directs the Secretary of Health and Human Services to determine what would constitute "preventative care under the mandate. 42 U.S.C § 300gg-13(a)(4).

87. On July 19, 2010, HHS, along with the Department of Treasury and the Department of Labor, published an interim final rule under the Affordable Care Act. 75 Fed. Reg. 41726 (2010).[1] The interim final rule required providers of group health insurance to cover preventive care for women as provided in guidelines to be published by the Health Resources and Services Administration at a later date. 75 Fed. Reg. 41759 (2010).

88. The Mandate also requires group health care plans and issuers to provide education and counseling for all women beneficiaries with reproductive capacity.

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[1] For ease of reading, references to "HHS" in this Complaint are to all three Departments.

89. The Mandate went into effect immediately as an "interim final rule."

90. HHS accepted public comments to the 2010 interim final rule until September 17, 2010. A number of groups filed comments warning of the potential conscience implications of requiring religious individuals and groups to pay for certain kinds of health care, including contraception, sterilization, and abortion.

91. HHS directed a private health policy organization, the Institute of Medicine ("IOM"), to suggest a list of recommended guidelines describing which drugs, procedures, and services should be covered by all health plans as preventive care for women. *See* http://www.hrsa.gov/womensguidelines.

92. In developing its guidelines, IOM invited a select number of groups to make presentations on the preventive care that should be mandated by all health plans. These were the Guttmacher Institute, the American Congress of Obstetricians and Gynecologists (ACOG), Prof. John Santelli, a Senior Fellow at the Guttmacher Institute, the National Women's Law Center, National Women's Health Network, Planned Parenthood Federation of America and Prof. Sara Rosenbaum, a proponent of government-funded abortion.

93. No religious groups or other groups that oppose government-mandated coverage of contraception, sterilization, abortion, and related education and counseling were among the invited presenters.

94. One year after the first interim final rule was published, on July 19, 2011, the IOM published its recommendations. It recommended that the preventive services include "[a]ll Food and Drug Administration approved contraceptive methods [and] sterilization procedures." Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* (July 19, 2011).

95. FDA-approved contraceptive methods include birth-control pills; prescription contraceptive devices and injections; levonorgestrel, also known as the "morning-after pill" or "Plan B"; and ulipristal, also known as "Ella" or the "week-after pill"; and other drugs, devices, and procedures. The FDA birth control guide specifically notes that Plan B and Ella may work by preventing "attachment (implantation)" of a fertilized egg to a woman's uterus. *See* http://www.fda.gov/downloads/ForConsumers/ByAudience/for Women/FreePublications/UCM2820 14.pdf.

96. Thirteen days later, on August 1, 2011, HRSA issued guidelines adopting the IOM recommendations. *See* http://www.hrsa.gov/womensguidelines. On the same day HHS, the Department of Labor, and the Department of Treasury promulgated an amended interim final rule which reiterated the Mandate and added a narrow exemption for "religious employer[s]." 76 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. § 147.130.

97. HHS did not take into account the concerns of religious organizations and individuals in the comments submitted before the Mandate was issued.

98. The Mandate was unresponsive to the concerns stated in the comments submitted by religious organizations and individuals.

99. When it issued the Mandate, HHS requested comments from the public by September 30, 2011, and indicated that comments would be available online.

100. Upon information and belief, over 100,000 comments were submitted against the Mandate and its narrow "religious employer" exemption.

101. On October 5, 2011, six days after the comment period ended, Defendant Sebelius gave a speech at a fundraiser for NARAL Pro-Choice America. She told the assembled crowd that "we are in a war."

102. The Mandate fails to take into account the statutory and constitutional conscience rights of religious individuals like the Green family, even though those rights were raised in the public comments.

103. The Mandate requires that Plaintiffs provide coverage or access to coverage for abortion-causing drugs and related education and counseling against their consciences in a manner that is contrary to law.

104. The Mandate constitutes government-imposed pressure and coercion on Plaintiffs to change or violate their religious beliefs.

105. The Mandate exposes Plaintiffs to substantial fines and other penalties and pressures for refusal to change or violate their religious beliefs.

106. The Mandate forces Plaintiffs to provide coverage or access to coverage for abortion-causing drugs

and devices, including Plan B and Ella, in violation of Plaintiffs' religious beliefs.

107. Plaintiffs have a sincere religious objection to providing coverage for Plan B and Ella since they believe those drugs could prevent a human embryo—which they understand to include a fertilized egg before it implants in the uterus—from implanting in the wall of the uterus, causing the death of the embryo.

108. Plaintiffs have a sincere religious objection to providing coverage for certain contraceptive intrauterine devices or "IUDs" since they believe those devices could prevent a human embryo from implanting in the wall of the uterus, causing the death of the embryo.

109. Plaintiffs consider the prevention by artificial means of the implantation of a human embryo to be an abortion.

110. Plaintiffs believe that Plan B, Ella and certain IUDs can cause the death of the embryo.

111. Plan B can prevent the implantation of a human embryo in the wall of the uterus.

112. Ella can prevent the implantation of a human embryo in the wall of the uterus.

113. Certain IUDs can prevent the implantation of a human embryo in the wall of the uterus.

114. Plan B, Ella, and certain IUDs can cause the death of the embryo.

115. The use of artificial means to prevent the implantation of a human embryo in the wall of the uterus

constitutes an "abortion" as that term is used in federal law.

116. The use of artificial means to cause the death of a human embryo constitutes an "abortion" as that term is used in federal law.

117. The Mandate forces Plaintiffs to provide insurance coverage or access to insurance coverage for abortion-causing drugs and devices, including Plan B and Ella, regardless of the ability of insured persons to obtain these drugs from other sources.

118. The Mandate forces Plaintiffs to provide insurance coverage or access to insurance coverage for education and counseling concerning abortion-causing drugs and devices that directly conflicts with their religious beliefs and teachings.

119. Providing this counseling and education is incompatible and irreconcilable with Plaintiffs' express messages and speech.

120. The Mandate forces Plaintiffs to choose between violating their religious beliefs or terminating employee health insurance coverage and incurring substantial fines.

121. Group health plans and issuers will be subject to the Mandate starting with the first insurance plan year that begins on or after August 1, 2012.

122. Plaintiffs have already had to devote significant institutional resources, including both staff time and funds, to determining how to respond to the Mandate. Plaintiffs anticipate continuing to make such

expenditures of time and money up until the time that the Mandate goes into effect.

V. The Narrow and Discretionary Religious Employer Exemption

123. The Mandate indicates that that the Health Resources and Services Administration ("HRSA") "may" grant religious exemptions to certain religious employers. 45 C.F.R. § 147.130(a)(iv)(A). Among other things, those employers must be "a non-profit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.130(a)(iv)(B).

124. As a for-profit company, Hobby Lobby does not qualify for this exemption.

125. After public outcry over the Mandate, Defendant Sebelius announced that "[n]onprofit employers who, based on religious beliefs, do not currently provide contraceptive coverage in their insurance plan, will be provided an additional year, until August 1, 2013, to comply with the new law," on the condition that those employers certify they qualify for the extension.

126. Hobby Lobby does not qualify for this "safe harbor," since it is a for-profit company.[2]

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[2] *See* HHS, Guidance on Temporary Enforcement Safe Harbor, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Feb. 10, 2012), at 3, *available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited Sept. 10, 2012). The government recently expanded the safe harbor, but it still does not

127. On February 10, 2012, President Obama held a press conference at which he announced an intention to initiate, at some unspecified future date, a separate rulemaking process that would work toward creating a different insurer-based mandate. This promised mandate would, the President stated, attempt to take into account the kinds of religious objections voiced against the original Mandate contained in the interim final rule.

128. On February 15, 2012, Defendants adopted as final, "without change," the narrow "religious employer" exemption. 77 Fed. Reg. 8725, 8727.

129. On March 16, 2012, Defendants issued an Advance Notice of Proposed Rulemaking ("ANPRM"). The ANPRM announced Defendants' intention to create an "accommodation" for non-exempt religious organizations under which Defendants would require a health insurance issuer (or third party administrator) to provide coverage for these drugs and services—without cost sharing and without charge—to employees covered under the organization's health plan. The ANPRM solicited public comments on structuring the proposed accommodation, and announced Defendants' intention to finalize an accommodation by the end of the Safe Harbor period. *See* https://s3.amazonaws.

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include for-profit businesses like Plaintiffs. *See* HHS, Guidance on Temporary Enforcement Safe Harbor, U.S. DEP'T OF HEALTH & HUMAN SERVS. (August 15, 2012), *available at* http://cciio.cms.gov/resources/files/prev-servicesguidance-08152012.pdf (last visited Sept. 10, 2012).

com/public-inspection.federalreisfed.gov/2012-06689.pdf (published on March 21, 2012).

130. The ANPRM did not announce any intention to alter the Mandate or its narrow "religious employer" exemption, which was made "final, without change" on February 15, 2012. All the ANPRM's suggestions for future rulemaking are limited to non-profit religious organizations. The government has made no promises, either in the ANPRM or anywhere else, to provide protection for religious business owners like Plaintiffs.

131. The plan year for Hobby Lobby's and Mardel's employee insurance plan begins on January 1 of each year.

132. The Mandate takes effect against Hobby Lobby's and Mardel's employee insurance plan on January 1, 2013.

133. On January 1, Plaintiffs will face an unconscionable choice: either violate the law, or violate their faith.

VI. The Mandate's Effect on the Plaintiffs and the Need for Immediate Relief

134. The Mandate constitutes government-imposed pressure on Plaintiffs to act contrary to their religious beliefs.

135. The Mandate exposes Plaintiffs to enormous fines and other penalties and pressures if it refuses to comply.

136. Hobby Lobby has about 13,240 full-time employees as of September 1, 2012.

137. Mardel has about 372 full-time employees as of September 1, 2012.

138. The Mandate imposes a burden on Plaintiffs' employee recruitment and retention efforts by creating uncertainty as to how they will be able to offer health insurance beyond 2012.

139. The Mandate places Plaintiffs at a competitive disadvantage in its efforts to recruit and retain employees.

140. Plaintiffs are planning now for the 2013 insurance plan year.

141. Every fall, Plaintiffs work with their insurance plan administrators to set up the plans for the coming year. The process is time consuming: Plaintiffs' HR department must work with its administrators on plan changes and on the production and distribution of plan materials and employee insurance cards.

142. Plaintiffs need immediate relief from the Mandate in order to arrange for and continue providing employee health insurance to their employees. Delay could lead to a lapse in coverage, placing the health and well-being of thousands of employees and their families in jeopardy. Denial of immediate relief will force Plaintiffs to choose between their religious beliefs and the prospect of crippling fines, regulatory penalties, and lawsuits.

143. The consequences for Plaintiffs' employees would be severe. Thousands of families rely on Plaintiffs' insurance plans.

144. The consequences for Plaintiffs' businesses would be enormous. For example, with over 13,000 full-time employees, Hobby Lobby faces fines of about $26 million dollars per year if it drops employee insurance altogether, and additional fines of about $1.3 million per *day* if it chooses to offer insurance that does not include all of the mandated drugs and services. Plaintiffs will be subject to those penalties on January 1, 2013.

CLAIMS

COUNT I

Violation of the Religious Freedom Restoration Act
Substantial Burden

145. Plaintiffs incorporate by reference all preceding paragraphs.

146. Plaintiffs' sincerely held religious beliefs prohibit them from providing coverage or access to coverage for abortion-causing drugs or devices or related education and counseling. Plaintiffs' compliance with these beliefs is a religious exercise.

147. The Mandate creates government-imposed coercive pressure on Plaintiffs to change or violate their religious beliefs.

148. The Mandate chills Plaintiffs' religious exercise.

149. The Mandate exposes Plaintiffs to substantial fines for their religious exercise.

150. The Mandate exposes Plaintiffs to substantial competitive disadvantages, in that they may no longer be permitted to offer health insurance.

151. The Mandate imposes a substantial burden on Plaintiffs' religious exercise.

152. The Mandate furthers no compelling governmental interest.

153. The Mandate is not narrowly tailored to any compelling governmental interest.

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

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

156. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT II

Violation of the First Amendment to the United States Constitution
Free Exercise Clause
Substantial Burden

157. Plaintiffs incorporate by reference all preceding paragraphs.

158. Plaintiffs' sincerely held religious beliefs prohibit them from providing coverage or access to coverage for abortion-causing drugs or devices or related education and counseling. Plaintiffs' compliance with these beliefs is a religious exercise.

159. Neither the Affordable Care Act nor the Mandate is neutral.

160. Neither the Affordable Care Act nor the Mandate is generally applicable.

161. Defendants have created categorical exemptions and individualized exemptions to the Mandate.

162. The Mandate furthers no compelling governmental interest.

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

164. The Mandate creates government-imposed coercive pressure on Plaintiffs to change or violate their religious beliefs.

165. The Mandate chills Plaintiffs' religious exercise.

166. The Mandate exposes Plaintiffs to substantial fines for their religious exercise.

167. The Mandate exposes Plaintiffs to substantial competitive disadvantages, in that they may no longer be permitted to offer health insurance.

168. The Mandate imposes a substantial burden on Plaintiffs' religious exercise.

169. The Mandate is not narrowly tailored to any compelling governmental interest.

170. The Mandate and Defendants' threatened enforcement of the Mandate violate Plaintiffs' rights secured to them by the Free Exercise Clause of the First Amendment to the United States Constitution.

171. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT III

Violation of the First Amendment to the United States Constitution
Free Exercise Clause
Intentional Discrimination

172. Plaintiffs incorporate by reference all preceding paragraphs.

173. Plaintiffs sincerely held religious beliefs prohibit them from providing coverage or access to coverage for abortion-causing drugs or devices or related education and counseling. Plaintiffs' compliance with these beliefs is a religious exercise.

174. Despite being informed in detail of these beliefs beforehand, Defendants designed the Mandate and the religious exemption to the Mandate in a way that made it impossible for Plaintiffs to comply with both their religious beliefs and the Mandate.

175. Defendants promulgated both the Mandate and the religious exemption to the Mandate in order to suppress the religious exercise of Plaintiffs and others.

176. The Mandate and Defendants' threatened enforcement of the Mandate thus violate the Plaintiffs rights secured to them by the Free Exercise Clause of the First Amendment to the United States Constitution.

177. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT IV

Religious Discrimination—
Violation of the First and Fifth Amendments to the United States Constitution
Free Exercise and Establishment Clauses;
Due Process and Equal Protection

178. Plaintiffs incorporate by reference all preceding paragraphs.

179. By design, Defendants imposed the Mandate on some religious individuals and organizations but not on others, resulting in discrimination among religious objectors.

180. The Mandate vests HRSA with unbridled discretion in deciding whether to allow exemptions to some, all, or no organizations meeting the definition of "religious employers."

181. Religious liberty is a fundamental right.

182. The "religious employer" exemption protects many religious objectors, but not Plaintiffs.

183. The "safe harbor" protects many religious objectors, but not Plaintiffs.

184. The ANPRM promises protection to many religious objectors, but not Plaintiffs.

185. The Mandate and Defendants' threatened enforcement of the Mandate thus violate Plaintiffs' rights secured to them by the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution and by Due Process Clause of the Fifth Amendment to the United States Constitution.

186. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT V

Violation of the First Amendment to the United States Constitution
Freedom of Speech
Compelled Speech

187. Plaintiffs incorporate by reference all preceding paragraphs.

188. Plaintiffs believe and profess that providing abortion-causing drugs and devices violates their religious beliefs.

189. The Mandate would compel Plaintiffs to cooperate in activities through its provision of health insurance that are violations of Plaintiffs' religious beliefs.

190. The Mandate would compel Plaintiffs to provide education and counseling related to abortion-causing drugs and devices.

191. Defendants' actions thus violate Plaintiffs' right to be free from compelled speech as secured to it by the First Amendment to the United States Constitution.

192. The Mandate's compelled speech requirement is not narrowly tailored to a compelling governmental interest.

193. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT VI

Violation of the First Amendment to the United States Constitution
Freedom of Speech
Expressive Association

194. Plaintiffs incorporate by reference all preceding paragraphs.

195. The Mandate would compel Plaintiffs to cooperate in activities through their provision of health insurance that are violations of Plaintiffs' religious beliefs.

196. The Mandate would compel Plaintiffs to provide, through their provision of health insurance, education and counseling related to abortion-causing drugs and devices.

197. Defendants' actions thus violate Plaintiffs' right of expressive association as secured to it by the First Amendment of the United States Constitution.

198. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT VII

Violation of the Administrative Procedure Act
Lack of Good Cause

199. Plaintiffs incorporate by reference all preceding paragraphs.

200. Defendants' stated reasons that public comments were unnecessary, impractical, and opposed to the public interest are false and insufficient, and do not constitute "good cause."

201. Without proper notice and opportunity for public comment, Defendants were unable to take into account the full implications of the regulations by completing a meaningful "consideration of the relevant matter presented." Defendants did not consider or respond to the voluminous comments they received in opposition to the interim final rule.

202. Therefore, Defendants have taken agency action not in observance with procedures required by law, and Plaintiffs are entitled to relief pursuant to 5 U.S.C. § 706(2)(D).

203. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT VIII

Violation of the Administrative Procedure Act
Arbitrary and Capricious Action

204. Plaintiffs incorporate by reference all preceding paragraphs.

205. In promulgating the Mandate, Defendants failed to consider the constitutional and statutory implications of the mandate on Plaintiffs and similar organizations and individuals.

206. Defendants' explanation for their decision not to exempt Plaintiffs and similar religious individuals from the Mandate runs counter to the evidence submitted by religious individuals during the comment period.

207. Thus, Defendants' issuance of the interim final rule was arbitrary and capricious within the meaning of 5 U.S.C. § 706(2)(A) because the rule fails to consider the full extent of the Mandate's implications and does not take into consideration the evidence against it.

208. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT IX

Violation of the Administrative Procedure Act
Agency Action Not in Accordance with Law
Weldon Amendment
Religious Freedom Restoration Act
First Amendment to the United States Constitution

209. Plaintiffs incorporate by reference all preceding paragraphs.

210. The Mandate is contrary to the provisions of the Weldon Amendment of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, Public Law 110 329, Div. A, Sec. 101, 122 Stat. 3574, 3575 (Sept. 30, 2008).

211. The Weldon Amendment provides that "[n]one of the funds made available in this Act [making appropriations for Defendants Department of Labor and Health and Human Services] may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."

212. The Mandate requires issuers, including Plaintiffs, to provide coverage or access to coverage of all FDA-approved "contraceptives."

213. Some FDA-approved "contraceptives" cause abortions.

214. As set forth above, the Mandate violates RFRA and the First Amendment.

215. Under 5 U.S.C. § 706(2)(A), the Mandate is contrary to existing law, and is in violation of the APA.

216. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT X

Violation of the Administrative Procedure Act
Agency Action Not in Accordance with Law
Affordable Care Act

217. Plaintiffs incorporate by reference all preceding paragraphs.

218. The Mandate is contrary to the provisions of the Affordable Care Act.

219. Section 1303(b)(1)(A) of the Affordable Care Act states that "nothing in this title"—*i.e.*, title I of the Act, which includes the provision dealing with "preventive services"—"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."

220. Section 1303 further states that it is "the issuer" of a plan that "shall determine whether or not the plan provides coverage" of abortion services.

221. Under the Affordable Care Act, Defendants do not have the authority to decide whether a plan covers abortion; only the issuer does.

222. The Mandate requires issuers, including Plaintiffs, to provide coverage or access to coverage for all

Federal Drug Administration-approved contraceptives.

223. Some FDA-approved contraceptives cause abortions.

224. Under 5 U.S.C. § 706(2)(A), the Mandate is contrary to existing law, and is in violation of the APA.

225. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that the Court:

a. Declare that the Mandate and Defendants' enforcement of the Mandate against Plaintiffs violate the First and Fifth Amendments to the United States Constitution;

b. Declare that the Mandate and Defendants' enforcement of the Mandate against Plaintiffs violate the Religious Freedom Restoration Act;

c. Declare that the Mandate was issued in violation of the Administrative Procedure Act;

d. Issue a permanent injunction prohibiting enforcement of the Mandate against Plaintiffs and other individuals and organizations that object on religious grounds to providing insurance coverage for abortion-causing drugs and devices, and related education and counseling;

e. Award Plaintiffs the costs of this action and reasonable attorney's fees; and

f. Award such other and further relief as it deems equitable and just.

JURY DEMAND

Plaintiffs request a trial by jury on all issues so triable.

* * * * *

Respectfully submitted this 12th day of September, 2012.

/s/ CHARLES E. GEISTER III
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-And-

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(*Motion for Pro Hac Vice pending*)
ERIC S. BAXTER, D.C. Bar
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kduncan@becketfund.org

ATTORNEYS FOR PLAINTIFFS

VERIFICATION OF COMPLAINT ACCORDING TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing is true and correct to the best of' my knowledge.

Executed on Sept. 12, 2012

/s/ DAVID GREEN
DAVID GREEN*

**I certify that I have the signed original of this document, which is available for inspection at any time by the Court or a party to this action.*

VERIFICATION OF COMPLAINT ACCORDING TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on Sept. 12, 2012

/s/ BARBARA GREEN
BARBARA GREEN*

**I certify that I have the signed original of this document, which is available for inspection at any time by the Court or a party to this action.*

VERIFICATION OF COMPLAINT ACCORDING TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing is true and correct to the Best of my knowledge.

Executed on Sept. 12, 2012

/s/ STEVE GREEN
STEVE GREEN*

**I certify that I have the signed original of this document, which is available for inspection at any*

time by the Court or a party to this action.

VERIFICATION OF COMPLAINT ACCORDING TO 28 U.S.C. § 1746

I declare under penalty of pe1jury that the foregoing is true and correct to the best of my knowledge.

Executed on Sept. 12, 2012

/s/ MART GREEN
MART GREEN

**I certify that I have the signed original of this document, which is available for inspection at any time by the Court or a party to this action.*

VERIFICATION OF COMPLAINT ACCORDING TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing is true and correct to the best or my knowledge.

Executed on Sept. 12, 20 12

/s/ DARSEE LETT
DARSEE LETT*

**I certify that 1 have the signed original of this document, which is available for inspection at any time by the Court or a party to this action.*

(ORDER LIST: 571 U.S.)

TUESDAY, NOVEMBER 26, 2013
CERTIORARI GRANTED

* * * * *

13-354 SEBELIUS, SEC. OF H&HS, ET AL V. HOBBY LOBBY STORES, INC.

13-356 CONESTOGA WOOD SPECIALITIES V. SEBELIUS, SEC. OF H&HS, ET AL.

The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument.