IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BECKWITH ELECTRIC CO., INC.; and THOMAS R. BECKWITH, Chief Executive Officer and Primary Shareholder of Beckwith Electric Co., Inc.,

Plaintiffs,

v.

Case No. 8:13-cv-00648-EAK-MAP

Hon. Elizabeth A. Kovachevich

Magistrate Judge Mark A. Pizzo

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SETH D. HARRIS, Acting Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; JACK LEW, Secretary of the United States Department of the Treasury; and UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.
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MEMORANDUM OF THE STATE OF FLORIDA,
BY ATTORNEY GENERAL PAM BONDI, AS AMICUS CURIAE
IN SUPPORT OF PLANTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The State of Florida, by Attorney General Pam Bondi, as amicus curiae, hereby submits this memorandum in support of Plaintiffs' Motion for Preliminary Injunction (Doc. 10).

Introduction and Statement of Interest

Florida law zealously protects religious liberties. Florida's Constitution guarantees that "[t]here shall be no law respecting the establishment of religion prohibiting or penalizing the free exercise thereof." Fla. Const. art. I, § 3. Its statutes provide that "[t]he government shall not

substantially burden a person's exercise of religion," with exceptions similar to those under the federal Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.* ("RFRA"). *Compare* Fla. Stat. § 761.03 *with* 42 U.S.C. § 2000bb-1. Under Florida law, government may neither "compel[] the religious adherent to engage in conduct that his religion forbids . . . [n]or forbid[] him to engage in conduct that his religion requires." *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 (Fla. 2004).

The religious liberty claim in this case was filed by a Florida business and business owner. Beckwith Electric Company and Thomas R. Beckwith contend that the HHS Mandate violates their religious liberty under both the RFRA and the First Amendment, by requiring them to provide certain insurance products and services to their employees that violate their religious convictions and core tenets of their Baptist faith.

These are exactly the liberties that federal and Florida laws strictly protect and which the State, through the Attorney General, seeks to vindicate here. In cases such as these, Florida law empowers the Attorney General, Fla. Stat. § 16.01, as the People's chief legal officer, to appear in legal matters and attend to the legal issues raised where, as here, the State has a substantial interest in how those issues are resolved.

The Attorney General advances three points: (1) the RFRA and the First Amendment apply to businesses that operate according to religious principles, even if they are not operated by a religious organization; (2) the HHS Mandate at issue imposes a substantial burden on Plaintiffs' free exercise of religion; and (3) there are no compelling reasons to apply the Mandate to Plaintiffs and other similarly-situated persons, particularly where there are less restrictive means by which the federal government could assure access to reproductive services.

Argument

The Plaintiffs' religious liberties should be protected from a federal mandate – to provide reproductive products and services, including early abortion-inducing drugs, in their employee insurance plans – that directly conflicts with their religious beliefs. The mandate at issue here conflicts with clear Southern Baptist Church tenets by which Beckwith Electric Company, a Florida business, and its principal owner, Thomas R. Beckwith, operate the business. Beckwith Electric has designed its health insurance policies with Humana to exclude abortifacient drugs and other services that violate Plaintiffs' religious principles. The HHS Mandate, in requiring Plaintiffs to provide reproductive products and services, would substantially burden Plaintiffs' constitutionally and statutorily protected religious freedom, as it would the religious freedom of all similarly situated Floridians.

I. THE FUNDAMENTAL RIGHT TO EXERCISE RELIGIOUS FREEDOM EXTENDS TO PERSONS AND THEIR BUSINESSES, REGARDLESS OF WHETHER THE BUSINESSES ARE INDEPENDENT OF RELIGIOUS ORGANIZATIONS.

It is well settled, and beyond reasonable dispute, that the First Amendment's protections of speech and association apply equally to religious and secular organizations. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 900 (2010) ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"). Indeed, Supreme Court precedent rejects any claim that the First Amendment's enumerated freedoms do not apply to secular businesses:

> Freedom of speech *and the other freedoms encompassed by the First Amendment* always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause, and the Court has not identified a separate source for the right when it has been asserted by corporations.

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 780 (1978) (citations omitted; emphasis added).

Thus, the First Amendment makes no distinction, in its protections of free exercise of religion and free speech, as between organizations and individuals or as between religious corporations and secular ones. Corporations are a legally-recognized form by which human beings – themselves cloaked with the religious and speech liberties under the First Amendment – associate and, together, form businesses in the hope of providing goods or services to others. Hence, a corporation must be protected as a "person" under the First Amendment. It follows that a corporation also must be accorded that same recognition and protection under 42 U.S.C. § 2000bb-1 of the RFRA. *See* 42 U.S.C. § 2000bb(a) (securing traditional federal First Amendment protections under the RFRA).[1]

In a departure from these settled principles, the district court in *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), adopted the argument that secular businesses are not protected by the First Amendment and are not protected under the RFRA. *Id*. at 1292. The court, plainly viewing corporations as abstract entities devoid of human motive and activity, stated:

> General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take religiously-motivated actions separate and apart from the intention and direction of their individual actors. Religious exercise is, by its nature, one of those "purely personal" matters referenced in *Bellotti* which is not the province of a general business corporation.

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[1] *But see Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003) (reserving the question but casting doubt on whether a non-profit corporation was a "person" within the meaning of the RFRA).

Id. After reaching this spurious conclusion – the very kind that Congress rejected in enacting the RFRA, as shown *infra* – the court then determined that the corporation's owners could not invoke the RFRA because the restrictions on religious liberty at issue had not been imposed on the owners, but on their corporation. *Id*. at 1294. *See also Gilardi v. Sebelius*, 2013 WL 781150, *7-8 (D.D.C. Mar. 3, 2013) (finding specific "secular for-profit companies" not to be exercising religion, yet declining to "reach the question of whether *any* secular, for-profit corporation can exercise religion.") (emphasis in original).

The Seventh Circuit has rejected this asserted basis for denying religious freedom, recognizing that this freedom is not lost simply because a person operates a for-profit business. The court stated:

> That the Kortes operate their business in the corporate form is not dispositive of their claim. See generally *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). . . . [T]he Kortes would have to violate their religious beliefs to operate their company in compliance with [the contraception mandate].

Korte v. Sebelius, 2012 WL 6757353, *3 (7th Cir. Dec. 28, 2012). *See also Grote v. Sebelius*, 708 F.3d 850 (7th Cir. Jan. 30, 2013) (recognizing freedom of religion for secular, for-profit business).

The suggestion that a privately-owned business has no religious protections because it engages in secular commercial transactions reflects a profound misunderstanding of both the First Amendment and the RFRA, and offends the religious liberty of closely-held and family-run businesses. Such a view would confine religious freedom to only those entities that are owned by religious institutions or that sell exclusively religious goods, effectively walling religious freedom off from the rest of society in its pervasive commercial context. The First Amendment knows no such restriction. It exists to protect its enumerated freedoms on behalf of everyone,

and not just religious organizations. To argue otherwise ignores that a business may be established and operated based on religious principles even if its mission is secular in nature.

The confinement of religious liberty to religious organizations contravenes the United States Constitution and laws promulgated pursuant to it, including the RFRA. Under the RFRA, Congress has provided for the protection of free exercise of religion rights from laws of "general applicability." 42 U.S.C. § 2000bb-1(a). Thus, as a matter of law, corporations, like the persons who own and operate them, are entitled to be protected against government intrusion into their religious freedom.

II. THE HHS MANDATE IMPOSES A SUBSTANTIAL BURDEN ON PLAINTIFFS' EXERCISE OF THEIR RELIGIOUS FREEDOM.

The only exception to the prohibition of a government-imposed limitation on religious freedom arises where the government can prove that the limitation both (1) "is in furtherance of a compelling governmental interest," and (2) "is the least restrictive means of furthering that compelling governmental interest." RFRA, 42 U.S.C. § 2000bb-1(a). In such cases, the burden on the government to justify intruding on religious liberty is a heavy one. That burden has not been and cannot be met here, warranting entry of injunctive relief in Plaintiffs' favor – as would be the case for any and all Floridians similarly situated.

Indeed, the RFRA was enacted to ensure that government would retain precisely that heavy burden. The RFRA expressly provides that its purpose is:

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
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> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b). Thus, the RFRA restored the constitutional standards governing the First Amendment prior to the decisions in *Employment Div. v. Smith*, 494 U.S. 872 (1990), which

"substantially circumscribed" the "broad applicability of the compelling interest test" established by *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *See also* 42 U.S.C. § 2000bb(a); *Lawson v. Singletary*, 85 F.3d 502, 508 (11th Cir. 1996). The RFRA codified the compelling interest standard for laws of general application that substantially burden the free exercise of religion.

Each of the two cases cited in the RFRA examined state laws of general applicability. In *Sherbert*, the Supreme Court determined that a South Carolina law that disqualified a Seventh-day Adventist who refused to work on Saturdays from unemployment benefits had to yield to her free exercise of her religion. 374 U.S. at 410. Even though this was an "incidental burden," i.e., an unintended effect, the State was required to come forward with a compelling interest to justify it. *Id*. at 403. Similar treatment was accorded in *Yoder*, where the obligation under Wisconsin law was that children must have compulsory education through age 16. 406 U.S. at 207. The law was held to be an unconstitutional burden on Amish children, in contravention of "the basic religious tenets and practice of the Amish faith[,]" *id.* at 218, and therefore "beyond the power of the State to control, even under regulations of general applicability[,]" *id*. at 220.[2]

The RFRA's general standards for determining whether there is a "substantial burden" on a person's exercise of religion also come from *Sherbert* and *Yoder*. The "disqualification for benefits" in *Sherbert* was deemed a substantial burden on the plaintiff's exercise of her freedom of religion because it forced her to choose between work and following the precepts of her religion:

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[2] *See also United States v. Lee*, 455 U.S. 252, 257 (1982) (noting that because "the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights.").

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Sherbert, 374 U.S. at 404.[3]

Application of the compelling interest standard is warranted here. Thomas R. Beckwith has attempted and wants to design a health insurance plan for Beckwith Electric that excludes emergency contraception, abortifacient drugs, and other services that conflict with the teachings of the Southern Baptist Convention. (Complaint, Doc. 1, at ¶ 23.) But he has been denied such a plan because of the HHS Mandate. (*Id.* at ¶¶ 47-49.) The Mandate requires Beckwith Electric and its owner either to abandon their commitment to Southern Baptist principles or face a yearly fine of $2,000 *per employee* for failing to provide health insurance for early abortion-inducing drugs.[4]

That the HHS Mandate is a rule of general applicability does not shield it from the RFRA's strict scrutiny, including the heavy burdens imposed under the Act to justify intrusions

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[3] The Florida Supreme Court has comparably defined "substantial burden" in the context of the Florida Religious Freedom Restoration Act, Fla. Stat. §§ 761.01 *et seq.*, ("FRFRA") as "one that either compels the religious adherent to engage in conduct that his religion forbids . . . or forbids him to engage in conduct that his religion requires." *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 (Fla. 2004). But no Florida court has addressed the FRFRA's applicability to individuals' businesses.

[4] Courts generally defer to the official statements of religious organizations regarding their doctrines and disciplines. *See Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 113 (1952) ("whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them") (internal quotes omitted). This is because "[r]eligion . . . must be left to the conviction and conscience" of the person. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 638 (2007) (internal quotations omitted).

on religious freedom. "[L]aws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2).

Courts in Florida and the Eleventh Circuit have not yet addressed the "substantial burden" issue in the context of the new federal healthcare law, but other federal courts have, with mixed results. *Compare Monaghan v. Sebelius*, 2013 WL 1014026 (E.D. Mich. Mar. 14, 2013) (substantial restriction found on an employer's religious beliefs; the company was both secular and for-profit), and *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013) (plaintiffs likely to show substantial burden on exercise of religious freedom; the company was both secular and for-profit), *with Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dept. of Health and Human Servs.*, 2013 WL 1277419 (3d Cir. Feb. 8, 2013) (although a "close call," plaintiffs not sufficiently likely to show substantial burden on religious liberty for purposes of preliminary injunction; merits undecided).

The Attorney General submits that the better reasoning of decisions such as *Grote* should guide the Court in this case. There, the Seventh Circuit stated:

> [Plaintiffs] maintain that the legal duties imposed on them by the contraception mandate conflict with the religious duties required by their faith, and they cannot comply with both. . . . And the government's minimalist characterization of the burden continues to obscure the substance of the religious-liberty violation asserted here . . . We conclude that the [plaintiffs] have established a reasonable likelihood of success on the merits of their RFRA claim.

Id., 708 F.3d at 854-55. *See also Korte v. Sebelius*, 2012 WL 6757353, *3 ("[T]he Kortes would have to violate their religious beliefs to operate their company in compliance with [the contraception mandate].").

Here, Plaintiff Thomas R. Beckwith is a 93 percent voting shareholder and Chief Executive Officer of Beckwith Electric. (Complaint, Doc. 1, at ¶ 28.) As in *Korte* and *Grote*, the mandate unlawfully requires him to violate his beliefs in operating his company. The burden

on the Plaintiffs' religious beliefs in this case is obvious, established, and entitled to judicial deference. *See Thomas v. Review Bd. of Ind. Employment Section Div.*, 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith."); *see also Legatus v. Sebelius*, 901 F. Supp. 2d 980, 991 (E.D. Mich. 2012).

Thus, the federal government bears a heavy burden in seeking to justify the Mandate's intrusion on Plaintiffs' religious freedom. That burden has not been and cannot be met here.

III. THE FEDERAL GOVERNMENT LACKS A COMPELLING INTEREST TO APPLY THE HHS MANDATE TO PLAINTIFFS.

The federal government lacks a compelling interest for subjecting Plaintiffs to the HHS Mandate, a result that is underscored by the patent availability of less restrictive alternatives for the government to achieve its goals without impinging on Plaintiffs' freedom of religion.

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424-31 (2006), the Supreme Court outlined the proper analytical framework for determining whether a compelling governmental interest exists that justifies a substantial burden on a person's religious liberty. There, the Court was careful to note that this examination requires an inquiry into whether a compelling interest justifies applying the government mandate to the "particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430-31.

The required focus on the "particular claimant" strengthens the instant Plaintiffs' position that no compelling interest can be shown here, because it is indisputable that multiple categories of organizations and participants are excluded from the Mandate's reach, including: (1) religious organizations (through a narrow exemption); (2) employers with fewer than 50 employees; and (3) more than 190 million health plan participants (through a grandfathering provision). *See Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012) ("this massive exemption

completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs."); *see also Legatus*, 901 F. Supp. 2d at 993 ("About 193 million health plans were in existence on March 23, 2010, and presumably qualified as grandfathered.").

Any contention that the Mandate requires national uniformity cannot withstand strict scrutiny. Even excluding the grandfathering exemption on which the *Newland* court relied, the other exceptions overwhelmingly demonstrate the lack of compelling need for the Mandate to be applied here or in comparable circumstances.

The Mandate's exception for "religious employers" that primarily inculcate the religious belief of a religious organization, primarily employ persons who share the tenets of that religious organization, and serve persons who share that religious faith, 45 C.F.R. § 147.130(a)(1)(A), (B), further underscores the lack of need for uniform applicability. Within the Southern Baptist Convention alone, this exception applies to more than 40,000 churches.[5]

Moreover, as regards the exemption for plans with fewer than 50 employees, the 2007 economic census (compiled every five years) indicates that there were more than 20 million paid employees at firms nationwide with fewer than 20 employees. *See* Table 2b "Employment Size of Employer and Nonemployer Firms, 2007."[6] That is, tens of millions of employees are not required to comply with this contraceptive mandate – not even counting the 190 million plan participants subject to the "grandfathering" provision.

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[5] Russ Rankin, "SBC Baptisms and Churches Increased in 2011, Membership Declined," LifeWay Christian Resources of the Southern Baptist Convention. This article may be found at the LifeWay website: http://www.lifeway.com/Article/news-sbc-baptisms-churches-increased-in-2011-membership-declined (last visited May 30, 2013).

[6] This United States Census Bureau document may be found at: http://www.census.gov/econ/smallbus.html (last visited on May 28, 2013).

These exemptions defeat any claim by the federal government that the Mandate *must* be imposed on all other businesses, including Plaintiff Beckwith Electric Company. In *O Centro*, the Court examined whether the United States violated the RFRA by applying the federal Controlled Substances Act to a religious sect that used a plant containing a hallucinogen in its sacramental communion tea. 546 U.S. at 423. The compelling interest that the federal government put forward was "the *uniform* application of the Controlled Substances Act, such that no exception to the ban on use of the hallucinogen can be made to accommodate the sect's sincere religious practice." *Id*. (emphasis in original). The Court rejected this argument, concluding that the Act itself contemplated exceptions, since the Attorney General for the United States was authorized to grant "waive[rs]" where consistent with the public health and safety. *Id*. at 432.

The same reasoning applies here. The number of employees affected by exempting Plaintiffs and other similarly situated businesses would surely be small in comparison to the exemptions already provided to employers with fewer than 50 employees. The claim that there can be no exceptions to this rule – even where it burdens the free exercise of religion – must be rejected.

Equally important, there are other, less restrictive means which the federal government could have chosen to achieve its goals. As Plaintiffs suggest (Motion, Doc. 10, at page 17), the United States could have opted to provide tax credits to employers such as Beckwith Electric to encourage them to make contraceptive and other services available. The court in *Newland* delineated several such less-restrictive options, including "creation of a contraception insurance plan with free enrollment, direct compensation of contraception and sterilization providers, creation of a tax credit or deduction for contraceptive purchases, or imposition of a mandate on

the contraception manufacturing industry to give its items away for free." *Id.*, 881 F. Supp. 2d at 1298. The availability of less-restrictive alternatives is underscored by the fact that tax credits are the mechanism by which the federal healthcare act seeks to provide an incentive for employers with fewer than 50 employees to obtain healthcare, as noted by the United States itself. *See* 42 U.S.C. §§ 18021, 18031(d)(2)(B)(i).

Additionally, the use of less restrictive alternatives to avoid infringement of First Amendment freedoms is plainly practical in this context. The court in *Newland* rejected the argument that reliance upon such alternatives would impose considerable costs and impractical burdens on the federal government, stating:

> Defendants have failed to adduce facts establishing that government provision of contraception services will necessarily entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women. Once again, the current existence of analogous programs heavily weighs against such an argument.

Newland, 881 F. Supp. 2d at 1299. At a bare minimum, any impracticality of pursuing such alternative means would be substantially outweighed by the encroachment on Plaintiffs' religious liberty.

Conclusion

For all of the reasons stated above, the Attorney General asks that the Court grant Plaintiffs' request for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2013, a copy of the foregoing was served on the counsel of record through the Court's CM/ECF Notice of Electronic Filing system.

/s/ Blaine H. Winship
Blaine H. Winship