IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA (WASHINGTON, DC)

FRANCIS A. GILARDI, et al.,	:	
	:	
Plaintiff,	:	Case No. 1:13-cv-00104-EGS
	:	
v.	:	Judge Emmet G. Sullivan
	:	
KATHLEEN G. SEBELIUS, et al.,	:	
	:	
Defendant.	:	

AMICUS BRIEF OF THE STATE OF OHIO IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Respectfully submitted,

MICHAEL DEWINE (OH-0009181)
OHIO ATTORNEY GENERAL

/s/ Frederick D. Nelson
FREDERICK D. NELSON (OH-0027977)
Senior Advisor [A.G. designee per LCvR 83.2(f)]
Ohio Attorney General's Office
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
Tel: 614-728-4947
frederick.nelson@ohioattorneygeneral.gov

Counsel for Amicus Curiae State of Ohio

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The State of Ohio, through its Attorney General Mike DeWine, respectfully submits this amicus brief in support of the Motion for a Preliminary Injunction filed by Ohio Plaintiffs Francis and Philip Gilardi and their closely held Ohio companies Freshway Foods and Freshway Logistics (together, "Plaintiffs," or "Freshway"). Freshway employs about 400 Ohioans full time and calculates that the penalties threatened by the Mandate at issue here could approach $15 million annually: These penalties could have a "crippling impact" on the businesses' "ability to survive economically," with a commensurate effect on their employees and their communities. *See* Declarations of Francis and Philip Gilardi, docs. 21-2 and 21-3 at ¶ 16. The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA") requires strict scrutiny of any federal requirement that compels persons to set aside sincerely held religious principles or face such punitive consequences, and the federal Mandate cannot satisfy that scrutiny in these circumstances. The State of Ohio asks this Court to vindicate the religious liberty rights protected by Congress in RFRA by granting the requested preliminary injunction.

AMICUS INTEREST OF THE STATE OF OHIO

The State of Ohio seeks to foster a robust business climate in which diverse employers can succeed to the benefit of their fellow Ohioans and expand the number of good, well-paying jobs within our State. Ohio also is committed to

preserving for its citizens the traditions of religious tolerance and pluralism that have served our nation so well and that have informed the enactment and application of RFRA. Indeed, our State Constitution provides more expansive protections of religious liberties than does the federal charter. *See* Ohio Const. art. I, sec. 7 (prohibiting "any interference with the rights of conscience"); *see also, e.g., Humphrey v. Lane*, 728 N.E.2d 1039, 1045 (Ohio S. Ct. 2000) ("the Ohio Constitution's free exercise protection is broader …. We adhere to the standard long held in Ohio regarding free exercise claims – that the state enactment must serve a compelling state interest and must be the least restrictive means of furthering that interest. That protection applies to direct and indirect encroachments upon religious freedoms"); *State Constitutional Law*, R. Holland, S. McAllister, J. Shaman, & J. Sutton (West pub. 2010) at 523-24 (noting breadth and specifics of Ohio protections). Ohio's Constitution, that is, in this context provides at the state level roughly the same measure of protection of religious liberties that RFRA adopts as a matter of federal statutory law.

Ohio therefore has a very strong interest in opposing application of a federal Mandate on local family businesses in a way that would contravene RFRA and exact devastating penalties that would injure the citizens of our State. Ohio's interest in this matter is further underscored by any reading of the Mandate that could pressure Ohio employers to drop group employee coverage altogether, as has

been (incorrectly) suggested as a remedial option by at least one Court, thereby subjecting the businesses to other fines while also further burdening religious principle and denying Ohio employees the benefits of valuable group health coverage. *Cf. Autocam Corp. v. Sebelius,* 2012 U.S. Dist. Lexis 184093 (W.D. Mich., Dec. 24, 2012) at *35, appeal pending, stay pend. ap. den. 2012 U.S. App. Lexis 26736 (6th Cir. Dec. 28, 2012) ("The net result of this scenario would seem to be a loss for everyone – for the Autocam Plaintiffs, for the Autocam employees, and for the Defendants – all of whom would presumably prefer to see at least continuation of existing group coverage, rather than termination of all group coverage. But such a result is traceable directly to the policy decisions of Congress and the Executive branch in selecting the substance, the timing, and enforcement incentives of the rules at issue"). Ohio has been a party in other litigation challenging the legality of the same federal Mandate in other applications. *State of Nebraska, et al. v. US Dep't of HHS, et al.* (pending in the 8th Circuit as case number 12-3238).

Attorney General Mike DeWine is the chief legal officer of the State of Ohio. Ohio Rev. Code § 109.02. He represents the State in urging this Court to recognize the significant religious liberty interests at stake here, where the federal Mandate that is being applied so as substantially to burden the religious practice of

Ohioans has not been narrowly tailored as the least restrictive means of advancing a compelling federal interest.

INTRODUCTION AND FRAMEWORK

This case involves whether the federal government legally can force the Freshway employers to abandon sincerely held religious principles under threat of severe financial penalty, even when the federal aims could be accomplished through other less infringing and repressive means. The answer is 'no,' because Congress enacted RFRA to guard against the imposition of the heavy-handed, undifferentiated approach reflected by the Mandate at issue here. The Mandate cannot satisfy RFRA's strict scrutiny. It exempts millions upon millions – yet does not tolerate deviation by the Gilardis and their family-owned and controlled Freshway businesses.

Ohio corporate law expressly permits the formation of such companies "for any purpose or combination of purposes for which individuals lawfully may associate themselves," Ohio Rev. Code § 1701.03(A). Ohio law does not require closely heldcorporate entities to pursue profit to the exclusion of all other values: our law by design allows Ohioans to combine in corporate form to advance various lawful purposes that they elect to pursue. As applied here, however, the federal Mandate thwarts the sworn purpose of the Gilardis to "manage and operate

Freshway Foods and Freshway Logistics in a way that reflects [their sincerely held understanding of] the teachings, mission, and values of [their] Catholic faith." *See* Gilardi Declarations, docs. 21-2, 21-3 at ¶ 6; *see also id.* at ¶ 11.

The record in support of Freshway's motion for preliminary injunction evidences religious belief sincerely held. According to the sworn declarations, Freshway: makes annual donations to many community non-profit charities, including Agape, Compassionate Care, United Way, Elizabeth's New Life Center, and the like; accommodates the diverse religious needs of employees; and has established its employee health insurance program "to be an integral component of furthering the mission and values of [the Freshway] corporations and of [the] religious beliefs and moral values" of the two Gilardi brothers who together wholly own and control the Freshway companies. *Id.* at ¶¶ 1, 7, 10. Those religious beliefs do not permit the Gilardis "to direct, or allow, Freshway Foods and Freshway Logistics to arrange for, pay for, provide, or facilitate employee health plan coverage for contraceptives, sterilization, abortion, or related education and counseling." *Id.* at ¶ 11. Yet that is precisely what the federal Mandate requires, in violation of RFRA.

This Court has had occasion recently to review the interplay between RFRA and the Mandate at issue here. *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-

1635, 2012 U.S. Dist. Lexis 163965 (D. D.C., Nov. 16, 2012) (Judge Walton). As the Court understands:

> The RFRA forbids the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the government can "demonstrate[ ] that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42. U.S.C. § 2000bb-1(a), (b). Congress enacted the RFRA in response to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 … (1990)…. The stringent requirements imposed by the RFRA reflect Congress's judgment that "governments should not substantially burden religious exercise without compelling justification" and are intended "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 … (1963) and *Wisconsin v. Yoder*, 406 US. 205 … (1972)." Id. §§ 2000bb(a)(3), (b)(1). Accordingly, courts look to pre-Smith free exercise jurisprudence in assessing RFRA claims. *See Vill. of Bensenville v. FAA,* 457 F.3d 52, 62 … (D.C. Cir. 2006).
>
> *Id.* at ** 33-34 (quoting statute).

Thus, except in those narrowly drawn circumstances:

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability[.]

42 U.S.C. § 2000bb-1(a); *Gonzales v. O Centro Espitita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424 (2006) ("Under RFRA, the Federal Government may not … substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability'"). "It is an exacting standard, and the government bears the burden of satisfying it." *Korte, et al. v. Sebelius*,

No. 10-14944, 2012 U.S. App. Lexis 26734 (7th Cir., Dec. 28, 2012), at *7 (staying Mandate application pending appeal).

As the Court further explained in *Tyndale House*, the Mandate that triggers this RFRA scrutiny was promulgated by Defendant Department of Health and Human Services through regulations "under which all health insurance plans and policies (except those grandfathered or otherwise exempt) are required to comply with the contraceptive coverage mandate starting with plan years beginning on or after August 1, 2012. 76 Fed. Reg. 46621-01 (August 3, 2011)." 2012 U.S. Dist. Lexis 163965 at * 5. Courts have noted that this federal regulatory Mandate requires non-exempt employers to provide their employees with insurance coverage that includes "without limitation, diaphragms, oral contraceptives, intra-uterine devices, and … the 'morning after pill' … and … the 'week after pill'," in addition to sterilization procedures and to related counseling. *See, e.g., Autocam*, 2012 U.S. Dist. Lexis 184093 at ** 6-7.

And although (amidst the controversies these regulations have engendered) federal authorities now have announced new proposed amendments to their previously published "final rules," those amendments explicitly would not address or accommodate in any way the religious convictions of for-profit employers such as the Gilardis. *See* 78 F.R. 8456 (2013-02-06). Indeed, the federal regulators have published that they "believe that this proposal would not expand the universe

of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules," and that they intentionally mean to "limit any [purported] accommodation [only] to nonprofit organizations that hold themselves out as religious…. The Departments do not propose that the definition of eligible organization extend to for-profit secular employers." *Id.; see also, e.g.,* "Latest Birth-Control Offer 'Falls Short,'" *Wall Street Journal* 2/08/13 (quoting President of the US Conference of Catholic Bishops, Cardinal Timothy Dolan, in noting teachings that instruct Catholics to "live their lives during the week to reflect the same beliefs that they proclaim on the Sabbath," and adding: "We cannot now abandon them to be forced to violate their morally well-informed consciences").

ARGUMENT

I. The federal Mandate requiring Freshway to provide insurance for contraception, sterilization, abortifacients and related products and services violates religious liberties protected by RFRA.

This case thus presents a clear clash between the Mandate and the free exercise of religion that RFRA is meant to protect. The Mandate and the guiding religious principles that animate Freshway stand in direct conflict: the federal Goliath here brooks no deviation from (non-"grandfathered," non-exempt) businesses like Freshway operated on religious conviction. The Gilardis believe that to operate their companies "consistent with [their] Catholic faith and values," they must "continue to be able to provide high quality, broad coverage health

insurance for … full-time employees that excludes coverage for things [they] believe are morally wrong … to arrange for, pay for, provide, facilitate, or otherwise support." Thus, the Mandate prevents them "from following the dictates of … Catholic faith in the operation and management of Freshway Foods and Freshway Logistics, [and] violates the religious-based principles by which [the companies] are run…." Declarations, Docs. 21-2, 21-3 at ¶¶ 14, 19. As applied to Freshway, this federal insistence on subjugating religious values to bureaucratic mandate cannot withstand strict scrutiny.

A. The federal Mandate as applied here substantially burdens the free exercise of religion.

To describe the undisputed conflict between the Mandate's strictures and the religious beliefs that inform the operation of Freshway is essentially to establish the substantial burden prong of the RFRA test. The Court in *Tyndale House* recognized that the Mandate "substantially burdens" the religious exercise of the plaintiffs considered there, 2012 U.S. Dist. Lexis 163965 at * 48, and that conclusion finds strong support in similar determinations by several other federal courts. Both the Seventh Circuit and the Eighth Circuit very recently have found a likelihood of "substantial burden" in this context sufficient to support appeals court issuance of injunctions pending appeal. *Annex Medical, Inc. et al. v. Sebelius*, No. 13-1118, 2013 U.S. App. Lexis 2497 (8th Cir., Feb. 1, 2013); *O'Brien v. U.S.*

Dep't HHS, No. 12-3357, 2012 U.S. App. Lexis 26633 (8th Cir., Nov. 28 , 2012); *Grote, et al. v. Sebelius*, No. 13-1077, 2013 U.S. App. Lexis 2112 (Jan. 30, 2013); *Korte, supra.* And various other federal district courts have granted preliminary relief in the context of the operation of for-profit enterprises that otherwise would be compelled by the Mandate to violate guiding religious principles. *See, e.g., Sharpe Holdings, Inc. v. U.S. Dep't of HHS,* No. 2:12-cv-92, 2012 U.S. Dist. Lexis 182942 (E.D. Mo., Dec. 31, 2012) at *13 (dairy corporation; "plaintiffs have shown that the enforcement of the … mandate, and its substantial financial penalties, on their health plan would substantially burden their religious beliefs"); *American Pulverizer Co. v. U.S. Dep't of HHS*, 2012 U.S. Dist. Lexis 182307 (W.D. Mo. Dec. 20, 2012); *Legatus v. Sebelius*, No. 12-12061, 2012 U.S. Dist. Lexis 156144 (E.D. MI., Oct 31, 2012) ("the court assumes that [family-owned outdoor power equipment company and its President] are likely to show at trial that the … Mandate substantially burdens the observance of the tenets of Catholicism"); others as catalogued in Freshway's Points of Law and Authority, doc. 21, at 2.

"To determine whether the contraceptive coverage mandate substantially burdens the plaintiffs' religious exercise, the Court must consider whether the government action puts 'substantial pressure on [the] adherent[s] to modify [their] behavior and to violate [their] beliefs'." *Tyndale House*, 2012 U.S. Dist. Lexis

163965 at * 36, quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008), quoting *Thomas v. Review Bd. Of Ind. Employ. Sec. Div.*, 450 U.S. 707, 718 (1981). In making this assessment, of course, courts should not succumb to any temptation to evaluate what they may consider the true doctrinal significance of sincerely held religious beliefs. Doctrines of any religion can appear intricate, especially when viewed by civil authorities in a non-religious context, and perhaps at times may even appear to be based more on faith than on legal logic. To enmesh the courts in making religious distinctions as to what matters of doctrine adherents are justified in regarding as significant and what matters the believers see as important but really should not is to embark on a dangerous course that RFRA helps deter.

Thus in RFRA, Congress defined the "exercise of religion" as "*any* exercise of religion, *whether or not compelled by, or central to, a system of religious belief*." 42 U.S.C. § 2000bb-2 (referencing 42 U.S.C. § 2000cc-5) (emphasis added). The Supreme Court has underscored this fundamental point: "Courts are not arbiters of scriptural interpretation." *Thomas,* 450 U.S. at 716.

The Supreme Court's warning is very apt in this context, where some Courts have found the Mandate's burden is too "attenuated" to be substantial because its massive (and distinctly not attenuated) penalties attach to the failure to insure for products or services that will be used (or not) by third parties instead of the

providers of the insurance. *See Conestoga Wood Specialties Crop. Secretary of U.S. Dep't of HHS,* 2013 U.S. App. LEXIS 2706 (3rd Cir. 2013)(denying stay pending appeal) at *7; *Hobby Lobby Stores, Inc. v. Sebelius,* 2012 U.S. App. LEXIS 26741 (10th Cir. Dec. 20, 2012) at *9*; Autocam*, *supra.* These limited opinions appear improperly to have arrogated to the Courts the religious determination of whether the leap to compelling employers to purchase insurance for abortifacients and contraceptives is sufficiently significant theological moment properly to offend religious sensibilities. (They also appear to have gotten the third party direct/indirect role backwards: in paying salaries, the employer is not purchasing anything that he views as religiously problematic, but direct purchase of the mandated insurance would violate Plaintiffs' sincerely held religious beliefs. *See* Gilardi Declarations, docs. 21-2, 21-3 at ¶ 11.)

Thus, when the *Autocam* Court finds "no functional difference" between paying salaries and paying for contraceptive insurance, and hence that the Mandate likely imposes no "substantial burden" on religion, 2012 U.S. Dist. Lexis 184093 at *18, not all theologians would agree. The National Conference of Catholic Bishops, for example, has stated that that the regulation affronts Catholic conscience in mandating "sponsoring of, and payment for, insurance as employers … without even the semblance of an exemption." "March 14 Statement on Religious Freedom and HHS Mandate," A Statement of the Administrative

Committee of the United States Conference of Catholic Bishops.[2] And certainly in other contexts, secular laws recognize a clear distinction between payment of a salary by one party and the subsequent use of that money by another.

The Seventh Circuit has explained the point precisely: the federal government's attenuation argument "misunderstands the substance of the claim. The religious liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not* – or perhaps more precisely, *not only* – in the later purchase or use of contraception or related services." *Korte*, No. 10-14944, 2012 U.S. App. Lexis 26754, at *3 (emphasis in original). Again, Plaintiffs' proof here is that their guiding religious principles do not permit them to direct, arrange for, provide, or pay for insurance covering contraceptives or abortifacients. Declarations, docs. 21-2, 21-3 at ¶ 11. But that is precisely what the Mandate – directly – commands.

Courts should not second guess sincerely held religious principles that inform Plaintiffs' operations. Recognizing that under our pluralistic system, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit" protection, and that "it is not within the judicial function and judicial competence to inquire" into the accuracy of religious conceptions,

[2] This document may be found at: http://www.usccb.org/issues-and-action/religious-liberty/march-14-statement-on-religious-freedom-and-hhs-mandate.cfm (last visited on February 18, 2013).

Thomas, 450 U.S. at 714, 716, other courts too have recognized the likelihood that the Mandate at issue imposes a substantial burden on the free exercise of those whose views are similar to Plaintiffs here. *See, e.g., Legatus,* 2012 U.S. Dist. Lexis 156144, at *20 (following lead of "courts [that] often simply assume that a law substantially burdens a person's exercise of religion when that person so claims," citing extensive authority); *Monahan & Domino's Farm Corp. v. Sebelius*, No. 12-15488, 2012 U.S. Dist. Lexis 182857, at *9 (E.D. MI., Dec. 30, 2012) ("the Court is in no position to decide whether and to what extent Monaghan would violate his religious beliefs by complying with the mandate.… Other courts have assumed that a law substantially burdens a person's free exercise of religion based on that person's assertions…. [Therefore], the Court will assume that abiding by the mandate would substantially burden … adherence to Catholic teachings").

Nor would it be an answer to suggest that the Mandate imposes no substantial burden on the exercise of religion because Freshway has the option simply of discontinuing its employee group insurance entirely and paying penalties at a level lower than the fines that apply to providing group insurance without the mandated abortifacient and contraception coverage. *Cf. Autocam*, 2012 U.S. Dist. Lexis 184093 at * 34 (noting "an irony: namely, one very real possibility … is that Plaintiffs will choose to terminate their existing coverage and run the risk of a

shared responsibility payment obligation under Section 4980H, rather than the more draconian financial consequences under Section 4980D for non-compliant group plans. This would, of course, leave Autocam's employees without group coverage of any kind…."). The testimony is that *either* the 26 U.S.C. § 498 0D penalty of $100 per employee per day for not covering the mandated products and services in a group plan (which would approach $15 million a year for Freshway), *or* the $2,000 per employee annual assessment under 26 U.S.C. § 4980H for not providing coverage at all (approaching some $800,000 and exacting obvious labor relations costs) "would have a crippling impact." Declarations, docs. 21-2 and 21-3 at ¶ 16. Even more significantly, forcing the companies to discontinue all group coverage would again be to coerce Freshway to depart from guiding religious principles. *Id.* at ¶ 10 (provision of employee group health insurance is "integral component" in furthering the mission of the guiding religious principles).

The Supreme Court itself has made clear that:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas, 450 U.S. at 718-19. Indeed, in the *Yoder* case cited by RFRA's text, the Supreme Court found a substantial burden in a $5.00 fine for violation of the

compulsory school attendance law at issue there. 406 U.S. at 208, 219. And the Court in *Tyndale House*, too, underscored that: "Government action can substantially burden a plaintiff's religious exercise even if the law only results in the plaintiff being forced to forgo a government benefit [citing *Sherbert*]. … As in *Yoder*, the contraceptive coverage mandate affirmatively compels the plaintiffs to violate their religious beliefs in order to comply with the law and avoid the sanctions that would be imposed for their noncompliance. Indeed, the pressure on the plaintiffs to violate their religious beliefs is 'unmistakable'". 2012 U.S. Dist. Lexis 163965, at *37-40 (D. D.C., Nov . 16, 2012). The Mandate's substantial burden on free exercise is clear beyond peradventure.

B. The federal government cannot show a compelling interest in applying this mandate to Freshway, as witness the wide spread exemptions for other businesses, and there are less restrictive means by which the federal government may achieve its goals.

The federal government is required under RFRA's strict scrutiny to demonstrate that the mandate's burden as applied to Freshway furthers a compelling governmental interest through the least restrictive means. The Supreme Court has held both that "the burden is placed squarely on the Government by RFRA," and that "the burdens at the preliminary injunction stage track the burdens at trial." *O Centro,* 546 U.S. at 429. The government cannot meet that burden here.

In *O Centro*, the Supreme Court explained that "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened." 546 U.S. at 430-31. This is a " more focused inquiry" under which the statute commands that courts look "beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 432, 431.

This sharpened inquiry undercuts the federal government's compelling interest position that no exception can be made for employers such as Freshway. There is no dispute that the Mandate already does not apply to any employer with fewer than 50 employees, or to employers with "grandfathered" plans covering tens of millions more plan participants. Just as the Court found in *Tyndale House*, 2012 U.S. Dist. Lexis 163965, at **60, 61: "The existence of these exemptions significantly undermines the defendants' interest in applying the contraceptive coverage mandate to the plaintiffs. Thus, [given the lack of proof regarding a harm for exemption of the particular claimants], and considering the myriad of exemptions to the contraceptive coverage mandate already granted by the government, the defendants have not shown a compelling interest in requiring the plaintiffs to provide the specific contraceptives to which they object." *See also,*

e.g, Newland, 2012 U.S. Dist. Lexis 104835, *23 ("this massive exemption [for grandfathered plans] completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs"); *Legatus,* 2012 U.S. Dist. Lexis 156144, *20; *American Pulverizer Co. v. U.S. Dep't of HHS,* 2012 U.S. Dist. Lexis 182307 (W.D. Mo. Dec. 20), *14 ("significant exemptions … exist. Accordingly, these exemptions undermine any compelling interest in applying the preventative coverage mandate to Plaintiffs").

Dispositive, too, under strict scrutiny analysis, the federal government has other less restrictive means available by which to accomplish its desired ends. Courts have observed that those alternatives range from direct purchase and distribution to tax incentives. *See, e.g., Newland*, 2012 U.S. Dist. Lexis 104835 (D. Co.), *24 (referencing options including "creation of a [government-provided] contraception insurance plan with free enrollment, direct compensation of contraception and sterilization providers, [and] creation of a tax credit or deduction for contraceptive purchases ….").

The Seventh Circuit twice has held in similar cases that "the government has not … demonstrated that requiring religious objectors to provide cost-free contraception coverage is the least restrictive means of increasing access to contraception." *Grote*, 2013 U.S. App. Lexis 2112, *11; *Korte*, 2012 U.S. App. Lexis 26734, *13. The demands of the federal government that particular

employers with particular religious scruples subordinate those values to the government's mandated approach is the least restrictive alternative only if the desired governmental end somehow would include the objective of establishing certain religious principles as misguided under a "your religious values are wrong, and we're going to show you who's boss" approach that we cannot assume the federal government intends. In any event, RFRA does not permit such heavy-handed, undifferentiated impositions.

C. RFRA protections extend to "persons," and the mandate is not immune from RFRA scrutiny as applied to Freshway's for-profit family owned businesses operated in accordance with religious principles as permitted under organizing Ohio law.

Congress deliberately chose to extend the protections of RFRA not only to individuals, but to "persons." 42 U.S.C. § 2000bb(b)(2) (purpose of RFRA is "to provide a claim or defense to persons whose religious exercise is substantially burdened by government"). Thus RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the test of strict scrutiny is satisfied. 42 U.S.C. § 2000bb-1(a). And Congress has made itself clear – in the very first section of the first Chapter of the United States Code – that unless otherwise indicated by context, "the word[ ] 'person' … include[s] corporations, companies,

associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1.

It would seem beyond dispute that RFRA protections can extend beyond individuals to combinations, *see, e.g., O Centro*, 546 U.S. at 425 (U.S. branch of plaintiff church numbered more than 100 people), and that religion can be exercised through the corporate form, *see, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 528 (1993) (upholding free exercise rights of church and its President in § 1983 action); *c.f. Holy Land Foundation v. Ashcroft,*333 F.3d 156, 167 (D .C. Cir. 2003) (questioning but not deciding whether corporation is a RFRA person; "no free exercise right to fund terrorists"). The Court in *Tyndale House* noted: "Nor is there any dispute" that non-profit religious organizations can exercise religion in their "own right…; indeed, the case law is replete with examples of such organizations asserting cognizable free exercise and RFRA challenges." 2012 U.S. Dist. Lexis 163965 at * 24 (citing, for example, *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 381, 384 (1990)). And the holding of *Tyndale House* that the for-profit Tyndale entity there had standing to assert the free exercise rights of its owners both directly and under the doctrine of third party standing, *id.* at ** 15, 24, 33, as a closely held corporation owned by a Foundation and three trusts, only enhances the position of the Freshway companies here because the businesses are owned

entirely by the two Gilardi brothers whose First Amendment and RFRA rights are unassailable, *see id.* at ** 20, 24 and n. 10, and Declarations, docs. 21-2, 21-3 at ¶ 1 (Gilardi brothers with 100% ownership stake).

Nonetheless, the federal government has taken the position in related cases that where the Mandate is applied to "a secular, for-profit enterprise, no rights under RFRA are implicated at all." *See, e.g., Korte*, 2012 U.S. App. Lexis 26734. That position has no basis either in the language of RFRA, or in logic. RFRA in no way categorizes the enterprises to which it applies or draws the sorts of distinctions that the federal government's argument implies. *See id.* at **8-9 ("That the Kortes operate their business in the corporate form is not dispositive of their claim. … The contraception mandate applies to K&L Contractors as an employer of more than 50 employees, and the Kortes would have to violate their religious beliefs to operate their company in compliance with it"); *Grote*, No. 13-1077, 2013 U.S. App. Lexis 2112, at **5, 9 (*Korte* "considered the likelihood of success of a claim brought by a secular, for-profit corporation owned and operated by a Catholic family in accordance with the teachings of the Catholic faith…. If anything, the Grote family and Grote Industries have a more compelling case …. [because] the Grote Industries health plan is self-insured and has never provided contraception coverage"); *Sharpe Holdings, Inc.*, 2012 U.S. Dist. Lexis 182942 at ** 9, 13 (Plaintiffs dairy corporation and owner have made "sufficient

initial showing of standing to sue," and "have shown that the enforcement of the … mandate, and its substantial financial penalties, on their health plan would substantially burden their religious beliefs"); *cf., Monahan*, No. 12-15488, 2012 U.S. Dist. Lexis 182857, at *9 ("For purposes of the instant Motion, it is sufficient for the Court to find that Monaghan may bring a claim under the RFRA based on his argument that the mandate requires him to perform an act that is at odds with his religious beliefs").

The notion that RFRA excludes from its coverage the operation of certain types of corporations (for-profit entities deemed secular), despite the lack of any such carve-out in the statute's text, is perhaps most forcefully expressed in the concurrence in *Conestoga Wood Specialties v. U.S. Dep't HHS*, 2013 U.S. App. Lexi 2706 (3rd Cir. Feb. 7, 2013) (Garth, J., concurring). The concurrence argues that "[u]nlike religious *non-profit corporations or organizations*, the religious liberty relevant in the context of for-profit corporations is the liberty of its individuals, not of a *profit-seeking* corporate entity." *Id.* at *14 (emphasis in original). But the rationale for that distinction is left unclear – for *all* corporations, non-profit as well as for-profit, ultimately are organized by and act through individuals, and the concurrence's point that for-profit companies "'do not pray, worship, [or] observe sacraments'" appears to have no greater force with regard to for-profit entities than it would as applied to the non-profit groups that all concede

receive RFRA coverage. The essence of the concurrence's claimed distinction really is captured in its exclamation that "the purpose – and only purpose – of the plaintiff [there] Conestoga is to make money!" *Id.* at *15. But whatever validity that conclusion may have under Pennsylvania law (and the concurrence provides no citation), that simply is not a fair statement of the requirements found in the Ohio law of corporations.

The Ohio law under which the family-owned Freshway companies are organized recites that (with certain exceptions not relevant here): "A corporation may be formed … for any purpose or combination of purposes for which individuals lawfully may associate themselves." Ohio Rev. Code § 1701.03(A). In keeping with that law, the approved Articles of Incorporation of Fresh Unlimited, Inc. as found at the official public website of the Ohio Secretary of State[3] set forth that the purpose for which the company is formed is "[t]o engage in any lawful act or activity for which corporations may be formed under Sections 1701.01 to 1701.98 inclusive, of the Ohio Revised Code." Absolutely nothing in those or other Code sections restricts, requires (or guarantees) Freshway "to make money!" Under Ohio law, the pursuit of profit need not be the exclusive or even the primary reason for the corporate existence. Just as "profit" is not a dirty word

[3] http://www2.sos.state.oh.us/reports/rwservlet?imgc&Din=G298_1231(last visited on February 20, 2013).

that should discredit the values by which an enterprise is operated, neither is it necessarily the animating or exclusive reason for corporate existence of closely held enterprises organized as the Freshway companies are. Family-owned companies that provide needed products and create good jobs with significant benefits surely can be operated according to agreed guiding religious principles of their owners regardless of whether they are organized under the general or the non-profit sections of Title 17 of the Ohio Revised Code (Ohio's corporations chapter).

> 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 National Bank of Boston v. Bellotti, 435 U.S. 765, 780 (1978) (citations omitted; emphasis added); *see also Citizens United v. Federal Election Commission*, 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'"); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 649 (2012) (vindicating free exercise rights of religious organizations).

The federal government's argument in similar cases that some blanket rule excludes secular for-profit entities from RFRA protection, while their owners at

the same time are precluded from advancing their own RFRA claims because the mandate applies only to the corporate entity, posits a *Catch 22* that is contrary to the purpose and the text of the Religious Freedom Restoration Act with its deliberate choice to cover "persons" as defined expansively in Code. Moreover, in similar circumstances, where the businesses do not "present any free exercise rights … different from or greater than" the rights of the owners, courts have held that they "have standing to assert the free exercise rights of [their] owners." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009) (state mandate of pharmacy sale of contraceptive drugs); *Tyndale House*, No. 12-1635, 2012 U.S. Dist. Lexis 163965, at *17-20. Further still, where there is injury and a "congruence of interests" between company and owner, and where the challenged regulation applies to the company and not directly against the owners, the company has standing to assert any free exercise rights that the government may argue cannot be advanced by the individuals. *See, Tyndale House*, at **27-33 (noting there that federal defendants had urged that no Tyndale entity would have standing to challenge the Mandate).

RFRA's protections are designedly broad, and operate to focus strict scrutiny on the Mandate as applied here to Freshway.

CONCLUSION

Because the Mandate at issue as applied to Freshway cannot withstand the strict scrutiny commanded by RFRA, the State of Ohio respectfully urges this Court to grant Plaintiffs' Motion for a Preliminary Injunction.

Respectfully submitted,

MICHAEL DEWINE (OH-0009181)
OHIO ATTORNEY GENERAL

/s/ Frederick D. Nelson
FREDERICK D. NELSON (OH-0027977)
Senior Advisor [A.G. designee per LCvR 83.2(f)]
Ohio Attorney General's Office
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
Tel: 614-728-4947
frederick.nelson@ohioattorneygeneral.gov

Counsel for Amicus Curiae State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was submitted to the Clerk's office by email pursuant to the Courts' Supplemental Civil Filing Procedures, Part II, F(2)(g), F(3)(a), and was served by email and regular U.S. mail upon counsel for all parties of record on this 21st day of February, 2013.

Edward L. White
American Center for Law & Justice
5068 Plymouth Road
Ann Arbor, Michigan 48105
Email: ewhite@aclj.org

Benjamin Leon Berwick
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington DC 20530
Email:
Benjamin.l.berwick@usdog.gov

Counsel for Defendants

/s/ Frederick D. Nelson
FREDERICK D. NELSON (OH-0027977)
Senior Advisor [A.G. designee per LCvR 83.2(f)]
Ohio Attorney General's Office