IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION

AMERICAN FAMILY ASSOCIATION, INC Plaintiff, v. KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; SETH HARRIS, in his official capacity as acting Secretary of the United States Department of Labor; JACOB LEW, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES DEPARTMENT OF THE TREASURY, Defendants,	Civil Action No. 1:13-CV-00032-SA-DAS

PLAINTIFF AMERICAN FAMILY ASSOCIATION INC'S MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REGULATIONS

INTRODUCTION

Plaintiff American Family Association, Inc. ("AFA") seeks preliminary injunctive relief enjoining the application of the Patient Protection and Affordable Care Act of 2010 (Pub. L. 111-148) and the Health Care and Education Reconciliation Act (Pub. L. 111-52) (jointly the "PPACA") to AFA, allowing AFA to operate in a manner consistent with its religious beliefs. AFA is a non-profit Christian organization, organized for religious purposes under Internal Revenue Code § 501(c)(3), that seeks to inform, equip, and activate individuals to strengthen the moral foundation of American culture while giving aid to the church in the United States of America and abroad in fulfilling the Great Commission. AFA presently has and provides group medical coverage for over 100 full-time employees.

AFA believes that God, in His Word, condemns abortion as the intentional destruction of innocent human life in violation of the Sixth Commandment of the Ten Commandments: "Thou shalt not murder." Due to this sincerely-held belief, AFA has publicly and consistently condemned FDA-approved drugs that destroy the human embryo after conception, such as Plan B (the "morning-after pill") and Ella (the "week-after pill").

AFA discovered, much to its horror, that it does not qualify for the "religious employer" exemption because it is neither a church nor a house of worship nor an annex thereto. AFA is also not able to meet the "grandfathering" exemption under the PPACA. Without a preliminary injunction enjoining enforcement of the PPACA against AFA, AFA will be forced to choose between following its religious convictions or defying the PPACA and subjecting itself to terminal fines. This is a choice that the government, being bound by the Religious Freedom Restoration Act and the First and Fifth Amendments to the United States Constitution, cannot rightly impose on AFA.

Additionally, the PPACA violates the Administrative Procedure Act because Defendants were arbitrary and capricious in determining the specifics of the PPACA, failed to give proper notice and opportunity for public comment, did not consider or respond to the voluminous comments that they received in opposition to the interim final rule, and exceeded authority granted them by Congress.

Courts in twelve separate cases have already granted preliminary injunctions to plaintiffs challenging the PPACA's application on religious liberty grounds. *See Korte v. Sebelius,* Case No. 12-3841, 2012 U.S. App. LEXIS 26734 (7th Cir. 2012); *O'Brien v. U.S. Dep't of Health and Human Svcs.,* No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. 2012); *Annex Medical, Inc. v. Sebelius,* No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. 2013); *Grote v. Sebelius,* No. 13-1077, 2013 U.S. App. LEXIS 2112 (7th Cir. 2013); *Tyndale House Publrs. v. Sebelius,* No. 12-1635, 2012 U.S. Dist. LEXIS 163873 (D.D.C. Nov. 16, 2012); *Legatus v. Sebelius,* No. 12-12061, 2012 U.S. Dist. LEXIS 156144 (E.D. Mich. Nov. 1, 2012); *American Pulverizer Co. v. United States Dep't of Health and Human Svcs.,* No. 12-3459, 2012 U.S. Dist. LEXIS 182307 (W.D. Mo. Dec. 20, 2012); *Monaghan v. Sebelius,* No. 12-15488, 2012 U.S. Dist. LEXIS 182857 (E.D. Mich. Dec. 30, 2012); *Sharpe Holdings, Inc. v. United States Dep't of Health and Human Svcs.,* No. 12-92, 2012 U.S. Dist. LEXIS 182942 (E.D. Mo. Dec. 31, 2012); *Triune Health Group, Inc. v. United States Dep't of Health & Human Svcs.,* No. 12-6756 (N.D. Ill. Jan. 3, 2013); *Sioux Chief Mfg. Co., Inc. v. Sebelius,* No. 13-0036 (W.D. Mo. Feb. 28, 2013); *Newland v. Sebelius,* No. 12-1123, 2012 U.S. Dist. LEXIS 104835 (D. Colo. July 27, 2012). AFA respectfully requests this Court to do the same.

STATUTORY AND FACTUAL BACKGROUND

I. PPACA and the HHS Mandate

On March 23, 2010, Congress enacted the PPACA, establishing numerous requirements for employer group health plans. Among these requirements, PPACA obliges employers with at least fifty full-time employees to supply a group health plan to cover "preventive care" services for women. 26 U.S.C. § 4980H; 42 U.S.C. § 300gg-13(4). This obligation forces qualifying employers to pay the full cost of "preventive care" services without deductible or co-payment. *Id.* The PPACA specifically states, "[N]othing in this title (or any amendment made by this title) shall be construed to require a qualified health plan to provide coverage of [abortion] services … as part of its essential health benefits for any plan year." 42 U.S.C. § 18023(b)(1)(A)(i).

On July 19, 2010, the United States Department of Health and Human Services ("HHS"), along with the Departments of Labor and the Treasury, issued interim final rules for group health plans requiring coverage of "preventive services" to women under PPACA. 75 Fed. Reg. 41726 (July 19, 2010). These rules were to take effect on September 17, 2010, for plans beginning on or after September 23, 2010. *Id.* at 41728. These interim rules require group health plans and health insurers to cover women's preventive health services and to eliminate cost-sharing requirements for such services, but omitted a description of the services to be included in the plan. *Id.* Instead, HHS stated that it would develop guidelines for what services would be included no later than August 1, 2011. *Id.* HHS gave its Health Resources and Services Administration ("HRSA") the task of developing these guidelines. *Id.* at 41756.

Approximately one year later, on or around July 19, 2011, the HRSA issued the guidelines, recommending that "preventive care" include "[a]ll Food and Drug Administration [("FDA")] approved contraceptive methods, sterilization methods, and patient education and counseling for all women with reproductive capacity." HRSA, "Women's Preventive Services,"

available at http://www.hrsa.gov/womensguidelines/ (last visited Mar. 5, 2013). FDA-approved contraceptive methods include abortion-inducing drugs such as Plan B (the "morning after" pill) and Ella (the "week after" pill), which studies show can function to kill embryos even after they have implanted in the uterus, by a mechanism similar to the abortion drug RU-486. A. Tarantal et al., "Effects of Two Antiprogestins on Early Pregnancy in the Long-Tailed Macaque (Macaca fascicularis)," 54 Contraception 107, 114 (1996) ("studies with mifepristone [RU-486] and HRP 2000 [Ella] have shown both antiprogestins to have roughly comparable activity in terminating pregnancy when administered during the early stages of gestation").

On August 1, 2011, HHS issued a mandate ("HHS Mandate") adopting these guidelines for identifying the "preventive services" that the group health plans must cover under PPACA. This HHS Mandate requires qualified employers to supply health insurance coverage for all FDA-approved contraceptive methods, including Plan B and Ella, at no cost to their employees. This requirement applies to plans beginning on August 1, 2012, or later. *See* 76 Fed. Reg. 46621 (Aug. 3, 2011).

Two days after the HHS Mandate was issued, Defendants published an amendment to the July 2010 interim final rules to permit an exemption for certain religious employers. *Id.* Defendants disregarded definitions of "religious employer" and "religious accommodation" that had already been established in various federal laws and instead defined "religious employer" as an organization that meets the following criteria:

(1) The inculcation of religious values is the purpose of the organization.

(2) The organization primarily employs persons who share the religious tenets of the organization.

(3) The organization serves primarily persons who share the religious tenets of the organization.

(4) The organization is a nonprofit corporation 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.

Id. at 46623; 45 C.F.R. § 147.130(a)(1)(iv)(B)(1)–(4) (HHS); 26 C.F.R. § 54.9815-2713T (Treasury); 29 C.F.R. § 2590.715-2713 (Labor). In issuing the amendment to the interim final rules, Defendants did not expound upon the basis for these criteria or explain why the criteria differ from those set forth in other federal laws. Defendants did permit comment on the amended interim final rules, and more than 200,000 responses were submitted. Many of these responses objected to the narrowness of the definition and the limited scope of the exemption for religious employers. 77 Fed. Reg. 8724, 8726–27 (Feb. 15, 2012).

On February 10, 2012, Defendants announced the adoption of the August 3, 2011, "religious employer" definition and exemption without change. *Id.* at 8729. That same day, Defendants also announced a one-year temporary enforcement safe harbor for certain non-exempt, non-profit organizations with religious objections to covering contraceptives or emergency contraceptives. *Id.* at 8727. This temporary enforcement safe harbor for those who quality would effectively postpone prosecution under the HHS Mandate until the first plan begins on or after August 1, 2013. 77 Fed. Reg. 16501, 16503 (Mar. 21, 2012).

To qualify for this safe harbor, (1) the organization must be organized and operated as a non-profit entity; (2) from February 10, 2012, onwards, the group health plan established or maintained by the organization must not have provided contraceptive coverage at any point, consistent with applicable state law, because of the religious beliefs of the organization; (3) the

group health plan (or another entity on its behalf, such as a health insurer or third-party administrator) must provide to participants of the plan notice stating that contraceptive coverage will not be provided under the plan for the first plan year beginning on or after August 1, 2012; and (4) the organization must self-certify that it satisfied items 1–3 above and must document its self-certification in accordance with procedures set by Defendants. *Id.*

Also on February 10, 2012, the White House announced that a policy could be developed to accommodate employers who did not fit the "religious employer" definition despite having religious objections to the HHS Mandate.

On March 21, 2012, Defendants published an Advance Notice of Proposed Rulemaking ("ANPRM") seeking comment on how to structure the proposed accommodation for religious objections. *Id.* This ANPRM led to Defendants' Notice of Proposed Rulemaking ("NPRM") in February 2013. The NPRM simplifies the definition of "religious employer," defining it as "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code, as amended." 78 Fed. Reg. 8456, 8474 (Feb. 6, 2013). IRC § 6033(a)(3)(A)(i) exempts "churches, their integrated auxiliaries, and conventions or associations of churches," and IRC § 6033(a)(3)(A)(iii) exempts "the exclusively religious activities of any religious order." If an applicable employer fails to provide health insurance coverage and even one full-time employee obtains a qualified health plan and receives premium credits or cost-sharing reductions, the employer is required to make a penalty payment of $2,000 per employee per year (adjusted for inflation) after the first 30 employees. 26 U.S.C. § 4980H. If an employer provides a health insurance plan that omits any abortifacients, contraception, sterilization, or education and counseling for the same, it is subject to a fine of up to one-hundred dollars per day per employee. 26 U.S.C. § 4980D.

Employers who do not submit to the HHS Mandate are also subject to a range of enforcement mechanisms under ERISA, including but not limited to civil actions by the Secretary of Labor or by plan participants and beneficiaries. Relief could include judicial orders mandating such employers violate their beliefs and provide coverage for items to which they object on religious grounds.

II. AFA

AFA is a non-profit organization is organized for religious purposes within the meaning of I.R.C. § 501(c)(3) and is incorporated in the State of Mississippi, with its principal place of business located in Tupelo, Mississippi. Affidavit of Timothy B. Wildmon, ¶3 ("AFA Aff.") (attached hereto as Exhibit 1). AFA has maintained at least 50 full-time employees since 1998. Currently, AFA has 135 employees, 110 of which work full-time for the organization. *Id.* at ¶13. AFA operates on a fiscal year, from July 1 to June 30, with the budget planning process—including its healthcare budget—beginning early in the calendar year. AFA is presently budgeting insurance costs for the next fiscal year, running from July 2013 to June 2014. *Id.* at ¶23.

AFA is a distinctly Christian organization whose purpose is to speak out on moral issues in American society. *Id.* at ¶5. AFA makes every effort to impact and benefit the society at large, maintaining a mission to inform, equip, and activate individuals to strengthen the moral foundations of American culture, while giving aid to the church in the United States of America and abroad in its task of fulfilling the Great Commission, that is, to "[g]o therefore and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, teaching them to observe all that I have commanded you." Matthew 28:19–20a (ESV). *Id.* at ¶7.

AFA believes that God has communicated absolute truth to mankind through Scripture, and that all people are subject to the authority of God's Word (Scripture). Therefore, AFA

believes that a culture based on biblical truth best serves the well-being of our nation and our families. *Id.* at ¶8.To be employed at AFA, a person must credibly profess faith in Jesus Christ as Savior and Lord. *Id.* at ¶11.

AFA firmly believes that God, in His Word, condemns abortion as the intentional destruction of innocent human life. Specifically, AFA believes that this proscription is set out in the Sixth Commandment of the Ten Commandments: "You shall not murder." *Id.* at ¶14; Exodus 20:13 (ESV). Consistent with its beliefs about Scripture, AFA believes that every human life is worthy of dignity, respect, and protection during all stages of life, from the time of conception forward, and has taken public positions proclaiming this earnestly-held belief. AFA Aff. at ¶15.

Historically, and as a matter of religious conviction, AFA has been very involved in life issues and the pro-life cause, making numerous public statements over the years about the impropriety of abortion, and objecting to procedures, devices, and drugs that serve to end the lives of human beings after conception. *Id.* at ¶16. AFA has publically and consistently condemned FDA-approved drugs that destroy the human embryo after conception, either after the embryo has been implanted in the uterus or before, believing as a matter of religious conviction that said drugs cause abortions and wrongly end human life. Toward this end, AFA has specifically spoken out against Plan B (also known as the morning-after pill) and Ella (also known as the week-after pill) as being drugs that cause abortions and wrongly end human lives. *Id.* at ¶17.

AFA believes that payment for and/or facilitation of the use of procedures, devices, and drugs that destroy human beings in the womb, including human embryos after conception, would violate the Sixth Commandment. Based upon this sincerely-held religious conviction, AFA

considers it sinful, immoral, and against its mission for it to participate in, pay for, arrange, facilitate, or otherwise support any form of abortion. *Id.* at ¶18.

As a benefit for its full-time employees, AFA has traditionally offered health insurance coverage. For the last decade, AFA has provided fully insured plans of group health coverage for its full-time employees. *Id.* at ¶19. AFA has never intended to supply any insurance coverage for abortions. *Id.* at ¶21.

In May of 2012, AFA made inquiries with its health insurer, United Healthcare, to determine how AFA could obtain the religious exemption to the HHS Mandate and avoid insurance coverage for FDA-approved contraceptive methods, particularly Plan B and Ella. While pressing the question, AFA learned from United Healthcare representatives—much to AFA's dismay—that the United Healthcare insurance policies for AFA that had been in place since 2010 actually covered FDA-approved contraceptive methods, including Plan B and Ella. *Id.* at ¶31. AFA's group health insurance coverage for FDA-approved contraceptive methods like Plan B and Ella was purely unintentional, being antithetical to AFA's mission and religious convictions. *Id.* at ¶33.

Wanting to eliminate insurance coverage for abortifacients—to rectify the situation as quickly as possible—AFA contacted United Healthcare about securing a religious exemption from this insurance coverage. At that time, AFA believed that it should qualify as a religious employer, and United Healthcare indicated that the religious exemption would be appropriate. AFA was unsure about the meaning of several of the phrases found in the HHS Mandate's definition of "religious employer" at the time, such as "inculcation of religious values" and "primarily serves," but was hopeful that it—being a distinctly Christian organization—could avoid the provision requiring insurance coverage for abortifacients.

III. Application of the HHS Mandate to AFA

On the same day that AFA's renewed health insurance coverage was to begin, February 1, 2013, the NPRM was released, clarifying that, for purposes of the HHS Mandate, a "religious employer" is "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code, as amended." 78 Fed. Reg. 8456, 8474. Under this simplified definition of "religious employer," AFA knows that it does not qualify as a "religious employer" because it is not a church or house of worship, placing the AFA outside of the two referenced provisions of the Internal Revenue Code. *Id.;* AFA Aff. at ¶6. Therefore, AFA is held responsible for providing insurance coverage for abortifacients such as Plan B and Ella to its employees.

Though other similarly-situated employers are able to avoid or postpone the impact of the HHS Mandate for various reasons, AFA has no such option. The HHS Mandate does not apply to employers with group health plans that are "grandfathered," but AFA's group health plan is not grandfathered under the PPACA. *See* 78 Fed. Reg. 8456, 8457. AFA is seeking to change the group health plan to eliminate coverage for FDA-approved contraceptives, particularly for Plan B and Ella, but doing so would eliminate the plan's "grandfathered" status. HealthCare.Gov, "Keeping the Health Plan You Have: The Affordable Care Act and 'Grandfathered' Health Plans," http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (June 14, 2010). Furthermore, AFA has made changes to its group health plan regarding deductibles and contribution rate that would cause it to lose any grandfathered status it may have otherwise had. *Id.;* AFA Aff. at ¶¶ 48–49. And, AFA has not provided the requisite notice needed to maintain grandfathered status. HealthCare.Gov; AFA Aff. ¶ 50.

Moreover, AFA does not come under a temporary, one-year "safe harbor" that will be in effect for some religious employers until the first plan year that begins on or after August 1,

2013. AFA does not qualify for this safe harbor provision because the provision applies only to organizations that, as of February 10, 2012, did not carry coverage for FDA-approved contraceptive methods to which they take religious objection and wish to exclude. Department of Health & Human Services, "Guidance on the Temporary Enforcement Safe Harbor for Certain Employers," *available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf (August 15, 2012). Because AFA was unaware that it was providing such coverage, AFA took no action before February 10, 2012, to exclude coverage of FDA-approved contraceptive methods to which it maintains a religious objection. AFA Aff. at ¶¶ 31 and 51.

While the ANPRM and the NPRM claim to offer a possible, future "accommodation" for some religious non-profit organizations that do not qualify for the "religious employer" exemption, this supposed relief does not alleviate AFA's concerns. Different from an exemption, the proposed accommodation is unsuitable because it still requires AFA to facilitate objectionable coverage through an insurance company. 77 Fed. Reg. 16501, 16503–08; AFA Aff. at ¶¶ 14–18, 52.

ARGUMENT

To obtain a preliminary injunction, AFA must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that the injunction might cause to the Defendants; and (4) that the injunction will not disserve the public interest. *Opulent Life Church v. City of Holly Springs Miss.*, 697 F.3d 279, 288 (5th Cir. 2012). As demonstrated herein, AFA satisfies each of these requirements and is entitled to the requested preliminary injunctive relief.

I. AFA is Overwhelmingly Likely to Prevail on the Merits

A. Violation of RFRA

Congress enacted the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"), "(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 religious is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b). To that end, RFRA prohibits 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 show 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.

The Supreme Court held in *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal,* that requirements of RFRA imposed upon the government must be met even at the preliminary injunction stage. *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006) ("Congress's express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test, including at the preliminary injunction stage.").

1. Substantially burdens AFA's sincerely-held religious beliefs

While the phrase "substantial burden" is not defined within RFRA, the Fifth Circuit observed that, under *Yoder,* one of the cases that RFRA was enacted to restore, a substantial burden existed when a "law affirmatively compel[led] [Plaintiffs], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Merced v. Kasson,* 577 F.3d 578, 589 (5th Cir. 2009) (quoting *Yoder,* 406 U.S. at 218). The

Merced Court went on to state that, "at a minimum, the government's ban of conduct sincerely motivated by religious belief substantially burdens an adherent's free exercise of that religion. While not a general rule—the inquiry is fact-specific—we note that such a conclusion accords with the Texas Supreme Court's decision in *Barr* [*v. City of Sinton*, 295 S.W.3d 287 (Tex. 2009) (interpreting the Texas Religious Freedom Restoration Act)]: 'A restriction need not be completely prohibitive to be substantial; it is enough that alternatives for the religious exercise are severely restricted.' … If a government's restriction of religious conduct may be a substantial burden, then a complete ban presents a much stronger case."). *Id.* at 590. The Fifth Circuit also noted that this understanding of "substantial burden" comports with the Ninth Circuit's statement in *Greene v. Solano County Jail*, 513 F.3d 982, 988 (9th Cir. 2008), that the court had "little difficulty" in concluding that an outright ban on a religious exercise is a substantial burden. *Id.*

Similarly, in *Sherbert*, the other case that RFRA was enacted to restore, the Supreme Court held that a state's denial of unemployment benefits to a Seventh-day Adventist employee whose religious beliefs prohibited her from working on Saturdays substantially burdened her exercise of religion because it "force[d] 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." *Sherbert*, 374 U.S. at 404.

In *Thomas v. Review Board*, the Supreme Court held that a state's denial of unemployment compensation benefits to a Jehovah's Witness, whose religious beliefs prohibited him from participating in the production of armaments, substantially burdened his religious beliefs. *Thomas v. Review Board*, 450 U.S. 707, 717 (1981) ("[T]he employee was put to a choice between fidelity to religious belief or cessation of work.").

Courts must accept a religious entity's statements as to what are its sincere religious beliefs. *Id.* ("The judiciary is ill-suited to opine on theological matters, and should avoid doing so." (citing *Employment Division v. Smith,* 494 U.S. 872, 887 (1990)); *Opulent Life Church,* 697 F.3d at 296 ("[C]ourts may not second-guess a religious entity's sincere belief that certain activities are central to or required by its religion."); *Hobbie v. Unemployment Appeals Comm'n,* 480 U.S. 136, 144 n.9 (1987) ("In applying the Free Exercise Clause, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs.").

Because AFA believes that funding, supporting, or doing anything that facilitates abortions, including through abortion-inducing drugs, like Plan B and Ella, or engaging in speech that advocates abortions, is sinful. AFA faces the troubling choice between sacrificing its sincerely-held religious beliefs or suffering severe penalties and fines from the government. AFA Aff. at ¶¶ 14–18. AFA must either arrange for coverage of these abortifacients, which AFA believes is sinful, or suffer fines and sanctions that will cripple AFA. *Id.* at ¶¶ 18 and 38–45. Facing this choice is the very definition of being "compel[led], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Yoder,* 406 U.S. at 218.

2. There is no compelling governmental interest served

The Supreme Court, in *Brown v. Entm't Merchs. Ass'n,* described a compelling governmental interest as one having "a high degree of necessity", 131 S. Ct. 2729, 2741 (2011) (holding that California did not have a compelling governmental interest in regulating the sale of violent video games to minors). The Fifth Circuit observed that "[f]ederal decisions interpreting the Free Exercise Clause … have described a compelling governmental interest using phrases such as 'of the highest order,' [*Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S.

520, 546 (1993)], and 'paramount,' *Yoder*, 406 U.S. at 213." *Merced*, 577 F.3d at 592. Furthermore, the Fifth Circuit noted that

> In *O Centro*, the Supreme Court interpreted RFRA to require "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. The government cannot rely upon general statements of its interest, but must tailor them to the specific issue at hand….

Id. As the Supreme Court explained in *O Centro*, "In [*Sherbert* and *Yoder*], this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 431; *see also Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 543 (1980) ("Mere speculation of harm does not constitute a compelling state interest."); *Brown*, 131 S. Ct. at 2738 ("The State must specifically identify an 'actual problem' in need of solving, and the curtailment of [the constitutionally protected right] must be actually necessary to the solution. That is a demanding standard." (internal cites omitted)).

Unless Defendants can show that there is a specific and "high degree of necessity" in enforcing the HHS Mandate against AFA, AFA prevails under RFRA. As the Supreme Court said, "[t]hat is a demanding standard." *Id.* Furthermore, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547. As the court in *Newland v. Sebelius* found, through the grandfathering in of old health care plans and the grant of exemptions to some religious employers, "[t]he government has exempted over 190 million health plan participants and beneficiaries from the preventive care coverage mandate; this massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs." *Newland*, 881 F. Supp. 2d at 1298.

3. HHS Mandate is not the least restrictive means of advancing legitimate goals

Even if the Defendants could show that there is a compelling governmental interest in enforcing the HHS Mandate against AFA, doing so is not the least restrictive means of advancing a compelling interest. *Anderson v. Celebrezze,* 460 U.S. 780, 806 (1983) (If the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties."). For example, the government could (1) create a contraception insurance plan with free enrollment; (2) permit reimbursement for payments for such services; (3) offer tax credits or deductions for the purchase of these services; or (4) require or incentivize pharmaceutical companies to provide such services for free. *See Newland,* 881 F. Supp. 2d at 1298–99 (holding that one or more of these options would be a less restrictive means of furthering a compelling interest).

B. Violates Free Exercise of Religion

"No liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause …." *Sherbert,* 374 U.S. at 413 (Stewart, J., concurring). The Free Exercise Clause of the First Amendment to the United States Constitution provides "Congress shall make no law … prohibiting the free exercise [of religion]." U.S. Const. amend. I. The Free Exercise Clause requires that any governmental action that burdens a particular religious practice be subject to strict scrutiny if the law is either not neutral towards religious or is not generally applicable. *Lukumi,* 508 U.S. at 531 ("In addressing the constitutional protection for free exercise of religion, … [n]eutrality and general applicability and interrelated, and … failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy

these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.").

In effect, the protection provided by the Free Exercise Clause is equivalent to that provided by RFRA, except RFRA applies to neutral and generally applicable laws, while the Free Exercise Clause does not. *See Smith* (limiting the protection provided by the Free Exercise Clause in cases involving neutral and generally applicable regulations) and 42 U.S.C. § 2000bb (RFRA was intended to reverse the limitation imposed by *Smith*). As demonstrated above, HHS Mandate is a substantial burden on AFA's sincerely-held religious belief, and Defendants do not have a compelling interest in mandating that burden. Because the HHS Mandate is not neutral and is not generally applicable, it also violates AFA's free exercise rights.

"[T]he minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Lukumi,* 508 U.S. at 533. The HHS Mandate violates this principle of neutrality in granting exemptions to churches and houses of worship while denying the religious exemption to other religious organizations, such as AFA. 78 Fed. Reg. 8456, 8474. This explicit distinction between types of religious organizations is equivalent to discrimination based on the "intensity" of the organization's religious beliefs and requires unconstitutional scrutiny of the organization's religious beliefs to determine the nature of the religious organization. *See Spencer v. World Vision, Inc.*, 619 F.3d 1109, 1114 (9th Cir. 2010) (granting an exemption to churches but not other religious organizations "would also raise the specter of constitutionally impermissible discrimination between institutions on the basis of the 'pervasiveness or intensity' of their religious beliefs." (quoting *Colo. Christian Univ. v. Weaver,* 534 F.3d 1245, 1259 (10th Cir. 2008))); *Univ. of Great Falls v. NLRB,* 278 F.3d 1335, 1342

(2002) (the inquiry necessary to discriminate between different types of religious organizations is impermissible).

The HHS Mandate is also subject to strict scrutiny because it is not generally applicable. A law is not generally applicable if it regulates religiously motivated conduct while leaving non-religiously motivated conduct unregulated. *See, e.g., Lukumi,* 508 U.S. at 544–45 (striking down an ordinance that permitting killing animals for secular purposes but not for religious purposes); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark,* 170 F.3d 359, 366 (3d Cir. 1999) (holding that a police department must permit a religious exemption to a no-facial-hair rule if it permits a medical exemption to the rule); *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth,* 556 F.3d 1021, 1035 (9th Cir. 2009) (Noonan, J., concurring) (campaign finance requirements are not generally applicable if they permit secular exemptions for newspapers and media but do not permit religious exemptions for churches).

In this case, the HHS Mandate is drafted such that religious organizations like AFA are subject to its requirements, and yet, because of the "grandfathering" exemption, the health insurance plans of 191 million persons are exempted from its application. *Newland,* 881 F. Supp. 2d at 1291. This differing treatment between secular motivations and religious ones illustrate that the HHS Mandate is not generally applicable.

Because the HHS Mandate is not neutral or generally applicable, the HHS Mandate does not survive strict scrutiny. Defendants Violated the Administrative Procedure Act in Enacting the HHS Mandate.

The Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* ("APA"), regulates the manner in which federal administrative agencies may propose and establish regulations. APA § 706(2) requires that a reviewing court "hold unlawful and set aside agency action, findings, and

conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law …."

Review of whether an agency action is arbitrary or capricious under APA § 706(2)(A) is a "narrow" standard, and "a court is not to substitute its judgment for that of the agency. … But courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decision making. When reviewing an agency action, [courts] must assess, among other matters, whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. That task involves examining the reasons for agency decisions—or, as the case may be, the absence of such reasons." *Judulang v. Holder,* 132 S. Ct. 476, 483–84 (2011) (internal cites and quotes omitted). Judicial review of the agency's decision under the arbitrary or capricious test is to be "searching and careful." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (overruled on other grounds).

APA § 706(2)(B), (C), and (D) require that courts use "exacting judicial scrutiny" to review whether an agency action is contrary to the constitution, exceeds statutory jurisdiction, or was implemented without observance of procedure required by law. *Natural Resources Defense Council, Inc. v. SEC,* 606 F.2d 1031, 1048 (D.C. Cir. 1979). In applying these limitations on informal rulemaking by an agency, "[n]umerous cases have held that an administrative rule which is not issued in accordance with the prior notice and opportunity for public comment procedures of Section 553 of the APA is void. See, e.g., *Wagner Electric Corp. v. Volpe,* 466 F.2d 1013 (3d Cir. 1972); *City of New York v. Diamond,* 379 F. Supp. 503 (S.D.N.Y. 1974)." *Dow Chemical, USA v. Consumer Product Safety Com.,* 459 F. Supp. 378, 390 (W.D. La. 1978).

In the case of the agency actions the led to the issuance of the HHS Mandate, they cannot survive the "exacting judicial scrutiny" of whether the HHS Mandate is contrary to the constitution, exceeds statutory jurisdiction, or was implemented without observance of procedure required by law. *Natural Resources Defense Council*, 606 F.2d at 1048. Furthermore, because the HHS Mandate was "not issued in accordance with the prior notice and opportunity for public comment procedures of Section 553 of the APA[, the HHS Mandate] is void." *Dow Chemical*, 459 F. Supp. at 390.

First, the PPACA itself states that "nothing in this title (or any amendment made by this title) shall be construed to require a qualified health plan to provide coverage of [abortion] services … as part of its essential health benefits for any plan year." 42 U.S.C. § 18023(b)(1)(A)(i). Because the clearly expressed intent of Congress was that rulemaking under the PPACA *not* require coverage of abortions, HHS violated this limitation to its delegated rulemaking authority in requiring coverage of abortifacient drugs.

The HHS Mandate also violates the PPACA's requirement that the HHS Mandate exist in final, unchanged form for one year prior to going into effect. 75 Fed. Reg. at 41726; 76 Fed. Reg. at 46624. Defendants themselves insisted, in August of 2011, that the HHS Mandate must exist in final form, unchanged from its form as of August of 2011, in order to deliver mandated items to college women by August of 2012. 76 Fed. Reg. 46621–26. Defendants received, however, over 200,000 comments to the "religious employer" definition. Many of these comments objected to the narrowness of the definition and the limited scope of the exemption. Despite these 200,000 comments, in February of 2012, HHS, the Department of Labor, and the Department of the Treasury adopted the August 2011 definition "without change," presumably to avoid missing the application of the HHS Mandate in August 2012. 77 Fed. Reg. 8725–30. Due

to public outcry about, however, Defendants then admitted in March of 2012 that the comments offered during the 2011 comment period actually did require alterations that Defendants had refused to consider but would now pursue. 77 Fed. Reg. 16501. Despite the fact that the definition of "religious employer" is presently in a state of flux and has not been static for a full year as required by the PPACA, Defendants are imposing the HHS Mandate on AFA as if it had been finalized in August of 2011. This is improper both because the rules have not been fixed for a full year and because the rules that were adopted in February of 2012 completely ignored all public comment, requiring such rulemaking to be struck down under APA § 706(2).

Finally, the rulemaking under the PPACA, including the HHS Mandate, are contrary to law and the constitution for all of the reasons stated above in this Memorandum in Support of Motion for Preliminary Injunction.

II. Enforcement of the HHS Mandate against AFA will Inflict Irreparable Harm on AFA

AFA automatically satisfies the irreparable harm requirement because it shows violations of First Amendment and RFRA rights. *Elrod v. Burns,* 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Opulent Life Church,* 697 F.3d at 295 ("Most basically, Opulent Life has satisfied the irreparable-harm requirement because it has alleged violations of its First Amendment and RLUIPA rights. … In the closely related RFRA context …, courts have recognized that this same principle applies." (internal cites and quotes omitted)); *Kikumura v. Hurley,* 242 F.3d 950, 963 (10th Cir. 2001) ("[C]ourts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA.").

AFA is also suffering irreparable harm because it cannot plan for the future and must choose to either violate its religious beliefs and provide coverage for items to which it objects on

religious grounds or refuse to provide health insurance coverage required by the HHS Mandate and subject itself to debilitating fines. AFA Aff. at ¶¶ 39–45.

III. Balance of Harms Favors Entry of Preliminary Injunction

Defendants would not be harmed by entry of this preliminary injunction. Defendants themselves have already exempted the employers of approximately 191 million persons from the HHS Mandate. *Newland*, 881 F. Supp. 2d at 1298. An order requiring them to refrain from applying the HHS Mandate to AFA while this case is pending could not further harm Defendants. Furthermore, "[t]he harm in delaying the implementation of a statute that may later be deemed constitutional must yield to the risk presented here of substantially infringing the sincere exercise of religious beliefs." *Legatus*, 2012 U.S. Dist. LEXIS 156144 at *44; *see also Opulent Life Church*, 697 F.3d at 297 ("We have just concluded that Opulent Life's harm is irreparable; hence, Holly Springs would need to present powerful evidence of harm to its interests to prevent Opulent Life from meeting this requirement.").

IV. Public Interest Favors Preliminary Injunction

"[I]njunctions protecting First Amendment freedoms are always in the public interest." *Opulent Life Church*, 697 F.3d at 298 (*quoting Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("[I]t is always in the public interest to protect constitutional rights."); *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (same). AFA does not seek to preliminarily enjoin the HHS Mandate as to all employers, but only as to itself. This preliminary injunction cannot possibly harm the public interest.

CONCLUSION

Application of PPACA and the HHS Mandate to AFA violates AFA's rights under the First and Fifth Amendments to the United States Constitution and under the Religious Freedom

Restoration Act. PPACA is also in violation of the Administrative Procedure Act. Because AFA has shown that it is likely to succeed on the merits that it is currently suffering irreparable harm, and that no harm to the public interest would result from the issuance of a preliminary injunction, this Court should grant AFA's Motion for Preliminary Injunction.

Respectfully submitted,

/s/ Nathan W. Kellum
Nathan W. Kellum
MS Bar No. 8813; TN Bar No. 13482
CENTER FOR RELIGIOUS EXPRESSION
699 Oakleaf Office Lane, Suite 107
Memphis, Tennessee 38117
(901) 684–5485 – Telephone
(901) 684–5499 – Facsimile

Jeffrey C. Mateer*
Texas State Bar No. 13185320
Hiram S. Sasser, III
Texas State Bar No. 24039157
LIBERTY INSTITUTE
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075
(972) 941–4444 – Telephone
(972) 941–4457 – Facsimile

Attorneys for Plaintiff American Family Association, Inc.

*Application for Admission *pro hac vice* is pending