Oral Argument Requested
No. 13-1218

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

W. L. (BILL) ARMSTRONG, JEFFREY S. MAY, WILLIAM L. (WIL) ARMSTRONG III, JOHN A. MAY, DOROTHY A. SHANAHAN, and CHERRY CREEK MORTGAGE CO., INC., a Colorado corporation,

Appellants,

v.

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

Appellees.

On Appeal from the United States District Court
for the District of Colorado
Case No. 1:13-cv-00563-RBJ-BNB
Judge Brooke R. Jackson, Presiding

BRIEF OF APPELLANTS

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DATED: July 31, 2013

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Appellants state the following:

Appellant Cherry Creek Mortgage Co., Inc., a Colorado corporation, is a privately-held company wholly owned by members of the Armstrong family and the May family. No publicly-held corporation owns 10% or more of its stock.

s/ Michael J. Norton
Michael J. Norton
Attorney for Appellants

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PRIOR AND RELATED APPEALS

The issues presented in this appeal were recently decided in *Hobby Lobby Stores, Inc. v. Sebelius*, 2013 WL 3216103, __ F.3d __ (10th Cir. June 27, 2013). Appellants consider *Hobby Lobby* to be dispositive of the issues in this appeal. The issues presented in this appeal are also pending in *Newland v. Sebelius*, No. 12-1380 (10th Cir.), which is scheduled for oral argument on September 26, 2013. In addition, the issues presented in this appeal are pending in:

Conestoga Wood Specialties Corp. v. Sebelius, No. 13-1144 (3rd Cir.)[1]

Autocam Corp. v. Sebelius, No. 12-2673 (6th Cir.)

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O'Brien v. U.S. Dep't of Health & Human Servs., No. 12-3357 (8th Cir.)

Annex Medical, Inc. v. Sebelius, No. 13-1118 (8th Cir.)

Tyndale House Publishers, Inc. v. Sebelius, No. 13-5018 (D.C. Cir.)

[1] Opinion issued July 26, 2013.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1361, and had authority to issue an injunction under 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. § 2000bb *et seq.* The district court denied the motion for a preliminary injunction on May 10, 2013 and a timely notice of appeal was filed on May 16, 2013. Aplt. App. at 187. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

A federal regulation (the "HHS Mandate") requires employer health insurance plans to cover all "FDA-approved contraceptives," including abortion-inducing drugs and devices. To comply with the HHS Mandate, the Armstrongs and the Mays, who own, manage, and operate Cherry Creek Mortgage Co., Inc., must violate their sincerely held religious beliefs that abortion is immoral by providing insurance coverage of these abortion-inducing drugs and devices. However, unless Plaintiffs comply with the HHS Mandate, Plaintiffs face severe sanctions and penalties.

Relying on the decision of a Tenth Circuit motions panel in *Hobby Lobby Stores, Inc. v. Sebelius*, 2012 WL 6930302 (10th Cir. 2012) which had denied an injunction pending appeal and the fact that en banc oral argument had been scheduled for *Hobby Lobby* in two weeks time from the hearing on Plaintiffs' preliminary injunction motion, the district court below denied Plaintiffs' request for a preliminary injunction. The district court below concluded that, pursuant to the Religious Freedom Restoration Act ("RFRA"), Plaintiff Cherry Creek Mortgage Co., Inc., had not demonstrated a reasonable likelihood of success on the merits because the HHS Mandate did not constitute a "substantial burden" on Plaintiffs' exercise of their sincerely held religious beliefs. The district court declined to issue a written order and informed the parties that the transcript of the

hearing on Plaintiffs' preliminary injunction motion constituted the district court's order.

The following issue is presented:

1) Does the HHS Mandate "substantially burden" the religious exercise of both the individual Plaintiffs and their for-profit corporation Cherry Creek Mortgage Co., Inc. because it subjects them to severe penalties unless, in violation of their sincerely held religious beliefs, they provide insurance coverage of abortion-inducing drugs? *See* Reporter's Transcript, Hearing on Plaintiffs' Motion for Preliminary Injunction ("Transcript") at 96 (May 10, 2013).

STATEMENT OF THE CASE

This appeal arises from a challenge to an agency regulation promulgated under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148. Plaintiffs moved for a preliminary injunction against enforcement of the regulation on the basis of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ("RFRA"), the First Amendment, and the Administrative Procedure Act, 5 U.S.C. § 500 *et seq*. VC ¶¶ 103-53. The district court, relying exclusively on RFRA and a decision by a Tenth Circuit motion's panel denying an injunction on appeal in *Hobby Lobby Stores, Inc. v. Sebelius*, 2012 WL 6930302 (10th Cir. 2012), denied Plaintiffs' request for preliminary injunctive relief and concluded that Plaintiffs had not demonstrated a reasonable likelihood of success on the merits because the HHS Mandate did not constitute a "substantial burden" on Plaintiffs' exercise of their sincerely held religious beliefs. *See* Reporter's Transcript, Hearing on Plaintiffs' Motion for Preliminary Injunction ("Transcript") at 97 (May 10, 2013). This appeal followed. Aplt. App. at 187. On June 27, 2013, this Court issued its opinion in *Hobby Lobby Stores Inc. v. Sebelius*, 2013 WL 3216103, __ F.3d __ (10th Cir. June 27, 2013) (en banc), which effectively overruled the earlier decision of the Tenth Circuit motions panel. Insomuch as this case raises "substantially the same issues as raised in" *Hobby Lobby*, 2013 WL 3216103 at *67, this case should be resolved in a like manner. Transcript at 89. The

proceedings below have been stayed by agreement of the parties and order of the district court pending the outcome of this appeal. Aplt. App. at 191.

INTRODUCTION

As in *Hobby Lobby*, this case asks whether business owners must forfeit their religious liberty rights and comply with the HHS Mandate in violation of those beliefs in order to do business in America. The Court must determine, as it did in its recent *en banc* decision in *Hobby Lobby*, whether RFRA protects a for-profit company and its owners so as to enable them to operate their business in conformity with their faith. The "HHS Mandate" coerces Plaintiffs to directly fund, arrange for, and facilitate coverage of objectionable abortion-inducing drugs and devices. If Plaintiffs do not comply, they face enormous fines and other legal consequences. Protecting persons from such coercion, including closely held for-profit corporations such as Plaintiff Cherry Creek Mortgage Co., Inc. ("Cherry Creek Mortgage"), who act in conformity with their religious beliefs is at the very heart of RFRA.

The lower court disagreed and held Cherry Creek Mortgage, as a for-profit secular business corporation, was not a "person" under RFRA and therefore could not exercise religion under the First Amendment. It concluded that the HHS Mandate's effects were too "indirect and attenuated" to constitute a substantial burden on Plaintiffs. While the district court did not go into great detail in its reasoning for its holding as set forth in the transcript of the hearing on Plaintiffs' preliminary injunction request, it concluded that, unless or until a Tenth Circuit

motions panel decision which had denied a motion for an injunction pending appeal in *Hobby Lobby* was modified or overruled, the district court was "bound" by this motions panel ruling. Indeed, this motions panel ruling was subsequently overturned by this Court's *en banc* Court in *Hobby Lobby*.

The district court erred in denying Plaintiffs' request for preliminary injunction. The threat of massive fines and penalties, as well as other sanctions, unless Plaintiffs took action in direct contradiction of their faith beliefs as to the immorality of abortion, places a clear and direct substantial burden on the religious exercise rights of all Plaintiffs. The government demand that Plaintiffs decide between their business and their faith is the kind of coercion that is repugnant to the First Amendment and RFRA and should again be rejected by this Court.

This Court should reverse and remand the district court's order with instructions to enter a preliminary injunction on behalf and in favor of Plaintiffs.

FACTUAL BACKGROUND

I. Cherry Creek Mortgage

The individual Plaintiffs are owners and all of the voting shareholders of Plaintiff Cherry Creek Mortgage, Co., Inc., a Colorado corporation ("Cherry Creek Mortgage"). Verified Complaint ("VC") ¶¶ 2, 3, 31. Each individual Plaintiff is a believing and practicing Evangelical Christian and believes that the Holy Bible is the inspired, inerrant Word of God. VC ¶ 42. Plaintiffs seek to follow the Holy

Bible in their management of Cherry Creek Mortgage. Their Christian faith, as instructed by the Holy Bible, permeates their management of Cherry Creek Mortgage and their personal lives. VC ¶¶ 4, 42, 43 44, 47. Their faith is evidenced by, among other things, the fact that, over the last 20 years or more, using revenues derived from Cherry Creek Mortgage and other sources, the individual Plaintiffs have collectively donated millions of dollars to Evangelical Christian and pro-life causes. VC ¶ 49.

Cherry Creek Mortgage is a Colorado corporation organized and operated by the individual Plaintiffs as an S-corporation. VC ¶¶ 2, 3, 31. It is a full-service residential mortgage banking company and employs approximately 730 full-time employees. VC ¶¶ 2, 3, 47, 51.

In the exercise of Plaintiffs' religious beliefs and in pursuit of Cherry Creek Mortgage's lawful purposes, Plaintiffs have established as their primary purpose that:

> OUR PURPOSE IS TO BUILD AND BECOME A GREAT COMPANY AND IN THIS PROCESS WE ASPIRE TO POSITIVELY IMPACT THE LIVES OF THOSE INDIVIDUALS WHO COME INTO CONTACT WITH OUR ORGANIZATION AND TO HONOR GOD IN ALL WE DO.

VC ¶ 43; *see also* VC, Exhibit A at 3.

This "purpose" appears in Cherry Creek Mortgage's publications, employee training manuals, on a wallet-sized plastic card given to all new employees, and on

a sign prominently displayed on the wall in Cherry Creek Mortgage's main conference room and employee-training center. In addition, key managers of Cherry Creek Mortgage, including Plaintiff Jeffrey S. May, president and CEO of Cherry Creek Mortgage, and Stacy Harding, Senior Vice President of Cherry Creek Mortgage, emphasize at regular monthly meetings of employees that Cherry Creek Mortgage's primary purpose is "to honor God in all that we do." VC ¶¶ 43, 44. At employee meetings, Plaintiffs regularly pray for God's continued blessings on their business and praise Him for His manifest blessings on Plaintiffs, their company, and their employees.

One of the Bible's teachings, which each individual Plaintiff embraces, is that a preborn child is, from the moment of conception (*i.e.*, from the moment of becoming a fertilized human embryo) a human being created in the image of God and thus of intrinsic value. Plaintiffs believe therefore that the destruction of a human embryo by, among other methods, abortion-inducing drugs and devices, is an abortion and is a sin against God. VC ¶¶ 4, 45, 46, 48. Thus, while Plaintiffs provide generous health insurance benefits to their employees, Plaintiffs believe it is immoral for them to participate in, pay for, facilitate, or otherwise support abortion-inducing drugs and devices, all as is forced upon them by the HHS Mandate. VC ¶¶ 4, 48, 50.

During 2012, as a result of the plethora of litigation around the country, the Plaintiffs grew more aware of the requirements of the HHS Mandate and its impact on their company. They discovered in late December 2012 that the health insurance plan they had been providing for their employees (which renewed on January 1, 2013 and is renewable on January 1 of each subsequent year) included "FDA-approved contraceptives." Unbeknownst to Plaintiffs, such "FDA-approved contraceptives" included abortion-inducing drugs and devices, *i.e.*, Plan B drugs (the so-called "morning after" pill), ella (the so-called "week after" pill), and intrauterine devices. VC ¶¶ 6, 7, 8, 52, 53.

As the HHS Mandate substantially burdens Plaintiffs' deeply held religious beliefs by requiring coverage of abortion-inducing drugs and devices, sterilization, and education and counseling in support of the same. VC ¶¶ 1, 5, 6, 7, 11, 12, 13, 15, 16, 18, 19, 20, 21, 22, 30-31, 48, 49, 50, 51, 52, Plaintiffs instructed Cherry Creek Mortgage's insurer, CIGNA, to omit coverage of such abortion-inducing drugs and devices from their health insurance plan beginning with the January 1, 2013 plan. VC ¶¶ 9, 10, 54. Plaintiffs were informed by CIGNA that CIGNA could not omit these items from the insurance plan without injunctive relief from the district court. VC ¶¶ 9, 10, 54, 57.

Plaintiffs thereupon developed and filed their Verified Complaint in the district court. However, so as to avoid regulatory violations and potential

sanctions, Plaintiffs had no choice but to comply with the HHS Mandate and thus included abortion-inducing drugs and devices in their January 1, 2013 health insurance plan, even as they sought relief from the district court. VC ¶¶ 11, 55.

II. The HHS Mandate

The HHS Mandate forces Plaintiffs to violate their religious beliefs by requiring them to included abortion-inducing drugs and devices in their employer health insurance plan.

In March 2010, Congress passed, and President Obama signed into law the Patient Protection and Affordable Care Act, Pub. L. 111-148 (March 23, 2010), and the Health Care and Education Reconciliation Act, Pub. L. 111-152 (March 30, 2010) (collectively, the "ACA"). The ACA attempts to regulate the national health insurance market by regulating group health insurance plans and health insurance issuers.

As enacted, the ACA requires "preventive care and screenings" for women at no cost sharing, but does not specifically require coverage of abortion-inducing drugs and devices. Subsequently, Defendants defined "preventive care and screenings" to cover, without charging a co-payment, co-insurance, or deductible to the plan participant, "[t]he full range of Food and Drug Administration ["FDA"]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." VC ¶ 5. "FDA-

approved contraceptive methods" include not only contraceptives, *i.e.*, birth-control pills, but also abortion-inducing drugs, including Plan B drugs (also known as the "morning-after pill"), ulipristal acetate (also known as "ella" or the "week-after pill"), and intrauterine devices.

While the government has exempted massive numbers of Americans employed by both for-profit and not-for-profit businesses from the requirements of the HHS Mandate, Cherry Creek Mortgage is not so exempt and is required, in violation of Plaintiffs' religious beliefs, to cover abortion-inducing drugs and devices in their employee health insurance plans.

Section 1563 of the ACA incorporates ACA's "preventive care services" requirement into the Internal Revenue Code and into the Employee Retirement Income Security Act ("ERISA"). *See* "Conforming Amendments," Pub. L. 111-148, §1563(e)-(f). As a result, crippling penalties may be imposed on employers of 50 or more persons (like Plaintiffs) if they refuse to include abortion-inducing drugs and devices in their health insurance. VC ¶ 76. A non-exempt employer faces fines of $100 per day, per employee, for non-compliance with the HHS Mandate. 26 U.S.C. § 4980D(a), (b); VC ¶ 79. Since Plaintiffs employ more than 730 employees, these penalties would amount to as much as $25.5 million per year to Plaintiffs. VC ¶ 79. Alternatively, Plaintiffs could choose to drop employee insurance entirely and incur an annual assessment of penalties of $1.4 million per

year. 26 U.S.C. § 4980H. VC ¶ 77. Such fines would drive Plaintiffs out of business and result in the discharge of their 730 employees. VC ¶ 80.

In addition, the Labor Department and health insurance plan participants are authorized to sue Plaintiffs for violating the law and for omitting the objectionable mandated coverage. Those suits can specifically force the Plaintiffs to violate their religious beliefs by mandating provision of the objectionable coverage. 29 U.S.C. § 1132(a). VC ¶ 81.

Because Plaintiffs' company, as a mortgage lender, is subject to a myriad of federal and state regulations and contractual agreements which require certification of compliance with all federal laws, intentional violation of the HHS Mandate (and thus a "violation" of a federal law) by Plaintiffs would put Plaintiffs' company at risk of being forced out of business even if there were no fines assessed. VC ¶¶ 55, 98.

Plaintiffs' health insurance plan does not qualify for any of the religious or secular exemptions to the HHS Mandate Defendants have arbitrarily chosen and provided. VC ¶¶ 69, 70, 71, 74, 75, 92, 93, 94, 95, 96.

III. Procedural History

After learning that their insurer could not exclude abortion-inducing drugs and devices from their employer health insurance plan, Plaintiffs filed suit in the U.S. District Court for the District of Colorado on March 5, 2013. Their lawsuit

challenged the HHS Mandate as a violation of RFRA, the First Amendment, and the Administrative Procedure Act. VC ¶¶ 103-53. At the same time Plaintiffs moved for a preliminary injunction. VC ¶¶ A, B. For the reasons described above, the Plaintiffs were obliged, at least temporarily, to comply with the HHS Mandate. VC ¶ 74. The district court, after hearing arguments, denied Plaintiffs' request for a preliminary injunction on May 10, 2013. Transcript at 97. The district court, concluding that its result might be different after the Tenth Circuit's *en banc* decision in *Hobby Lobby,* decided it was "bound" by the decision of a Tenth Circuit two judge motions panel in which an injunction pending appeal in *Hobby Lobby* had been denied, 2012 WL 6930302 (10th Cir. Dec. 20, 2012). Transcript at 93-97. The decision of that motions panel was subsequently overturned by this Court's *en banc* decision in *Hobby Lobby*.[2] While the *en banc* decision in *Hobby Lobby* left unresolved two prongs of the preliminary injunction standard – equitable balance and public interest – the U.S. District Court for the Western District of Oklahoma has since resolved those issues in favor of Hobby Lobby and has entered a preliminary injunction. *Hobby Lobby II*, CIV-12-1000-HE (ordering

[2] Hereinafter the Tenth Circuit decision in *Hobby Lobby Inc. v. Sebelius*, 2013 WL 3216103, __ F.3d __ (10th Cir. June 27, 2013) will be referred to as *Hobby Lobby I*, while the district court order in *Hobby Lobby Stores, Inc. v. Sebelius*, Case No. CIV-12-1000-HE (W.D. Okla. July 19, 2013) (Heaton, J.) will be referred to as *Hobby Lobby II*.

a preliminary injunction for the plaintiffs and holding for the plaintiffs on all four preliminary injunction requirements).

Plaintiffs here appealed the district court's denial of their preliminary injunction motion on May 16, 2013 and seek reversal of the district court's denial of a preliminary injunction. Aplt. App. at 187.

LEGAL STANDARDS

I. Standard of Review

This Court reviews the denial of a preliminary injunction by the district court for abuse of discretion. *Little v. Jones*, 607 F.3d 1245, 1250 (10th Cir. 2010). A district court abuses its discretion by basing a denial of a preliminary injunction on an error of law. *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009). A district court can also abuse its discretion if it applies "the wrong legal standard" in denying a preliminary injunction. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2002).

This Court reviews legal conclusions by the district court *de novo*. *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002). Therefore, this Court "review[s] the meaning of the RFRA *de novo*, including the definitions as to what constitutes substantial burden and what constitutes religious belief, and the ultimate determination as to whether RFRA has been violated." *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996). This Court has the authority to decide whether

the Plaintiffs should be granted a preliminary injunction. *See Westar Energy*, 552 F.3d at 1224 (stating that "[i]f the district court fails to analyze the factors necessary to justify a preliminary injunction, this court may do so if the record is sufficiently developed").

II. Preliminary Injunction Standard

Defendants' unconstitutional HHS Mandate poses an urgent threat to Plaintiffs and a substantial burden on their religious liberty interests thereby justifying injunctive relief. Plaintiffs have no adequate remedy at law. VC ¶ 102. Unless this Court directs the district court to enter injunctive relief in favor of Plaintiffs so as to prevent the HHS Mandate's applicability to them, Plaintiffs will be forced to continue to comply with the HHS Mandate, VC ¶ 97, thereby suffering irreparable and continuing harm in violation of their sincere religious beliefs. VC ¶ 101.

To obtain a preliminary injunction, a movant must show (a) a substantial likelihood of prevailing on the merits; (b) irreparable harm unless the injunction is issued; (c) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (d) that the injunction, if issued, will not adversely affect the public interest. *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2009); *Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776-77 (10th Cir. 2009).

If the movant can establish that the latter three requirements tip strongly in the movant's favor, a modified version of the traditional likelihood of success test applies. This test requires a showing that the questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation, *i.e.*, a trial. *Davis*, 302 F.3d at 1111; *see also Newland*, 881 F.Supp. 2d at 1294 (enjoining HHS Mandate under modified standard). This Court need not resolve whether to use the modified test, however, because the Plaintiffs are entitled to an injunction under either the modified standard or the traditional standard. *Awad v. Ziriax*, 670 F.3d 1111, 1126 (10th Cir. 2012) (not resolving issue because free exercise movant met heightened standard).

SUMMARY OF ARGUMENT

The district court fundamentally misunderstood and misapplied RFRA and thus erred in denying preliminary injunctive relief to the Plaintiffs.

The HHS Mandate forces Plaintiffs to violate their sincerely held religious beliefs or face massive penalties. A substantial burden under RFRA has therefore been placed on the individual Plaintiffs and their company Cherry Creek Mortgage. The district court stated that the relationship between the requirements of the HHS Mandate and Cherry Creek Mortgage's religious beliefs was "indirect and attenuated." However, this Circuit has rejected any distinction between

"direct" and "indirect" burdens. Plaintiffs oppose having to supply certain abortion-inducing drugs and devices, not the possibility that their employees may use those drugs. The Plaintiffs and the Plaintiffs alone determine their religious beliefs, without any interference from or reinterpretation by the court. Plaintiffs, including Cherry Creek Mortgage, are protected under RFRA and may exercise their religious rights through Cherry Creek Mortgage. *Hobby Lobby I*, 2013 WL 3216103 at *9-10.

ARGUMENT

I. Plaintiffs Are Likely To Succeed On Their RFRA Claims.

1. RFRA applies to Plaintiffs' religious exercise.

RFRA, by which Congress restored the strict scrutiny test to governmental action which was deemed to have been modified by the Supreme Court in *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990),[3] applies to actions

[3] In *Smith*, two employees were fired from their jobs because they ingested peyote, a Schedule I controlled substance, for sacramental purposes at a ceremony of the Native American Church of which plaintiffs were members. Their applications for unemployment benefits were denied because their terminations from employment resulted from the illegal use of a controlled substance. The Supreme Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879.

of the federal government.[4] *See also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 n.1 (2006).

RFRA requires courts to apply the pre-*Smith Sherbert*[5] standard by directing that the "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. Thus, a plaintiff makes a prima facie RFRA case by first showing that government action has substantially burdened a plaintiff's exercise of sincerely held religious beliefs. *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001).

Once a plaintiff has shown that specific government conduct substantially burdens a plaintiff's exercise of sincerely held religious beliefs, RFRA requires that the Government "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 (emphasis added); *see United States v. Hardman*, 297 F.3d 1116, 1126 (10th Cir. 2002) (en banc) (discussing RFRA).

RFRA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Religious exercise involves "not only belief and profession but

[4] The Supreme Court partially invalidated RFRA in *City of Boerne v. Flores*, 521 U.S. 507 (1997), but only insofar as it applied to the states. Federal government actions are still subject to RFRA.

[5] *Sherbert v. Verner*, 374 U.S. 398 (1963).

the performance of (or abstention from) physical acts." *Smith*, 494 U.S. at 877 (Free Exercise claim).[6]

A "substantial burden" is imposed, even in indirect instances, where a law forces a person or group "to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order to accept [government benefits], on the other hand." *Sherbert*, 374 U.S. at 404. *Sherbert* held that it was "clear" that denying unemployment benefits to an employee was a substantial burden, even though the law did not directly command her to violate her beliefs against working on Saturdays. *Id.* at 403–04.

2. The Plaintiffs, including Cherry Creek Mortgage, are protected by RFRA.

It is essential to freedom in America for citizens to be able to live out their faith in their everyday lives, including in the way they run their businesses. Family businesses should be free to conduct their business in accord with their religious convictions and should not be forced by the government to violate their faith in order to stay in business. *See Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) (noting that government follows "the best of our traditions" when it "respects the

[6] *Smith* reaffirmed that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts," for example, "abstaining from certain foods or certain modes of transportation." 494 U.S. at 877.

religious nature of our people and accommodates the public service to their spiritual needs").

The Tenth Circuit has held that "as a matter of statutory interpretation that Congress did not exclude for-profit corporations from RFRA's protections. Such corporations can be 'persons' exercising religion for purposes of the statute…[and] as a matter of constitutional law, Free Exercise rights may extend to some for-profit organizations." *Hobby Lobby I*, 2013 WL 3216103 at 9. This Court relied in part on the Dictionary Act, which defines the word "person" as used in RFRA as "includ[ing] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Thus, like the plaintiffs in *Hobby Lobby I*, all Plaintiffs, including Cherry Creek Mortgage, should be protected under RFRA as well.

Just in *Hobby Lobby*, Cherry Creek Mortgage is a corporation owned and operated by the individual Plaintiffs as an S-corporation. Plaintiffs here, as in *Hobby Lobby*, have organized their business with express religious principles and seek to apply their "faith to guide business decisions." *Id*. at 2. Over the last 20 years or more, using revenues derived from Cherry Creek Mortgage and other sources, the individual Plaintiffs have collectively donated millions of dollars to Evangelical Christian and pro-life causes.

Colorado law likewise empowers Cherry Creek Mortgage to "exercise religion." Its "all lawful business purpose" provision in its Articles of Incorporation is drawn from C.R.S. § 7-103-101(1) under which for-profit corporations are empowered to "engage[e] in any lawful business unless a more limited purpose is set forth in the articles of incorporation." No such "more limited purpose" is in Cherry Creek Mortgage's Articles of Incorporation. *See also* C.R.S. § 7-102-102 et seq.

C.R.S. § 7-102-102(4) provides that "[t]he articles of incorporation need not set forth any of the corporate powers enumerated in Articles 101 to 117 of this Title." As is relevant to Cherry Creek Mortgage and its right to "exercise religion," the Colorado Business Corporation Act also provides:

- "'Person' means an individual or an entity." C.R.S. § 7-101-401(24).
- "'Entity' includes a domestic . . . corporation . . ." C.R.S. § 7-101-401(17).
- "Unless otherwise provided in the Articles of Incorporation, every corporation has . . . the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including the power . . . [t]o make donations for the public welfare or for charitable, scientific, or educational purposes. . ." C.R.S. § 7-103-101(1)(m).

- "[A]ll corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, the board of directors. . ." C.R.S. § 7-108-101(2).

Thus, "[t]he proper question" said the Supreme Court, "is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead the question must be whether [the challenged law] abridges expression that the First Amendment was meant to protect." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (recognizing the corporations have First Amendment speech rights, but declining to "address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment"). *See also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 899-900 (2010) (explaining that "political speech does not lose First Amendment protection 'simply because its source is a corporation'") (quoting *Bellotti*, 435 U.S. at 784).

Both federal law and Colorado law empower Cherry Creek Mortgage to exercise the religious faith of its owners. Businesses, no matter the entity form, can, and often do, engage in a wide range of quintessentially "religious" or ethical acts such as donating money to charities and conducting themselves in accord with moral and ethical principles, including biblical teachings.

Plaintiffs declare that Cherry Creek Mortgage's primary ". . . PURPOSE IS TO BUILD AND BECOME A GREAT COMPANY . . . AND TO HONOR GOD IN ALL WE DO." In this way, Plaintiffs exercise their religion by recognizing the simple truth that the acts of Cherry Creek Mortgage are indeed the acts of its owners.

Both the individual Plaintiffs and their company Cherry Creek Mortgage are "persons" protected by RFRA. It is of no consequence under RFRA that the individual Plaintiffs' company is a secular, for-profit S-corporation, as opposed to a house of worship, a temporarily "grandfathered" organization, a small business that need not abide by the HHS Mandate, or any other organization that Defendants have arbitrarily exempted from their HHS Mandate.

RFRA protects "persons" without distinguishing between natural or artificial persons or between for-profit or non-profit entities. Nowhere in RFRA are its terms limited to individuals only. A corporation is thus a "person" under both Colorado law and under RFRA. *See* 1 U.S.C. § 1 (the term "person" in RFRA is not otherwise defined and the context does not require a different reading than that a corporation is a "person").

Importantly, in *Hobby Lobby II*, CIV-12-1000-HE, and in *Newland v. Sebelius*, 881 F.Supp.2d 1287 (D.Colo. July 27, 2012) (Kane, J.), the corporate

form of the business entity was found to be immaterial to a business owner's ability to assert religious claims.

3. The HHS Mandate substantially burdens Plaintiffs' exercise of religion.

Plaintiffs' operation of Cherry Creek Mortgage and its health insurance plan is in accord with their religious beliefs and constitutes the "exercise of religion." To outlaw that religious exercise and "compel a violation of conscience" is a quintessential substantial burden. *Thomas v. Review Board*, 450 U.S. 707, 717 (1981).

Nearly 20 years after *Sherbert*, the Supreme Court confirmed the *Sherbert* standard for establishing a substantial burden by stating:

> 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 v. Review Board, 450 U.S. at 709 (worker objected to participating in the production of war materials). *See also Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (Alito, J.) (concerning a police officer's belief that wearing a beard was religiously required). The claims of Plaintiffs are identical to those raised in *Hobby Lobby*, and are similar to those raised in *Thomas*, *United States v. Lee*, 455 U.S. 252 (1982), and *Abdulhaseeb v. Calbone*, 600 F.3d

1301 (10th Cir. 2010), and those decisions should guide this Court's analysis. *See Hobby Lobby I*, 2013 WL 3216103 at *20.

The religious beliefs in this case are identical to those of the plaintiffs in *Hobby Lobby*. Plaintiffs, all Evangelical Christians, believe that life begins at conception. Therefore, Plaintiffs have a "sincere religious objection to providing coverage for Plan B and Ella since they believe those drugs could prevent a human embryo…from implanting in the wall of the uterus, causing the death of the embryo." *Id.* (internal citations omitted). Just as in *Hobby Lobby*, Plaintiffs also allege a "sincere religious objection to providing coverage for certain contraceptives [IUDs] since they believe those devices could prevent a human embryo from implanting in the wall of the uterus, causing the death of the embryo." *Id*. Additionally, just as the plaintiffs in *Hobby Lobby*, Plaintiffs here object to "participating in, providing access to, paying for, training others to engage in, or otherwise supporting" those drugs and devices which result in the destruction of a human embryo. *Id*.

Second, the Court must determine whether the Plaintiffs sincerely hold these beliefs. Just as with the plaintiffs in *Hobby Lobby*, the government does not dispute the fact or sincerity of Plaintiffs' religious beliefs. Transcript at 3-4 and 89 (finding Plaintiffs' religious beliefs to be sincerely held); *see also*, *Hobby Lobby II*, CIV-12-1000-HE.

Third, as it did in *Hobby Lobby*, the Court should determine that the HHS Mandate constitutes a substantial burden on the Plaintiffs' religious beliefs. Like in *Hobby Lobby*, the pressure exerted on the Plaintiffs is decidedly substantial. If Plaintiffs provide a health plan which does not conform to the HHS Mandate, they would be fined $100 per employee, per day. 26 U.S.C. § 4980D(b)(1). With over 730 employees, fines could approximate $25.5 million each year. If Plaintiffs simply stop providing health insurance altogether, then the Plaintiffs would be forced to pay about $1.4 million per year. *See id*. § 4980H(c)(1) (fining employer $2,000 per employee per year), and put themselves at a serious disadvantage in their ability to attract and keep employees.

The government has not challenged the reality of these financial threats. Therefore, there is only one possible conclusion - Plaintiffs' religious beliefs have been and are being substantial burdened because the HHS Mandate requires Plaintiffs to:

- Compromise their religious beliefs,
- Pay close to $25.5 million more in fines or penalties, or
- Pay roughly $1.4 million in annual taxes and drop health-insurance benefits for all employees.

This is exactly the kind of Hobson's choice described in *Hobby Lobby I*. Plaintiffs have established a substantial burden as a matter of law. *Id*. at *20-21.

In addressing the issue of substantial burden in its order, the district court below stated that the issue was "whether it is a substantial burden" on Plaintiffs. Transcript at 96. The district court quoted from the *Hobby Lobby* Tenth Circuit motions panel which noted that the "particular burden of which plaintiffs complain is that funds which plaintiffs will contribute to a group health plan might, after a series of independent decisions by health-care providers and patients covered by the plan, subsidize someone else's… participation in an activity that is condemned by plaintiffs' religion. *Such an indirect and attenuated relationship appears unlikely to establish the necessary substantial burden*… it had not been shown to be substantially likely, that the plaintiffs would succeed on the merits in establishing a substantial burden on their exercise of their religious beliefs; and therefore, they…denied the injunction." *Id.* (emphasis added).The district court then concluded that "the proper thing for me to do is to follow the lead of the motions panel," and denied the preliminary injunction. However, this result is in direct contrast with this Court's determination in *Hobby Lobby I*, that "[i]t is not the employees' health care decisions that burden the corporations' religious beliefs, but the government's demand that [plaintiffs] enable access to contraceptives that [plaintiffs] deem morally problematic." *Hobby Lobby I* at 21.

By forcing Plaintiffs to provide for and participate in what their religious beliefs denounce as ending a human life and a grievous sin, the government has

unquestionably imposed a substantial burden both as a matter of fact and as a matter of law.

4. The HHS Mandate, as applied to these Plaintiffs, violates RFRA.

Insomuch as the HHS Mandate substantially burdens Plaintiffs' exercise of religion, the burden shifts to the government to demonstrate that application of the burden to these Plaintiffs is (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; *O Centro Espirita*, 546 U.S. at 429, 430 (citing 42 U.S.C. § 2000bb-1(b)); *Lukumi*, 508 U.S. at 546.

It is not enough for government to describe a compelling interest in the abstract or in a categorical fashion; the government must demonstrate that the interest "would be adversely affected by granting an exemption" to the religious claimant. *O Centro Espirita*, 546 U.S. at 431; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520,546 (1993) (rejecting the assertion that protecting public health was a compelling interest "in the context of these ordinances"). *See also United States v. Robel*, 389 U.S. 258, 263 (1967); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000) (government cannot propose such an interest "in the abstract," but must show a compelling interest "in the circumstances of this case" by looking at the particular "aspect" of the interest as "addressed by the law at issue" and to these Plaintiffs).

a. The HHS Mandate does not further a compelling government interest.

A compelling interest is an interest of "the highest order," *Lukumi*, 508 U.S. at 546, and is implicated only by "the gravest abuses, endangering paramount interests," *Thomas v. Collins*, 323 U.S. 516, 530 (1945). To be compelling, the government's evidence must show not merely a correlation but a "caus[al]" nexus between its Mandate and the grave interest it supposedly serves. *Brown v. Entertainment Merchandise Association*, 131 S. Ct. 2729, 2739 (June 27, 2011). If Defendants' "evidence is not compelling," they fail their burden. Critically, the government "bears the risk of uncertainty . . . ambiguous proof will not suffice" and cannot satisfy its burden under RFRA with speculation and generalizations. *Id.* This court stated in *Hobby Lobby I* that the government failed to prove a compelling interest for two reasons. 2013 WL 3216103 at *59. The first reason was that the government's stated interests are insufficient because they are too "broadly formulated" to "justify[]." *Id*. (quoting *O Centro*, 546 U.S. at 431). The second was that the HHS Mandate "cannot be compelling" because of the millions of people the government has already exempted. *Id*.

While recognizing "the general interest in promoting public health and safety," the Supreme Court has held that "invocation of such general interests, standing alone, is not enough." *O Centro Espirita*, 546 U.S. at 438. The government must demonstrate "some substantial threat to public safety, peace, or

order" (or an equally compelling interest) that would be posed by exempting the claimant. *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972). In this context, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Sherbert*, 374 U.S. at 406.

Defendants must show that the alleged harm to Plaintiffs' employees is not mild, but extreme; and that, absent the HHS Mandate, it threatens the "gravest," "highest," and most "paramount" consequences for Plaintiffs' employees. But the HHS Mandate's regulations cite no rash of contraceptive/abortifacient-deprived injuries or deaths among employees of religiously-devout employers or otherwise.

The most ironic flaw in Defendants' assertion of a compelling interest is that the federal government itself has voluntarily omitted millions of employees from the HHS Mandate for secular and religious reasons, but Defendants still refuse to exempt Plaintiffs and their employees. Congress considered some of the ACA's requirements paramount enough to impose on grandfathered plans.[7] *See* 75 Fed. Reg. at 34,542 (listing ACA §§ 2704, 2708, 2711, 2712, 2715, and 2718 as applicable to grandfathered plans).

No compelling interest exists when the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of

[7] Judge Kane estimated in his July 27, 2012 order granting preliminary injunctive relief to the plaintiffs that "191 million Americans belong to plans which may be grandfathered under the ACA." *Newland*, 881 F.Supp.2d at 1291; accord *Tyndale House*, 2012 WL 5817323 at *18.

the same sort." *Lukumi*, 508 U.S. at 546–47. Importantly, the Supreme Court and lower courts have insisted that that government action cannot survive strict scrutiny if it offers exemptions to others. *See, e.g.*, *id.* at 542–46; *O Centro Espirita*, 546 U.S. at 432–37. The Defendants' exemptions to the HHS Mandate "fatally undermine[] the Government's broader contention that [its law] will be 'necessarily . . . undercut'" if Plaintiffs are exempted too. *O Centro Espirita*, 546 U.S. at 434.

Congress intentionally omitted the HHS Mandate from the statute as a requirement it considered important enough to impose on all plans. Moreover, Congress gave HHS authority to exempt from their HHS Mandate any religious objectors it wanted to exempt. 76 Fed. Reg. 46,621, 46,623-24; 77 Fed. Reg. 8725, 8,726. Such a second class interest cannot be considered compelling under strict scrutiny and cannot trump religious objections under RFRA.

As virtually all other courts confronted with this issue have recognized, the government has exempted employers in a number of categories from compliance with the HHS Mandate. Defendants' immense grandfathering exemption in particular has nothing to do with a determination that those more than 100 million Americans in grandfathered plans do not need contraceptive/abortifacient coverage while Plaintiffs' employees somehow do. 76 Fed. Reg. at 46,623 & n.4. The exemption rather was a purely political effort to garner votes for the ACA by

which President Obama could claim, "If you like your health care plan, you can keep your health care plan."

Defendants cannot claim a grave interest in a scarcity or cost of abortion-inducing drugs and devices in health insurance as such drugs and devices are ubiquitous. Defendant Sebelius herself admitted that "contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support."[8] Such "income-based support" is available through federal government subsidies in Title XIX-Medicaid, Title X-Family Planning Services and other federal programs,[9] as well as through subsidies by state governments.[10]

[8] "A statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius," (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Mar. 9, 2013).

[9] In 2010, public expenditures for family planning services totaled $2.37 billion, and Title X of the Public Health Service Act, devoted specifically to family planning services, contributed $228 million during this same year. Guttmacher Institute, *Facts on Publicly Funded Contraceptive Services in the United States* (May 2012), http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited Feb. 22, 2013).

[10] Recently, Defendants showed that they do not believe a compelling interest exists to promote contraceptive access. In Texas, HHS has decided to cease providing 90% of funding of a $40 million Texas Women's Health family planning program the primary purpose of which is contraceptive management. Texas had been using that funding to provide thousands of women with family planning, but Texas required funding providers not, directly or indirectly, to provide abortion. On this basis alone HHS, withdrew federal funding, which Defendant Sebelius admitted would cause "a huge gap in family planning." HHS decided that protecting the interests of abortion providers was more important than providing contraception access. *See* CBS News "Feds to stop funding Texas women's health program" (Mar. 9, 2012), *available at* http://www.cbsnews.com/8301-501363_162-57394686/feds-to-stop-funding-texas- womens-health-program/ (last visited Apr. 28, 2012).

The availability of contraceptive items for sale is ubiquitous, now reaching even vending machines on college campuses. Indeed, a large majority of Americans reportedly already have contraceptive coverage.[11] According to a recent study, cost is not a prohibitive factor to contraceptive access. Among women currently not using birth control, only 2.3% said it was due to birth control being "too expensive," and among women currently using birth control, only 1.3% said they chose their particular method of birth control because it was affordable.[12]

Defendants cannot claim there is a "grave" or "paramount" interest to impose the HHS Mandate on Plaintiffs or other religious objectors while allowing more than 100 million employees to be "unprotected." "[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 520. *See also United States v. Friday*, 525 F.3d 938, 958 (10th Cir. 2008) ("[T]he government is generally not permitted to punish religious damage to its compelling interests while letting equally serious secular damage go unpunished.").

The tens of millions of employees whose employers are not subject to the HHS Mandate and whose purported health and equality interests are left untouched

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[11] Nine out of ten employers, pre-Mandate, already provide a "full range" of contraceptive coverage. Guttmacher Institute, "Facts on Contraceptive Use in the United States," June 2010, *available at* http://www.guttmacher.org/pubs/fb_contr_use.html (last visited Apr. 28, 2012).

[12] Contraception in American, *Unmet Needs Survey, Executive Summary* 14 (Fib. 10, 16 (Fig. 12) (2012), http://www.contraceptioninamerica.com/downloads/Executive_Summary.pdf. (last visited Mar. 9, 2013).

by the HHS Mandate "completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs." *Newland*, 881 F. Supp. 2d at 1298 (citing 42 U.S.C. § 18011; 26 U.S.C. § 4980H(c)(2)).

While Defendants essentially admit that the HHS Mandate implicates religious exercise by exempting churches and, at least temporarily, religious non-profits, Defendants refuse to expand their exemption to include religiously-motivated employers like Plaintiffs. Defendants have simply engaged in political line-drawing.[13] Plaintiffs, who likewise object to the HHS Mandate on religious grounds, cannot be denied an exemption on the premise that Defendants can pick and choose between religious objectors. *See O Centro Espirita*, 546 U.S. at 434 (since the law does "not preclude exceptions altogether; RFRA makes clear that it is the obligation of the courts to consider" whether exceptions must also be afforded to others because of RFRA).

The Supreme Court insists that a law cannot survive strict scrutiny and be deemed to serve a compelling government interest while offering exemptions to others as does the HHS Mandate. *See, Lukumi* 508 U.S. at 542–46; *O Centro Espirita*, 546 U.S. at 432–37.

[13] The New York Times describes in great detail the politically-driven deliberation that led to the Mandate. "Rule Shift on Birth Control Is Concession to Obama Allies" (Feb. 10, 2012), *available at* http://www.nytimes.com/2012/02/11/health/policy/obama-to-offer- accommodation-on-birth-control-rule-officials-say.html?pagewanted=all (last visited Mar. 9, 2013).

b. The HHS Mandate is neither neutral nor generally applicable.

Likewise, as a consequence of the secular and even religious exemptions to the HHS Mandate, Defendants' HHS Mandate scheme is neither "neutral" nor "generally applicable." The HHS Mandate is neither neutral nor generally applicable as it discriminates among religious objectors, penalizes Plaintiffs for their religious conduct, and, as described above, allows massive exemptions from its provisions.

These massive exemptions cannot coexist with the concept that, as against Plaintiffs, there is a compelling interest that is implemented in a neutral and generally applicable manner.

c. The HHS Mandate is not the least restrictive means of achieving the purported interest.

The HHS Mandate is also not the least restrictive means of achieving the government's purported interest even assuming, *arguendo*, it advances a compelling government interest. RFRA requires the government to demonstrate that there are no feasible, less-restrictive alternatives. 42 U.S.C. § 2000bb-1(b)(2). In other words, the HHS Mandate must be demonstrated to be "the least restrictive means," not the least restrictive means the government chooses.

There are numerous obviously less-religiously-restrictive means by which the government could provide, at no cost to users, contraceptives, abortion-inducing drugs and devices, sterilization, and counseling and education for the

same, including by fully paying for such drugs and devices with taxpayer dollars. *See Newland*, 2012 WL 3069154 at *8 & 15.

Defendants bear the burden to show both of these elements—compelling interest and least restrictive means—including at the preliminary injunction stage. *O Centro Espirita*, 546 U.S. at 428–30 ("[T]he burdens at the preliminary injunction stage track the burdens at trial. . . . RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the [compelling interest] test," such as for speech claims under the First Amendment.).

Defendants fail the least restrictive means test simply because the government could easily achieve its presumed desire for free coverage of contraceptives and abortifacients *by providing that benefit itself***.** Rather than coerce Plaintiffs and others to provide this coverage in their health insurance plans, the government could:

- Create its own "contraception insurance" plan which covers all mandated abortion-inducing drugs and devices and then allow free enrollment in that plan for whomever the government seeks to cover.

- Directly subsidize providers of abortion-inducing drugs and devices to provide such drugs and devices to whomever the government designates.

- Offer tax credits or deductions to users for purchases of abortion-inducing drugs and devices.

- Impose a mandate on the abortion-inducing drugs and devices manufacturing industry to give away its products free.[14]

Defendants have not heretofore denied and cannot now deny that the government could pursue its goal more directly. This conclusion is not only dictated by common sense, but is also demonstrated by the plethora of federal and state government programs which already directly subsidize birth control and abortion-inducing drug and device coverage for many citizens through Title XIX-Medicaid, Title X-Family Planning Services programs and a myriad of other federal and state government programs.

These and other options could fully achieve Defendants' apparent goals while clearly being less restrictive on Plaintiffs' beliefs. There is thus no essential need to coerce Plaintiffs or other religious objectors to provide the objectionable contraceptives/abortifacients themselves. These other options may be more costly or more difficult to get through Congress (which further illustrates the public's disbelief that the HHS Mandate's interest is "compelling"). "The lesson" from

[14] And by virtue of Defendants' attempts to quell political backlash by claiming they may create an "accommodation" for some additional religious entities (but still not for Plaintiffs), Defendants are necessarily admitting that the Mandate is not the least restrictive means to achieve their goals. See 77 Fed. Reg. 16,501–08 (Mar. 21, 2012).

RFRA's case law "is that the government must show something more compelling than saving money."[15]

If a less restrictive alternative would serve the government's purposes, "the legislature must use that alternative." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). 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." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983).

CONCLUSION

The Court should reverse the district court's decision and remand with instructions to enter a preliminary injunction on behalf of Cherry Creek.

Respectfully submitted,

s/ Michael J. Norton

[15] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 224.

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ORAL ARGUMENT STATEMENT

Appellants submit that oral argument is necessary because this appeal presents issues of exceptional importance currently pending before several other circuits.

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CERTIFICATE OF SERVICE

I, Marilyn Kuipers, hereby certify that on July 31, 2013, I sent (or emailed with permission) a copy of the foregoing Brief for Appellants to:

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(A)(7)(B) because this brief contains 7,701 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

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ADDENDUM

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Kara, I'm going to rule from the bench. Are you still okay?

THE REPORTER: Yes.

THE COURT: I certainly have considered the briefs. I found them very interesting to read and good arguments and I wanted to say to you lawyers and others that this kind of a case is really why one wants to be a federal judge. You've got fairly interesting, difficult, challenging issues, good counsel, and that's really what we live for. At the same time, this case and the abortion issues generally I think maybe call for wisdom that no judge really can have. They're just too difficult. And our country and our society are just too divided with people very sincerely feeling really strongly on both sides. And the courts have a job to do, but it's not an easy job at all.

And I do not shrink from the job. Mr. Norton said at the beginning that it is my duty, and he's absolutely correct, to decide cases that come before me. And I will decide this motion this morning.

But as I will say as we move forward here, it comes before this Court from a unique and different way than I think it has probably come before most other courts who have considered the issue. The issue really today is whether or not the Court should grant an injunction. This is not the "decision on the merits" day. This is injunction day.

Possibly the first of more than one injunction day in this case.

It was a little curious to me that in the plaintiffs' lengthy and excellent brief, they did not really get to the injunction issues until page 63 or so. But they are on page 1 for me because that's what I face.

The issue is whether the Court should grant a preliminary injunction by reason of a substantial likelihood that the plaintiffs can and will be able to prove a violation of the Religious Freedom Restoration Act of 1993, which we have been calling RFRA, reported at 42 U.S.C. section 2000bb-1. That statute is the focus of my attention today because as both parties have said, and I agree, that provides even more protection for religious freedom and the free exercise of religion even than the Constitution does; and therefore if the plaintiffs cannot establish their right to an injunction under the RFRA statute, the Court need go no further in exploring the other constitutional issues.

RFRA has two basic parts. The first part is a burden on the plaintiff. The plaintiff must show that the government action has substantially burdened the plaintiffs' exercise of sincerely held religious beliefs. If the plaintiff presents a *prima facie* case of substantial burden, then it turns to the government to show that there is, notwithstanding the burden, a compelling governmental interest that furthers the existence of

the burden and that the way in which the government tackled the compelling governmental interest is the least restrictive means of furthering that compelling interest.

And that takes me to the Hobby Lobby case. I'm speaking of Hobby Lobby Stores, Inc., vs. Sebelius, reported at 2012 WL 6930302, a decision of a two-judge motions panel from the Tenth Circuit issued in November 2012. The panel was addressing a request for an injunction pending appeal of a decision of Judge Heaton of the western district of Oklahoma, which decision is reported at 870 F.Supp.2d 1278, also a 2012 decision. And in the underlying case in Oklahoma, the plaintiff raised substantially the same issues as are raised in the present case. That is not surprising at all because I have found in all of the cases I have read -- and I most certainly haven't read the 25 plus or minus cases, all of them, that the parties have referred to -- but in the ones that I have read, the issues are substantially the same.

And that is that a for-profit corporation is owned and operated by individuals who have sincere, very sincerely held religious beliefs and feel that it is offensive to and a burden on their religious beliefs if their company is forced to provide coverage, insurance coverage, so that females can obtain contraceptives and, as they see it, abortion products. They want no involvement in that; they want no association with that; and they feel that the federal statute that we're all

talking about here today -- I don't have the citation committed to memory -- the Patient Protection and Affordable Care Act, and regulations issued pursuant to that act, forces upon them.

In the Oklahoma decision by Judge Heaton, he examined the various issues in a really lengthy opinion in which he denied Hobby Lobby's request for a preliminary injunction. And according to the lawyers here today, or at least plaintiffs' counsel, that put Judge Heaton in the minority of district court judges around the country who have ruled on the issue. But for better or for worse, the plaintiffs in Hobby Lobby went to the Tenth Circuit and filed a motion for an injunction pending their appeal of Judge Heaton's decision. And that is how it came before Judges Ebel and Lucero of the Tenth Circuit.

In the written decision of the motion panel, the panel addressed a number of issues that we have heard discussed here today. To begin with, the panel noted, as Mr. Norton has also noted, that it would and did assess the same factors in dealing with the motion before them as will control the merits of the Tenth Circuit panel's review with respect to the injunction issue. So there is no distinction between considering it on a motion for preliminary -- for injunction pending appeal heard by the two judges than the factors that will control the merits of the issue.

They then went on to discuss whether there is a so-called heightened burden on the plaintiffs because it is one

of the disfavored types of injunctions, such as injunctions that alter the status quo, mandatory injunctions, injunctions that afford the movant all of the relief it could recover at the conclusion of a full trial on the merits. And the panel said no. It is not that type of injunction; we will apply the normal four-factor test for a preliminary injunction. To that extent, at least, the panel favored the position of the plaintiffs.

It's interesting here that to the extent that there are differences between this case and Hobby Lobby, one of them is that you could look at this case as seeking an injunction that alters the status quo. The status quo that affects the Cherry Creek plaintiffs is that whether or not they were aware of it or agreed to it, which they did not, their policy has been and is providing this kind of coverage and has been doing that for quite some period of time, many months at least. And so in that sense, the injunction that they ask the Court to issue today would alter that status quo.

However, I'm not sure that that's the way that we should look at it. I think the way that the Tenth Circuit seemed to look at it really was whether the injunction would alter the status quo that existed before this type of coverage was required. And in that sense, there wouldn't be a heightened burden. I don't have to decide that today. It's not material to me because I am perfectly comfortable applying

the normal four-part test, as did the Tenth Circuit panel.

Under that test, the moving party, here the plaintiffs, must show:

1. A substantial likelihood of success on the merits. That makes perfect sense. They're trying to stop this government program in its tracks pending the ultimate decision by the Court on the merits. And you can't come and ask a court to enjoin something unless you are prepared to show that there's a substantial likelihood that you ultimately will prevail.

Secondly, that you have suffered and are suffering irreparable injury.

Third, that the threatened injury outweighs any damage that the injunction may cause the opposing party.

And 4, that the injunction would not be adverse to the public interest.

There's been some discussion of the second of those factors today, irreparable injury. The government claims that there's no irreparable injury because the plaintiffs have sat on their rights. They knew in December that this was in their plan, but they did not file a case until March and so far as the Court is aware, made little, if any, effort to obtain an immediate, emergent, forthwith injunctive hearing, putting us here in May, five to six months after they learned of it.

I don't think I have to decide the irreparable injury

issue, but I do want to comment on one aspect of it that's a little unique here. And that is we are two weeks away from an argument in front of the Tenth Circuit *en banc* on the very issues that we are addressing today. It does seem to me that if the plaintiffs were willing to wait three months to file the suit and five months to have their argument, it's a little difficult for them to complain that they will suffer irreparable injury by having to wait two weeks, plus whatever amount of time the *en banc* panel may need to use to put together their decision. We are simply so close to having a decision that will control and bind the Court that I think their irreparable injury argument is difficult to make.

But the circuit doesn't discuss irreparable injury, and I'm not saying that I'm deciding this case based on the lack of irreparable injury. I don't think I need to do that.

The circuit then addressed the troublesome issue of what is the standard that applies to whether there is a substantial likelihood of success. You might think that substantial likelihood of success means just what it says, but courts find ways sometimes to interpret language in a different way than maybe other people would interpret the same language. And courts have said that if the other three factors; namely, irreparable injury, does the threatened injury outweigh any damage, would it be adverse to the public interest. If those factors weigh particularly heavily in favor of the plaintiff,

then the court is prepared to apply what it calls a relaxed type of standard regarding substantial likelihood of success. Basically if there are substantial, difficult, unresolved issues, we should keep our pants on and wait until we get to the merits; but it's good enough for a preliminary injunction.

The Tenth Circuit rejected the notion that the relaxed standard should apply. They did so because of previous Tenth Circuit law which they quoted, and I quote, Where a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the less rigorous "fair ground for litigation standard" should not be applied.

Let me pause for a moment to reflect on what the motions-panel decision means to me. Is it binding on me as binding precedent? No. The decision of the *en banc* panel will be. But the decision of Judges Ebel and Lucero is not. On the other hand, is it relevant to me? Absolutely relevant to me. I'm a trial court. The Tenth Circuit is my boss. They tell me what the law is, and I apply it. Even though we don't have a binding, final decision on the merits, that, again, to be discussed by the circuit in two weeks, we have the decision of two experienced, highly reputable judges who have said what they think about these issues that I face today; and it would be idiotic for me not to consider that to be relevant.

Furthermore -- and I'll come back to this point --

with respect to the decision on which it reached its decision -- on the basis on which it reached its decision, the motion panel said, quote, Again, we do not think there is a substantial likelihood that this court -- referring to the Tenth Circuit court -- will extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship.

So what we have, folks, is two judges of the Tenth Circuit deciding these issues. Two judges of the Tenth Circuit saying, we do not think this court will view them differently. And a decision practically around the corner from that court. I cannot help but be affected in my thinking by that unusual combination of circumstances.

Anyway, having rejected relaxed standard regarding substantial likelihood of success, the panel then went on to say that the plaintiffs had failed to satisfy the first of the two RFRA elements, *i.e.*, that the challenged mandates substantially burdened their exercise of religion. I think it's only fair at this point to note that they did not, the government does not, and certainly I do not, doubt even for a second that the plaintiffs here not only have sincerely held religious beliefs as they have articulated them, but that they sincerely believe that this program imposes a substantial burden on those beliefs and their right to exercise those beliefs. That is clear to me.

But that isn't the issue. The issue is not whether do they believe it's a substantial burden, but whether it is a substantial burden, and on that issue the court found that the plaintiffs there had not shown that it was.

They then explained why, and they did so first by quoting from Judge Heaton's decision. They said -- and again I'm quoting now -- The particular burden of which plaintiffs complain is that funds which plaintiffs will contribute to a group health plan might, after a series of independent decisions by health-care providers and patients covered by the plan, subsidize someone else's -- and they emphasize someone else's -- participation in an activity that is condemned by plaintiffs' religion. Such an indirect and attenuated relationship appears unlikely to establish the necessary substantial burden.

And that is what they said, what I quoted before, We do not think there is a substantial likelihood that this court will extend the reach of RFRA to encompass the conduct of third parties with whom plaintiffs' is only a commercial relationship. In short, they found that it was not substantially likely, or at least it had not been shown to be substantially likely, that the plaintiffs would succeed on the merits in establishing a substantial burden on their exercise of their religious beliefs; and therefore they, like the district court, in Hobby Lobby, denied the injunction.

I noted before and I note again that in doing so, they said that they were not addressing the issue whether a corporation has free exercise rights. They were not addressing the issue of whether or not the individual plaintiffs here have to go it alone or that Cherry Creek Mortgage as a company has its own right to free exercise of religion. That is an enormously difficult issue. It is the issue identified by Judge Kane as the substantial and difficult issue that under the relaxed standard convinced him that the -- there was for that purpose substantial likelihood of success.

But the relaxed standard does not apply, according to the panel. And they determined that they did not have to address that issue because either way, individually or corporate-wise, there was a common failure to demonstrate a substantial likelihood of success on the RFRA *prima facie* case, and that sufficed to dispose of the motion for an injunction.

And because I think that is relevant, I have decided that the proper thing for me to do is to follow the lead of the motions panel and therefore I deny the motion, which is motion no. 12, for a preliminary injunction.

In saying that, however, I recognize, as you all do, that what the Tenth Circuit will say soon enough may differ. The prediction of Judges Ebel and Lucero as to what the merits panel would do may not turn out to be accurate. And therefore if the Tenth Circuit comes out the other way, as at least three

circuits have, on the issue, the plaintiffs are in no way foreclosed from coming back to this Court and once again requesting a preliminary injunction. This Court will follow the lead of the Tenth Circuit, no matter what direction that lead takes; and in fact, I would anticipate that if the Tenth Circuit rules in plaintiffs' favor, that there is a very good chance that this will be another one of those situations where the government might stipulate to an injunction.

Ms. Bennett has taken on a tiger by the tail, but she also knows when to stop beating her head against the wall. But that, for today, will be my decision. As I said, it was very interesting, I really enjoyed reading your materials, and I appreciate the quality of your arguments.

Thank you, folks.

Are there any questions?

MR. NORTON: Your Honor, would there be a written order forthcoming, or is this --

THE COURT: I think if you want a written order, you'll need to order the transcript. I don't intend to write this up.

MR. NORTON: You what?

THE COURT: The transcript. The transcript will be my written order.

MR. NORTON: Okay. Thank you, Your Honor.

THE COURT: Miss Bennett.

MS. BENNETT: Nothing, Your Honor; thank you.

THE COURT: Then if that's it, we'll be in recess; but I want to do one more thing, because this is just my thing, and that is I would like to meet you folks.

(Recess at 11:45 a.m.)

REPORTER'S CERTIFICATE

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

Dated at Denver, Colorado, this 17th day of May, 2013.

s/Kara Spitler
Kara Spitler

42 U.S.C. § 2000bb

Religious Freedom Restoration Act

(a) Findings

The Congress finds that--

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

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

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

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

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

(b) Purposes

The purposes of this chapter are--

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

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

42 U.S.C. § 2000bb-1

Free exercise of religion protected

(a) In general

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

(b) Exception

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

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

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

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-2

Definitions

As used in this chapter--

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

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

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

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

42 U.S.C.A. § 2000bb-3

Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

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

(c) Religious belief unaffected

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

26 U.S.C.A. § 4980D

Failure to meet certain group health plan requirements

(a) General rule.--There is hereby imposed a tax on any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements).

(b) Amount of tax.--

(1) In general.--The amount of the tax imposed by subsection (a) on any failure shall be $100 for each day in the noncompliance period with respect to each individual to whom such failure relates.

(2) Noncompliance period.--For purposes of this section, the term "noncompliance period" means, with respect to any failure, the period--

(A) beginning on the date such failure first occurs, and

(B) ending on the date such failure is corrected.

(3) Minimum tax for noncompliance period where failure discovered after notice of examination.--Notwithstanding paragraphs (1) and (2) of subsection (c)--

(A) In general.--In the case of 1 or more failures with respect to an individual--

(i) which are not corrected before the date a notice of examination of income tax liability is sent to the employer, and

(ii) which occurred or continued during the period under examination,

the amount of tax imposed by subsection (a) by reason of such failures with respect to such individual shall not be less than the lesser of $2,500 or the amount of tax which would be imposed by subsection (a) without regard to such paragraphs.

(B) Higher minimum tax where violations are more than de minimis.--To the extent violations for which any person is liable under subsection (e) for any year are more than de minimis, subparagraph (A) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(C) Exception for church plans.--This paragraph shall not apply to any failure under a church plan (as defined in section 414(e)).

(c) Limitations on amount of tax.--

(1) Tax not to apply where failure not discovered exercising reasonable diligence.--No tax shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such tax did not know, and exercising reasonable diligence would not have known, that such failure existed.

(2) Tax not to apply to failures corrected within certain periods.--No tax shall be imposed by subsection (a) on any failure if--

(A) such failure was due to reasonable cause and not to willful neglect, and

(B)(i) in the case of a plan other than a church plan (as defined in section 414(e)), such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such tax knew, or exercising reasonable diligence would have known, that such failure existed, and

(ii) in the case of a church plan (as so defined), such failure is corrected before the close of the correction period (determined under the rules of section 414(e)(4)(C)).

(3) Overall limitation for unintentional failures.--In the case of failures which are due to reasonable cause and not to willful neglect--

(A) Single employer plans.--

(i) In general.--In the case of failures with respect to plans other than specified multiple employer health plans, the tax imposed by subsection (a) for failures during the taxable year of the employer shall not exceed the amount equal to the lesser of--

(I) 10 percent of the aggregate amount paid or incurred by the employer (or predecessor employer) during the preceding taxable year for group health plans, or

(II) $500,000.

(ii) Taxable years in the case of certain controlled groups.--For purposes of this subparagraph, if not all persons who are treated as a single employer for purposes of this section have the same taxable year, the taxable years taken into account shall be determined under principles similar to the principles of section 1561.

(B) Specified multiple employer health plans.--

(i) In general.--In the case of failures with respect to a specified multiple employer health plan, the tax imposed by subsection (a) for failures during the taxable year of the trust forming part of such plan shall not exceed the amount equal to the lesser of--

(I) 10 percent of the amount paid or incurred by such trust during such taxable year to provide medical care (as defined in section 9832(d)(3)) directly or through insurance, reimbursement, or otherwise, or

(II) $500,000.

For purposes of the preceding sentence, all plans of which the same trust forms a part shall be treated as one plan.

(ii) Special rule for employers required to pay tax.--If an employer is assessed a tax imposed by subsection (a) by reason of a failure with respect to a specified multiple employer health plan, the limit shall be determined under subparagraph (A) (and not under this subparagraph) and as if such plan were not a specified multiple employer health plan.

(4) Waiver by Secretary.--In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the tax imposed by subsection (a) to the extent that the payment of such tax would be excessive relative to the failure involved.

(d) Tax not to apply to certain insured small employer plans.--

(1) In general.--In the case of a group health plan of a small employer which provides health insurance coverage solely through a contract with a health insurance issuer, no tax shall be imposed by this section on the employer on any failure (other than a failure attributable to section 9811) which is solely because of the health insurance coverage offered by such issuer.

(2) Small employer.--

(A) In general.--For purposes of paragraph (1), the term "small employer" means, with respect to a calendar year and a plan year, an employer who employed an average of at least 2 but not more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year. For purposes of the preceding sentence, all persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 shall be treated as one employer.

(B) Employers not in existence in preceding year.--In the case of an employer which was not in existence throughout the preceding calendar year, the

determination of whether such employer is a small employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(C) Predecessors.--Any reference in this paragraph to an employer shall include a reference to any predecessor of such employer.

(3) Health insurance coverage; health insurance issuer.--For purposes of paragraph (1), the terms "health insurance coverage" and "health insurance issuer" have the respective meanings given such terms by section 9832.

(e) Liability for tax.--The following shall be liable for the tax imposed by subsection (a) on a failure:

(1) Except as otherwise provided in this subsection, the employer.

(2) In the case of a multiemployer plan, the plan.

(3) In the case of a failure under section 9803 (relating to guaranteed renewability) with respect to a plan described in subsection (f)(2)(B), the plan.

(f) Definitions.--For purposes of this section--

(1) Group health plan.--The term "group health plan" has the meaning given such term by section 9832(a).

(2) Specified multiple employer health plan.--The term "specified multiple employer health plan" means a group health plan which is--

(A) any multiemployer plan, or

(B) any multiple employer welfare arrangement (as defined in section 3(40) of the Employee Retirement Income Security Act of 1974, as in effect on the date of the enactment of this section).

(3) Correction.--A failure of a group health plan shall be treated as corrected if--

(A) such failure is retroactively undone to the extent possible, and

(B) the person to whom the failure relates is placed in a financial position which is as good as such person would have been in had such failure not occurred.

26 U.S.C.A. § 4980H

Shared responsibility for employers regarding health coverage

(a) Large employers not offering health coverage.--If--

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under

an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee, then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

(b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.--

(1) In general.--If--

(A) an applicable large employer offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee, then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1/12 of $3,000.

(2) Overall limitation.--The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

[(3) Repealed. Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(4), Apr. 15, 2011, 125 Stat. 169]

(c) Definitions and special rules.--For purposes of this section--

(1) Applicable payment amount.--The term "applicable payment amount" means, with respect to any month, 1/12 of $2,000.

(2) Applicable large employer.--

(A) In general.--The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.

(B) Exemption for certain employers.--

(i) In general.--An employer shall not be considered to employ more than 50 full-time employees if--

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers.--The term "seasonal worker" means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including workers covered by section 500.20(s)(1) of title 29, Code of Federal Regulations and retail workers employed exclusively during holiday seasons.

(C) Rules for determining employer size.--For purposes of this paragraph--

(i) Application of aggregation rule for employers.--All persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) Employers not in existence in preceding year.--In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(iii) Predecessors.--Any reference in this subsection to an employer shall include a reference to any predecessor of such employer.

(D) Application of employer size to assessable penalties.--

(i) In general.--The number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating--

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

(ii) Aggregation.--In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with respect to such persons and such reduction shall be allocated

among such persons ratably on the basis of the number of full-time employees employed by each such person.

(E) Full-time equivalents treated as full-time employees.--Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

(3) Applicable premium tax credit and cost-sharing reduction.--The term "applicable premium tax credit and cost-sharing reduction" means--

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) Full-time employee.--

(A) In general.--The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) Hours of service.--The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment.--

(A) In general.--In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of--

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(B) Rounding.--If the amount of any increase under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) Other definitions.--Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

(7) Tax nondeductible.--For denial of deduction for the tax imposed by this section, see section 275(a)(6).

(d) Administration and procedure.--

(1) In general.--Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Time for payment.--The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc.--The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost-sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

26 U.S.C.A. § 5000A

Requirement to maintain minimum essential coverage

(a) Requirement to maintain minimum essential coverage.--An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

(b) Shared responsibility payment.--

(1) In general.--If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).

(2) Inclusion with return.--Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

(3) Payment of penalty.--If an individual with respect to whom a penalty is imposed by this section for any month--

(A) is a dependent (as defined in section 152) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

(B) files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

(c) Amount of penalty.--

(1) In general.--The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the lesser of--

(A) the sum of the monthly penalty amounts determined under paragraph (2) for months in the taxable year during which 1 or more such failures occurred, or

(B) an amount equal to the national average premium for qualified health plans which have a bronze level of coverage, provide coverage for the applicable family size involved, and are offered through Exchanges for plan years beginning in the calendar year with or within which the taxable year ends.

(2) Monthly penalty amounts.--For purposes of paragraph (1)(A), the monthly penalty amount with respect to any taxpayer for any month during which any failure described in subsection (b)(1) occurred is an amount equal to 1/12 of the greater of the following amounts:

(A) Flat dollar amount.--An amount equal to the lesser of--

(i) the sum of the applicable dollar amounts for all individuals with respect to whom such failure occurred during such month, or

(ii) 300 percent of the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

(B) Percentage of income.--An amount equal to the following percentage of the excess of the taxpayer's household income for the taxable year over the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer for the taxable year:

(i) 1.0 percent for taxable years beginning in 2014.

(ii) 2.0 percent for taxable years beginning in 2015.

(iii) 2.5 percent for taxable years beginning after 2015.

(3) Applicable dollar amount.--For purposes of paragraph (1)--

(A) In general.--Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $695.

(B) Phase in.--The applicable dollar amount is $95 for 2014 and $325 for 2015.

(C) Special rule for individuals under age 18.--If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for the month shall be equal to one-half of the applicable dollar amount for the calendar year in which the month occurs.

(D) Indexing of amount.--In the case of any calendar year beginning after 2016, the applicable dollar amount shall be equal to $695, increased by an amount equal to--

(i) $695, multiplied by

(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year, determined by substituting "calendar year 2015" for "calendar year 1992" in subparagraph (B) thereof.

If the amount of any increase under clause (i) is not a multiple of $50, such increase shall be rounded to the next lowest multiple of $50.

(4) Terms relating to income and families.--For purposes of this section--

(A) Family size.--The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year.

(B) Household income.--The term "household income" means, with respect to any taxpayer for any taxable year, an amount equal to the sum of--

(i) the modified adjusted gross income of the taxpayer, plus

(ii) the aggregate modified adjusted gross incomes of all other individuals who--

(I) were taken into account in determining the taxpayer's family size under paragraph (1), and

(II) were required to file a return of tax imposed by section 1 for the taxable year.

(C) Modified adjusted gross income.--The term "modified adjusted gross income" means adjusted gross income increased by--

(i) any amount excluded from gross income under section 911, and

(ii) any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax.

[(D) Repealed. Pub.L. 111-152, Title I, § 1002(b)(1), Mar. 30, 2010, 124 Stat. 1032]

(d) Applicable individual.--For purposes of this section--

(1) In general.--The term "applicable individual" means, with respect to any month, an individual other than an individual described in paragraph (2), (3), or (4).

(2) Religious exemptions.--

(A) Religious conscience exemption.--Such term shall not include any individual for any month if such individual has in effect an exemption under section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act which certifies that such individual is--

(i) a member of a recognized religious sect or division thereof which is described in section 1402(g)(1), and

(ii) an adherent of established tenets or teachings of such sect or division as described in such section.

(B) Health care sharing ministry.--

(i) In general.--Such term shall not include any individual for any month if such individual is a member of a health care sharing ministry for the month.

(ii) Health care sharing ministry.--The term "health care sharing ministry" means an organization--

(I) which is described in section 501(c)(3) and is exempt from taxation under section 501(a),

(II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,

(III) members of which retain membership even after they develop a medical condition,

(IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and

(V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

(3) Individuals not lawfully present.--Such term shall not include an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.

(4) Incarcerated individuals.--Such term shall not include an individual for any month if for the month the individual is incarcerated, other than incarceration pending the disposition of charges.

(e) Exemptions.--No penalty shall be imposed under subsection (a) with respect to--

(1) Individuals who cannot afford coverage.--

(A) In general.--Any applicable individual for any month if the applicable individual's required contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act. For purposes of applying this subparagraph, the taxpayer's household income shall be increased by any exclusion from gross income for any portion of the required contribution made through a salary reduction arrangement.

(B) Required contribution.--For purposes of this paragraph, the term "required contribution" means--

(i) in the case of an individual eligible to purchase minimum essential coverage consisting of coverage through an eligible-employer-sponsored plan, the portion of the annual premium which would be paid by the individual (without regard to whether paid through salary reduction or otherwise) for self-only coverage, or

(ii) in the case of an individual eligible only to purchase minimum essential coverage described in subsection (f)(1)(C), the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides (without regard to whether the individual purchased a qualified health plan through the Exchange), reduced by the amount of the credit allowable under section 36B for the taxable year (determined as if the individual was covered by a qualified health plan offered through the Exchange for the entire taxable year).

(C) Special rules for individuals related to employees.--For purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by reason of a relationship to an employee, the determination under subparagraph (A) shall be made by reference to required contribution of the employee.

(D) Indexing.--In the case of plan years beginning in any calendar year after 2014, subparagraph (A) shall be applied by substituting for '8 percent' the percentage the Secretary of Health and Human Services determines reflects the excess of the rate of premium growth between the preceding calendar year and 2013 over the rate of income growth for such period.

(2) Taxpayers with income below filing threshold.--Any applicable individual for any month during a calendar year if the individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act is less than the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer.

(3) Members of Indian tribes.--Any applicable individual for any month during which the individual is a member of an Indian tribe (as defined in section 45A(c)(6)).

(4) Months during short coverage gaps.--

(A) In general.--Any month the last day of which occurred during a period in which the applicable individual was not covered by minimum essential coverage for a continuous period of less than 3 months.

(B) Special rules.--For purposes of applying this paragraph--

(i) the length of a continuous period shall be determined without regard to the calendar years in which months in such period occur,

(ii) if a continuous period is greater than the period allowed under subparagraph (A), no exception shall be provided under this paragraph for any month in the period, and

(iii) if there is more than 1 continuous period described in subparagraph (A) covering months in a calendar year, the exception provided by this paragraph shall only apply to months in the first of such periods.

The Secretary shall prescribe rules for the collection of the penalty imposed by this section in cases where continuous periods include months in more than 1 taxable year.

(5) Hardships.--Any applicable individual who for any month is determined by the Secretary of Health and Human Services under section 1311(d)(4)(H) to have

suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

(f) Minimum essential coverage.--For purposes of this section--

(1) In general.--The term "minimum essential coverage" means any of the following:

(A) Government sponsored programs.--Coverage under--

(i) the Medicare program under part A of title XVIII of the Social Security Act,

(ii) the Medicaid program under title XIX of the Social Security Act,

(iii) the CHIP program under title XXI of the Social Security Act,

(iv) medical coverage under chapter 55 of title 10, United States Code, including coverage under the TRICARE program;

(v) a health care program under chapter 17 or 18 of title 38, United States Code, as determined by the Secretary of Veterans Affairs, in coordination with the Secretary of Health and Human Services and the Secretary,

(vi) a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers); or

(vii) the Nonappropriated Fund Health Benefits Program of the Department of Defense, established under section 349 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337; 10 U.S.C. 1587 note).

(B) Employer-sponsored plan.--Coverage under an eligible employer-sponsored plan.

(C) Plans in the individual market.--Coverage under a health plan offered in the individual market within a State.

(D) Grandfathered health plan.--Coverage under a grandfathered health plan.

(E) Other coverage.--Such other health benefits coverage, such as a State health benefits risk pool, as the Secretary of Health and Human Services, in coordination with the Secretary, recognizes for purposes of this subsection.

(2) Eligible employer-sponsored plan.--The term "eligible employer-sponsored plan" means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is--

(A) a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act), or

(B) any other plan or coverage offered in the small or large group market within a State.

Such term shall include a grandfathered health plan described in paragraph (1)(D) offered in a group market.

(3) Excepted benefits not treated as minimum essential coverage.--The term "minimum essential coverage" shall not include health insurance coverage which consists of coverage of excepted benefits--

(A) described in paragraph (1) of subsection (c) of section 2791 of the Public Health Service Act; or

(B) described in paragraph (2), (3), or (4) of such subsection if the benefits are provided under a separate policy, certificate, or contract of insurance.

(4) Individuals residing outside United States or residents of territories.--Any applicable individual shall be treated as having minimum essential coverage for any month--

(A) if such month occurs during any period described in subparagraph (A) or (B) of section 911(d)(1) which is applicable to the individual, or

(B) if such individual is a bona fide resident of any possession of the United States (as determined under section 937(a)) for such month.

(5) Insurance-related terms.--Any term used in this section which is also used in title I of the Patient Protection and Affordable Care Act shall have the same meaning as when used in such title.

(g) Administration and procedure.--

(1) In general.--The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Special rules.--Notwithstanding any other provision of law--

(A) Waiver of criminal penalties.--In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

(B) Limitations on liens and levies.--The Secretary shall not--

(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

(ii) levy on any such property with respect to such failure.

29 U.S.C.A. § 1132

Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), (8), or (9) of subsection (c) of this section or under subsection (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title1 or the terms of the plan, by the Secretary, by any individual who was a participant or

beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts; or

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor--

(A) has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or

(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section, by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if--

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(3) Except as provided in subsections (c)(9) and (a)(6) (with respect to collecting civil penalties under subsection (c)(9)), the Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 1191b(a)(1) of this title). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title, section 1021(e)(1) of this title or section 1021(f), or section 1025(a) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(1) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person or who fails to meet the requirements of section 1082(d)(12)(E) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 a day for each violation by any person of subsection (j), (k), or (l) of section 1021 of this title or section 1144(e)(3) of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 1021(g) of this title.

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 1024(a)(6) of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with subsection (i) or (m) of section 1021 of this title. For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(8) The Secretary may assess against any plan sponsor of a multiemployer plan a civil penalty of not more than $1,100 per day--

(A) for each violation by such sponsor of the requirement under section 1085 of this title to adopt by the deadline established in that section a funding improvement plan or rehabilitation plan with respect to a multiemployer plan which is in endangered or critical status, or

(B) in the case of a plan in endangered status which is not in seriously endangered status, for failure by the plan to meet the applicable benchmarks under section 1085 of this title by the end of the funding improvement period with respect to the plan.

(9)

(A) The Secretary may assess a civil penalty against any employer of up to $100 a day from the date of the employer's failure to meet the notice requirement of section 1181(f)(3)(B)(i)(I) of this title. For purposes of this subparagraph, each violation with respect to any single employee shall be treated as a separate violation.

(B) The Secretary may assess a civil penalty against any plan administrator of up to $100 a day from the date of the plan administrator's failure to timely provide to any State the information required to be disclosed under section 1181(f)(3)(B)(ii) of this title. For purposes of this subparagraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(10) Secretarial enforcement authority relating to use of genetic information

(A) General rule

The Secretary may impose a penalty against any plan sponsor of a group health plan, or any health insurance issuer offering health insurance coverage in connection with the plan, for any failure by such sponsor or issuer to meet the requirements of subsection (a)(1)(F), (b)(3), (c), or (d) of section 1182 of this title or section 1181 or 1182(b)(1) of this title with respect to genetic information, in connection with the plan.

(B) Amount

(i) In general

The amount of the penalty imposed by subparagraph (A) shall be $100 for each day in the noncompliance period with respect to each participant or beneficiary to whom such failure relates.

(ii) Noncompliance period

For purposes of this paragraph, the term "noncompliance period" means, with respect to any failure, the period--

(I) beginning on the date such failure first occurs; and

(II) ending on the date the failure is corrected.

(C) Minimum penalties where failure discovered

Notwithstanding clauses (i) and (ii) of subparagraph (D):

(i) In general

In the case of 1 or more failures with respect to a participant or beneficiary--

(I) which are not corrected before the date on which the plan receives a notice from the Secretary of such violation; and

(II) which occurred or continued during the period involved;

the amount of penalty imposed by subparagraph (A) by reason of such failures with respect to such participant or beneficiary shall not be less than $2,500.

(ii) Higher minimum penalty where violations are more than de minimis

To the extent violations for which any person is liable under this paragraph for any year are more than de minimis, clause (i) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(D) Limitations

(i) Penalty not to apply where failure not discovered exercising reasonable diligence

No penalty shall be imposed by subparagraph (A) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such penalty did not know, and exercising reasonable diligence would not have known, that such failure existed.

(ii) Penalty not to apply to failures corrected within certain periods

No penalty shall be imposed by subparagraph (A) on any failure if--

(I) such failure was due to reasonable cause and not to willful neglect; and

(II) such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such penalty knew, or exercising reasonable diligence would have known, that such failure existed.

(iii) Overall limitation for unintentional failures

In the case of failures which are due to reasonable cause and not to willful neglect, the penalty imposed by subparagraph (A) for failures shall not exceed the amount equal to the lesser of--

(I) 10 percent of the aggregate amount paid or incurred by the plan sponsor (or predecessor plan sponsor) during the preceding taxable year for group health plans; or

(II) $500,000.

(E) Waiver by Secretary

In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the penalty imposed by subparagraph (A) to the extent that the payment of such penalty would be excessive relative to the failure involved.

(F) Definitions

Terms used in this paragraph which are defined in section 1191b of this title shall have the meanings provided such terms in such section.

(10) 2 The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8) of Title 42.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan--

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of--

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)--

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that--

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

42 U.S.C. § 300gg-13.

Coverage of preventive health services

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for--

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

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

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

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

(5) for the purposes of this chapter, and for the purposes of any other provision of law, the current recommendations of the United States Preventive Service Task Force regarding breast cancer screening, mammography, and prevention shall be considered the most current other than those issued in or around November 2009.

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

(b) Interval

(1) In general

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

(2) Minimum

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

(c) Value-based insurance design

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

42 U.S.C.A. § 18011

Preservation of right to maintain existing coverage

(a) No changes to existing coverage

(1) In general

Nothing in this Act (or an amendment made by this Act) shall be construed to require that an individual terminate coverage under a group health plan or health insurance coverage in which such individual was enrolled on March 23, 2010.

(2) Continuation of coverage

Except as provided in paragraph (3), with respect to a group health plan or health insurance coverage in which an individual was enrolled on March 23, 2010, this subtitle and subtitle A (and the amendments made by such subtitles) shall not apply to such plan or coverage, regardless of whether the individual renews such coverage after March 23, 2010.

(3) Application of certain provisions

The provisions of sections 2715 [42 U.S.C. 300gg-15] and 2718 [42 U.S.C. 300gg-18] of the Public Health Service Act (as added by subtitle A) shall apply to grandfathered health plans for plan years beginning on or after March 23, 2010.

(4) Application of certain provisions

(A) In general

The following provisions of the Public Health Service Act [42 U.S.C. 201 et seq.] (as added by this title) shall apply to grandfathered health plans for plan years beginning with the first plan year to which such provisions would otherwise apply:

(i) Section 2708 [42 U.S.C. 300gg-7] (relating to excessive waiting periods).

(ii) Those provisions of section 2711 [42 U.S.C. 300gg-11] relating to lifetime limits.

(iii) Section 2712 [42 U.S.C. 300gg-12] (relating to rescissions).

(iv) Section 2714 [42 U.S.C. 300gg-14] (relating to extension of dependent coverage).

(B) Provisions applicable only to group health plans

(i) Provisions described

Those provisions of section 2711 [42 U.S.C. 300gg-11] relating to annual limits and the provisions of section 2704 [42 U.S.C. 300gg-3] (relating to pre-existing condition exclusions) of the Public Health Service Act (as added by this subtitle) shall apply to grandfathered health plans that are group health plans for plan years beginning with the first plan year to which such provisions otherwise apply.

(ii) Adult child coverage

For plan years beginning before January 1, 2014, the provisions of section 2714 of the Public Health Service Act [42 U.S.C. 300gg-14] (as added by this subtitle) shall apply in the case of an adult child with respect to a grandfathered health plan that is a group health plan only if such adult child is not eligible to enroll in an eligible employer-sponsored health plan (as defined insection 5000A(f)(2) of Title 26) other than such grandfathered health plan.

(b) Allowance for family members to join current coverage

With respect to a group health plan or health insurance coverage in which an individual was enrolled on March 23, 2010, and which is renewed after such date, family members of such individual shall be permitted to enroll in such plan or coverage if such enrollment is permitted under the terms of the plan in effect as of March 23, 2010.

(c) Allowance for new employees to join current plan

A group health plan that provides coverage on March 23, 2010, may provide for the enrolling of new employees (and their families) in such plan, and this subtitle and subtitle A (and the amendments made by such subtitles) shall not apply with respect to such plan and such new employees (and their families).

(d) Effect on collective bargaining agreements

In the case of health insurance coverage maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers that was ratified before March 23, 2010, the provisions of this subtitle and subtitle A (and the amendments made by such subtitles) shall not apply until the date on which the last of the collective bargaining agreements relating to the coverage terminates. Any coverage amendment made pursuant to a collective bargaining agreement relating to the coverage which amends the coverage solely to conform to any requirement added by this subtitle or subtitle A (or amendments) shall not be treated as a termination of such collective bargaining agreement.

(e) Definition

In this title, the term "grandfathered health plan" means any group health plan or health insurance coverage to which this section applies.