UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

W. L. (BILL) ARMSTRONG, et al., *Plaintiffs-Appellants,* v. KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services, et al., *Defendants-Appellees.*	No. 13-1218 (D.C. No. 1:13-CV-00563-RBJ)

PLAINTIFFS-APPELLANTS' MOTION
FOR INJUNCTION PENDING APPEAL

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I. INTRODUCTION AND PROCEDURAL BACKGROUND

Pursuant to F.R.A.P. 8, Plaintiffs-Appellants (referred to herein as "Plaintiffs") move this Court for the entry of an order granting them an injunction pending appeal against enforcement by Defendants-Appellees (referred to herein as "Defendants") of the preventive services coverage mandate of the Patient Protection and Affordable Care Act ("ACA") and related regulations (the "Mandate"). In support hereof, Plaintiffs state as follows:

On March 5, 2013, Plaintiffs filed their Verified Complaint (Doc. 1). On March 18, 2013, Plaintiffs filed their Motion for a Preliminary Injunction (Doc. 12) and their Brief in Support of Motion for Preliminary Injunction (Doc. 13).

On May 10, 2013, the district court conducted a hearing on Plaintiffs' Motion for a Preliminary Injunction and entered its oral order denying this motion (Doc. 38).

Thereafter, on May 16, 2013, Plaintiffs filed their Notice of Appeal (Doc. 39) and, on July 31, 2013, Plaintiffs filed their Opening Brief on Appeal. Defendants reply brief is to be filed on or before September 10, 2013.

On June 27, 2013, this Court rendered its en banc decision in *Hobby Lobby Stores Inc. v. Sebelius*, No. 12-6294, 2013 WL 3216103 (10th Cir.). In brief summary, this Court held that the Hobby Lobby and Mardel plaintiffs: (a) were entitled to bring claims under the Religious Freedom Restoration Act ("RFRA"); (b) had established a likelihood of success that their rights under RFRA were substantially burdened by the Mandate and that the government satisfied neither the compelling interest nor least restrictive means requirements of RFRA; and (c) had established irreparable harm. The Court commanded no majority on

the other equitable factors in the Hobby Lobby plaintiffs' injunction motion, and thereupon remanded the *Hobby Lobby* case to the district court for further evaluation.

On July 1, 2013, Plaintiffs moved the district court below for an injunction pursuant to Fed. R. Civ. P. 62(c) in light of this Court's en banc decision in *Hobby Lobby*, because the claim of Plaintiffs is materially indistinguishable from the claim of Hobby Lobby.

The district court asked for additional briefing (Doc. # 50) focusing primarily on the issue of whether the court retains sufficient jurisdiction to continue proceedings during this appeal and to enter an injunction for the Plaintiffs. Plaintiffs asserted that the court does retain jurisdiction to enter an injunction, including pursuant to Rule 62(c). *See also State of Colo. v. Idarado Min. Co.*, 916 F.2d 1486, 1490 n.2 (10th Cir. 1990) ("the district 'court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal,'" quoting Rule 62(c), and citing 9 MOORE'S FEDERAL PRACTICE ¶ 203.11).

In the meantime, on July 19, 2013, the district court for the Western District of Oklahoma resolved the two remaining preliminary injunction factors in favor of the Hobby Lobby plaintiffs. *Hobby Lobby Stores, Inc. v. Sebelius,* Case No. CIV-12-1000-HE, 2013 WL 3869832 (W.D. Okla. July 19, 2013).

On August 19, 2013, the district court entered an order that declined to rule specifically for or against an injunction for Plaintiffs, based solely on the government's dispute over whether the district court has jurisdiction to do so. (Doc. 54). Thus, the district court "failed to afford the relief requested." Fed. R. App. P. 8(a)(2)(A)(ii).

Thus, Plaintiffs promptly attempted to obtain an injunction from the district court after *Hobby Lobby*, and the district court decided not to rule.

Hobby Lobby and the reasons stated therein demonstrate that Plaintiffs are likely to succeed on the merits of this appeal and therefore are entitled to an injunction pending appeal. Specifically, because of the holdings in *Hobby Lobby*:

- Cherry Creek Mortgage Co., Inc., a Colorado corporation ("Cherry Creek"), has Article III standing to sue pursuant to RFRA, and exercise religion under RFRA, when it and its owners object to the mandate that Cherry Creek provide health insurance coverage for abortifacient items.

- Cherry Creek has established a likelihood of success that its religious rights under RFRA have been and continue to be substantially burdened by the Mandate, and that the government cannot satisfy either of its burdens under RFRA that it has a compelling interest to impose this mandate on Cherry Creek or that the imposition is the government's least restrictive means of achieving its goals.

- Cherry Creek has established irreparable harm by virtue of its compelled compliance with the Mandate in violation of its rights under RFRA, under the threat of massive fines and lawsuit penalties for refusal to comply.[1]

The facts and claims of Plaintiffs here are virtually identical to the facts and claims of the Hobby Lobby plaintiffs, and the government has asserted no substantive challenge to the facts of Cherry Creek and its owners. Thus, Plaintiffs are likely to succeed on the merits of this appeal, and are entitled to an injunction from this Court pending appeal.

Plaintiffs need an injunction pending appeal from this Court. On pain of financial penalties and potential dissolution of their business, Plaintiffs continue to be coerced into

[1] Plaintiffs' motion for an injunction pending appeal is based only on their RFRA claim since full relief may be granted Plaintiffs pursuant to that statute.

providing coverage of abortion-inducing drugs and devices in their health insurance plan and into acting against their religious beliefs. Only an injunction from this Court will enable Plaintiffs and their insurer to remove coverage of abortion-inducing drugs and devices from Plaintiffs' health insurance plan. The district court "failed to afford the relief requested" under Fed. R. App. P. 8(a)(2)(A)(ii), based on the incorrect view asserted by the government that the court lacked jurisdiction to do so even though Rule 62 explicitly authorizes the district court to "suspend, modify, restore, or grant an injunction during the pendency of the appeal." Further proceedings in the district court below would be futile and impracticable under Rule 8(a)(2)(A)(i), since Plaintiffs have already requested the same relief from the district court and have been informed that no ruling will issue.

Defendants, through their counsel, have advised counsel for Plaintiffs that Defendants oppose the grant by this Court of an injunction pending appeal.

II. FACTUAL BACKGROUND

A. Plaintiffs and Their Religious Beliefs.

As described in detail in Plaintiffs' Verified Complaint ("VC"), the individual Plaintiffs are the owners, managers, and all of the voting shareholders of Cherry Creek Mortgage. VC ¶¶ 2, 3, 31. Each individual Plaintiff is a practicing Evangelical Christian and believes that the Holy Bible is the inspired, inerrant Word of God. VC ¶ 42.

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 being 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 ways, preventing his implantation in the uterus (early abortion-inducing drugs and devices), is a sin against God. VC ¶¶ 4, 45, 46, 48.

Plaintiffs seek to follow the Holy Bible in their management of Cherry Creek. Their Christian faith permeates both their management of Cherry Creek and their personal lives. VC ¶¶ 4, 42, 43 44, 47. While Plaintiffs provide generous health insurance benefits to their employees, Plaintiffs believe it is immoral for them to continue to be forced to participate in, pay for, facilitate, or otherwise support early abortion-inducing items and to provide the required education and counseling, all of which the Mandate requires of them. VC ¶¶ 4, 48, 50. Yet, without the requested injunctive relief, Plaintiffs have no practical option short of the potential dissolution of their business. VC ¶¶ 77-81, 86-88, 97-102.

Cherry Creek is managed and operated by the individual Plaintiffs as an "S-corporation" closely held family business. VC ¶¶ 2, 3, 31. It is a full-service residential mortgage banking company and employs approximately 730 full-time employees, approximately 400 of which are covered by Cherry Creek's health insurance plan. VC ¶¶ 2, 3, 4, 47, 51.

In the exercise of Plaintiffs' religious beliefs and in pursuit of Cherry Creek's statutorily authorized "lawful" purposes, Plaintiffs have established as Cherry Creek's primary purpose the following:

> **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 ¶¶ 31, 43; *see also* VC, Exhibit A at 3.

This primary "purpose" appears in Cherry Creek's publications, employee training manuals, on a wallet-sized plastic card given to each new employee, and in bold letter as shown above on a sign prominently displayed on the wall in Cherry Creek's main conference room/employee-training center. In addition, key managers of Cherry Creek, including Plaintiff Jeffrey S. May, president and CEO of Cherry Creek, and Stacy Harding, Senior Vice President of Cherry Creek, emphasize at regular monthly meetings of employees that Cherry Creek's primary purpose is "to honor God in all that we do." VC ¶¶ 43, 44. At employee meetings, Plaintiffs seek to conduct the business of Cherry Creek with integrity and in compliance with their pro-life beliefs and in a manner that honors God. VC ¶ 47.

As Plaintiffs became more aware of the requirements of the Mandate and its impact on their company, they discovered in late December 2012 that Cherry Creek's health insurance plan (which plan renewed on January 1, 2013 and is renewable on January 1 of each subsequent year) included "FDA-approved contraceptives." Plaintiffs did not understand until late December 2012 that such "FDA-approved "contraceptives" included drugs and devices that are not truly "contraceptives," but were, in fact, drugs and devices that can induce early abortions by means of preventing implantation of an embryo, *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.

Plaintiffs thereupon instructed Cherry Creek's insurer, *i.e.,* CIGNA, to omit coverage

of such early abortion-inducing items from their health insurance plan. VC ¶¶ 9, 10, 54. Plaintiffs were subsequently informed by CIGNA that, without a court ordered injunction, CIGNA could not omit these items from the insurance plan. VC ¶¶ 9, 10, 54, 57. As soon after learning this from CIGNA as was reasonably possible, Plaintiffs instructed their counsel to draft and file their Verified Complaint. Plaintiffs' Verified Complaint and Motion for Preliminary Injunction were filed on March 5, 2013 and March 18, 2013 respectively, and set for hearing on May 10, 2013.

Cherry Creek is subject, as a mortgage company, to a myriad of federal and state regulations and contractual agreements which require, among other things, certification of compliance with all federal laws. Intentional violation of the Mandate by Plaintiffs would put Plaintiffs' company at risk of being forced out of business on this basis alone. VC ¶¶ 55, 98. So as to avoid regulatory violations or contract breach allegations for being in "violation" of a federal law and to avoid massive fines and penalties for non-compliance with the Mandate, Plaintiffs had no choice but to temporarily comply with the Mandate on and after January 1, 2013 as they continue to seek injunctive relief. VC ¶¶ 11, 55. In this regard, Plaintiffs have been informed by CIGNA that Plaintiffs will be able to amend their insurance plan to delete coverage of these objectionable drugs and devices when the injunctive relief requested is provided.

Notwithstanding the fact that Defendants Mandate substantially burdens Plaintiffs' deeply held religious beliefs by requiring coverage not only of "contraceptives" (to which Plaintiffs do not object) but of early abortion-inducing items (to which Plaintiffs do object)

(see VC ¶¶ 1, 5, 6, 7, 11, 12, 13, 15, 16, 18, 19, 20, 21, 22, 30-31, 48, 49, 50, 51, 52), the district court denied Plaintiffs' motion for preliminary injunction (Doc. 38).

B. Defendants' Mandate.

The Patient Protection and Affordable Care Act ("ACA") requires that "preventive care and screenings" be provided for women at no cost sharing. 42 U.S.C. § 300gg-13(4). The ACA does not contain specific language as to what constitutes "preventive care and screenings" for women. Rather, the ACA delegates this determination to HHS. After enactment of the ACA and in conjunction with the Institute of Medicine ("IOM"), HHS, through its agency HRSA, adopted IOM's guidelines and issued interim final regulations requiring that, among other things, drugs and items be covered in employer health plans that the FDA designates as contraceptives, but that can also act to prevent the implantation of an early embryo after fertilization. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the ACA, 76 Fed. Reg. 46,621, 46,626 (Aug. 3, 2011).

This requirement (hereinafter "Mandate") contains a limited exemption for certain religious employers, *i.e.*, houses of worship. The rule requires coverage for "'[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity,' as prescribed by a provider." VC ¶ 5; 77 Fed. Reg. 8725 (Feb. 15, 2012). Such FDA-approved "contraceptive methods" include "emergency contraception" such as Plan B drugs (also known as the "morning-after pill"), ulipristal acetate (also known as "ella" or the "week-after pill"), and

intrauterine devices—all of which may cause the destruction of a fertilized human embryo. *See, e.g.*, *Hobby Lobby*, 2013 WL 3216103 at *3 n.3 ("Both the government and the medical amici supporting the government concede that at least some of the contraceptive methods to which the plaintiffs object have the potential to prevent uterine implantation.")

Defendants' regulations (coupled with provisions of the ACA) voluntarily omitted or exempted millions of insurance plan participants from the Mandate for both secular and religious reasons, including, in particular:

(a) "Grandfathered" plans, *i.e.*, those plans in which significant changes have not been made on or after March 23, 2010. 42 U.S.C. § 18011 (a)(2). Employers with grandfathered plans may never need to comply with the Mandate. Tens of millions of women will be covered in grandfathered plans as far out as the government's data predicts. 75 Fed. Reg. 34,538, 35,550–53 (June 17, 2010).

(b) A temporary "safe harbor" for plans of particular "religious" organizations that did not qualify for the narrow religious employer exemption. This safe harbor provides that Defendants will not take any enforcement action against a nonexempt, non-grandfathered religiously-motivated employer with a health plan that failed to cover some or all of the objectionable items "until the first plan year that begins on or after January 1, 2014.[2] Defendants have also adopted a compromise "accommodation" for otherwise non-qualified religious organizations. 78 Fed. Reg. 39,870 (July 2, 2013). Many such religious organizations have found this arrangement to be unacceptable, but its existence demonstrates another way in which the government is pursuing its goals.

(c) Businesses with fewer than fifty (50) employees which, pursuant to the ACA, are not required to participate in employer-sponsored health plans and, thus, are

[2] See "Guidance on the Temporary Enforcement Safe Harbor for Certain Employers 6/28/13http://www.cms.gov/CCIIO/Resources/RegulationsandGuidance/Downloads/preventive services-guidance-6-28-2013.pdf.

not subject to some (though not all) of the penalties which pressure compliance with the Mandate. See, *e.g.*, 26 U.S.C. § 4980H.

Providing enforcement authority, Defendants' Mandate requirement is incorporated by the ACA into the Internal Revenue Code and into ERISA. *See* "Conforming Amendments," Pub. L. 111-148, §1563(e)-(f). As a result, penalties may be imposed on employers with at least 50 employees, like Plaintiffs, if such employers refuse to comply with the Mandate. VC ¶ 76. A non-exempt employer faces fines of $100 per day, per employee for non-compliance with the Mandate. 26 U.S.C. § 4980D(a) and (b). VC ¶ 79. Since Plaintiffs employ more than 730 employees, these penalties could amount to as much as $25,500,000 per year to Plaintiffs. VC ¶ 79. Alternatively, Plaintiffs could choose to drop employee insurance altogether and incur annual penalties of $1,400,000 per year. 26 U.S.C. § 4980H. VC ¶ 77.

In addition, both the Labor Department and health insurance plan participants are authorized to sue Plaintiffs for violating the ACA and can specifically force Plaintiffs to comply with the Mandate and to violate their religious beliefs. 29 U.S.C. § 1132(a). VC ¶ 81.

Insomuch as there is no exemption relating to for-profit entities such as Cherry Creek, Plaintiffs' health insurance plan does not qualify for any of Defendants' religious or secular exemptions. VC ¶¶ 69, 70, 71, 74, 75, 92, 93, 94, 95, 96.

The facts and claims of these Plaintiffs are materially indistinguishable from the facts and claims of the Hobby Lobby plaintiffs. Therefore these Plaintiffs are entitled to an injunction from this Court pending appeal so that Plaintiffs may thereby instruct and enable

their insurer to remove coverage of abortion-inducing drugs and devices from their health insurance plan and thus be relieved of the burden on their religious beliefs.

III. INJUNCTION PENDING APPEAL STANDARD

In deciding a motion for an injunction pending appeal pursuant to Fed. R. App. P. 8, this Court should grant such an injunction upon a showing of (1) substantial likelihood of success on appeal; (2) the threat of irreparable harm if the injunction is not granted; (3) the absence of harm to opposing parties if the injunction is granted; and (4) any risk of harm to the public interest. The same four equitable factors that govern preliminary injunctions also govern injunctions pending appeal. *See, e.g.*, *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001).

IV. ARGUMENT

A. Plaintiffs are Likely to Succeed on Their RFRA Claim.

This Circuit's en banc decision in *Hobby Lobby* controls this case and compels the conclusion that Plaintiffs are likely to succeed on the merits of their appeal, necessitating reversal of the district court's denial of Plaintiffs' motion for preliminary injunction. The reasoning of this en banc Court demonstrates that Cherry Creek exercises religion, is substantially burdened by the government's action, and the government's Mandate fails the strict scrutiny test.

1. *Hobby Lobby* demonstrates that Cherry Creek is exercising religion.

Under *Hobby Lobby*, corporations such as Cherry Creek that hold religious objections to the Mandate are "persons exercising religion for purposes of RFRA" requiring this panel to "end the matter here since the plain language of the text encompasses 'corporations'" such as Cherry Creek. *Hobby Lobby,* 2013 WL 3216103 at *9. "[A]s a matter of statutory interpretation [ ] Congress did not exclude for-profit corporations from RFRA's protections." *Id.* Narrower religious employer exemptions found in other statutes, such as Title VII, "rather than providing contextual support for excluding for-profit corporations from RFRA . . . show that Congress knows how to craft a corporate religious exemption, but chose not to do so in RFRA." *Id.* at *10. No fact distinguishes Cherry Creek from the *Hobby Lobby* plaintiffs on this point. The government raises no dispute, nor any basis for a dispute, about the facts surrounding Cherry Creek and its owner's pursuit of religion in their business generally, or their assertion of beliefs with respect to their health insurance plan.

2. *Hobby Lobby* holds that the Mandate is a substantial burden.

Hobby Lobby requires this panel to find that Cherry Creek's exercise of religion in its objection to the Mandate's application to its health plan "is substantially burdened within the meaning of RFRA." 2013 WL 3216103 at *17. In fact, this Court cannot "characterize the pressure as anything but substantial." *Id.* at *20. Just as the *Hobby Lobby* plaintiffs were substantially burdened by the Mandate, Cherry Creek is likewise presented with the same "Hobson's choice" of suffering the\ Mandate's penalties or the burden on and violation of its religious beliefs. *Id.* at *20. There is no discernible difference between Cherry Creek's claim and the *Hobby Lobby* plaintiffs' claim that the Mandate forces them to choose between their

religious objection and the Mandate's penalties. Under *Hobby Lobby*, Cherry Creek has therefore "established a substantial burden as a matter of law." *Id.* at *21.

3. *Hobby Lobby* holds that the Mandate fails under strict scrutiny.

Hobby Lobby requires this panel to conclude that the government has failed to assert a compelling interest in coercing Cherry Creek and the individual Plaintiffs to comply with the Mandate. Just as in *Hobby Lobby*, "[t]he interest here cannot be compelling because the contraceptive-coverage requirement does not apply to tens of millions of people." *Id.* at *23. "[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 527 (1993)).

Under strict scrutiny, the government loses if it fails to satisfy either its compelling interest burden or its least restrictive means burden. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429, 439 (2006) (ruling that the government has the burden to show both strict scrutiny factors, and rendering judgment in the claimant's favor because "the Government failed to demonstrate . . . a compelling interest"). Thus, the *Hobby Lobby* determination that the Mandate serves no "compelling interest" resolves Cherry Creek's RFRA claim without any need for recourse to or argument about the least restrictive means prong requirement of RFRA.

Again there are no grounds to distinguish this case from *Hobby Lobby*. The en banc Court held that the Mandate is not justified by any compelling interest due to the government's decision not to apply the Mandate to tens of millions of women. The same is

necessarily true for Cherry Creek and the individual Plaintiffs because the same Mandate is still inapplicable to tens of millions of women. As was true in the *Hobby Lobby* case, these Plaintiffs are not eligible for the Mandate grandfathering exemption because of unrelated changes made to their plan. *Hobby Lobby*, 2013 WL 3216103 at *4. That indistinguishable fact made no difference in *Hobby Lobby* and can make no difference here.

The government's failure to establish a compelling interest resolves Plaintiffs' RFRA claim in Plaintiffs' favor entirely, since the government has the burden to demonstrate both a compelling interest and that it is pursuing that interest by the least restrictive means. *See Hobby Lobby,* 2013 WL 3216103 at *22, *24. The *Hobby Lobby* decision likewise resolves the least restrictive means factor against the government as a matter of law. The government

> has not explained how those larger interests would be undermined by granting Hobby Lobby and Mardel their requested exemption. Hobby Lobby and Mardel ask only to be excused from covering four contraceptive methods out of twenty, not to be excused from covering contraception altogether. The government does not articulate why accommodating such a limited request fundamentally frustrates its goals.

Id. at *24. Furthermore, it remains true that Defendants' already massive provision and subsidy of family planning to women who actually or purportedly need help in obtaining abortion-inducing drugs and devices make it clear that ample alternative means to achieve the government's interests exist without requiring that Cherry Creek and the individual Plaintiffs be coerced into the violation of their religious liberty interests. The government cannot claim that no least restrictive means exists to provide women "emergency contraception" when it is already providing women those items on a massive scale without coercing Cherry Creek.

If the government's "supposedly vital" health and equality interests in providing the mandated items were really "grave" and "paramount," as they must be under strict scrutiny, *Thomas v. Collins*, 323 U.S. 516, 530 (1945), the government could not be content to impose the Mandate in such a massively inapplicable or a haphazard way. The Mandate is simply not a concern that the government itself treats it as "compelling," except when or until religious people object.

4. Plaintiffs will continue to suffer irreparable harm absent an injunction pending appeal.

Hobby Lobby holds that once a likely violation of RFRA is established, irreparable harm exists. *Hobby Lobby,* 2013 WL 3216103 at *26.

The Mandate requiring Plaintiffs to include early abortion-inducing items in Cherry Creek's health insurance plan puts Plaintiffs in an unconscionable position. Beginning on January 1, 2013 and continuing until injunctive relief is finally entered in their favor, Plaintiffs are obliged, in order to avoid punitive, business-ending penalties and sanctions, to violate their deeply held religious convictions concerning the sanctity of life and facilitate an employee's free access to abortion-inducing drugs and devices.

Few laws in American history have imposed such severe penalties on any conduct, and *none* has ever imposed such penalties and burdens on the exercise of religion. It is well-settled that pressuring a party to violate the party's religion in this manner constitutes irreparable harm. *See, e.g., Kikumura* v. *Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (noting that "courts have held that a plaintiff satisfies the irreparable harm analysis

by alleging a violation of RFRA"); *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Heideman* v. *S. Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (finding irreparable harm for even "minimal" restrictions on nude dancing because "our precedents dictate that we treat alleged First Amendment harms gingerly").

Because there is no dispute that Plaintiffs are suffering and will continue to suffer irreparable harm before a decision on the merits can be rendered in this case, "Plaintiffs have adequately established that they will suffer imminent irreparable harm absent injunctive relief. This factor [irreparable harm] strongly favors entry of injunctive relief." *Newland*, 881 F.Supp.2d at 1295 (quoting *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)).

B. The remaining injunctive relief factors support Plaintiffs' substantial likelihood of success on appeal.

The fact that *Hobby Lobby* demonstrates that Plaintiffs have a likelihood of success on the merits of their RFRA claim and are experiencing irreparable harm should cause this Court to provide Plaintiffs an injunction pending appeal. The analysis of the remaining equitable factors, in a motion for injunction pending appeal, is for this Court to decide. But Plaintiffs appeal is likely to lead to reversal of the district court. Four judges in *Hobby Lobby* deemed the remaining equitable factors established in the Hobby Lobby plaintiffs' favor as a matter of law, while a fifth gave deference to the *Hobby Lobby* district court judge to decide those factors. As is set forth above, the *Hobby Lobby* district court judge did indeed decide these two injunction factors in favor of the Hobby Lobby plaintiffs. *See Hobby Lobby*, 2013

WL 3216103 at *26 (Kelly, Hartz, Tymkovich, and Gorsuch, JJ.); *37 (Bacharach, J., concurring); *see also Hobby Lobby Stores, Inc. v. Sebelius,* Case No. CIV-12-1000-HE, 2013 WL 3869832 (W.D. Okla. July 19, 2013).

Therefore this panel, at minimum, has the discretion to find these two factors in Plaintiffs' favor here, and a near majority of the en banc Tenth Circuit would have done so as a matter of law.

The clear, textual intent of Congress demonstrates that the balance of equities and the public interest prongs must be decided in Plaintiffs' favor. There are two statutory schemes in tension in this case, RFRA and the ACA. While the ACA requires Plaintiffs to insure and facilitate early abortion-inducing drugs and devices in their health plan, RFRA protects Plaintiffs in the exercise of their religious liberty interests by requiring that Defendants exempt Plaintiffs from the requirements of the Mandate. But the two statutes are not on par with each other. RFRA explicitly declares that "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." 42 U.S.C. § 2000bb-3. Nothing in the Mandate, or anywhere in the ACA, explicitly (or implicitly) excludes itself from RFRA.

Consequently, by virtue of the fact that Plaintiffs have strongly established (under *Hobby Lobby*) their likelihood of success on the merits of their RFRA claim, *it is the explicit will of Congress that the Mandate in this case not apply to Plaintiffs.* The government cannot possibly contend that equitable or public interests counsel otherwise, because the government Defendants' pursuit of the Mandate derives entirely from their statutory authority.

Put another way, suppose that Congress repealed 42 U.S.C. § 300gg-13(4), removing any statutory authority for this Mandate. It would not be possible for the government Defendants to claim a public interest, or a balance of equities, to impose the Mandate on Plaintiffs, since in those circumstances the Mandate would be without statutory authority. RFRA effectively does repeal this Mandate as it applies to Plaintiffs, and *Hobby Lobby* requires the Court to reach that conclusion. The government is foreclosed from asserting equities or alleged public interests in enforcing a Mandate that Congress itself, through RFRA, has declared should not apply.

Finally, the government has consented to the entry of multiple preliminary injunctions for plaintiffs challenging this Mandate in Courts of Appeals that have issued decisions in favor of plaintiffs' RFRA claim. The government may have changed its litigation strategy, but it cannot claim that the equities prevent entry of such an injunction here. *See Geneva College v. Sebelius*, 2013 WL 1703871, 12 (W.D. Pa. Apr. 19, 2013) ("It strikes the court that defendants cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in several similar cases.") (citing *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12–cv–00092, ECF No. 41 (E.D. Mo. Mar. 11, 2013); *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13–cv–0036, ECF No. 9 (W.D. Mo. Feb. 28, 2013)); *Hall v. Sebelius*, No. 13–0295, ECF No. 10 (D. Minn. Apr. 2, 2013); and *Bick Holding, Inc. v. Sebelius*, No. 4:13–cv–00462, ECF No. 18 (E.D. Mo. Apr. 1, 2013)). *See also Ozinga v. U.S. Dep't of Health and Human Servs.*, No. 1:13-cv-03292-TMD (N.D. Ill. July 16, 2013) (entering preliminary injunction upon government non-opposition); *Bindon v. Sebelius*, No.

1:13-cv-01207-EGS (D.D.C. Aug. 14, 2013) (same).

1. The balance of equities tips decidedly in Plaintiffs' favor.

There is no real dispute that, absent an injunction, Plaintiffs now face and will continue to face grievous harm—government compulsion to continue to violate their religious beliefs or crippling, business-ending fines and penalties. The district court below stated, "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 . . . but that they sincerely believe that this program [the Mandate] imposes a substantial burden on those beliefs and their right to exercise those beliefs." *See* May 10, 2013 Hearing Transcript at 95, lines 18-25, attached hereto. In contrast, granting the injunction will merely prevent the government from enforcing one element of the Mandate (the requirement to cover abortion-inducing drugs and devices) against one employer whose health insurance covers about 400 employees during the pendency of this appeal. *See Newland,* 881 F. Supp. 2d at 1295 ("This harm pales in comparison to the possible infringement upon Plaintiffs' constitutional and statutory rights. This factor strongly favors entry of injunctive relief.").

The district court below also acknowledged that, should an injunction be entered, the "status quo" was the situation "before this type of coverage was required" by the Mandate. *See* May 10, 2013 Hearing Transcript at 91, lines 20-23, attached hereto. Preserving the status quo in such circumstances is the very purpose of the requested injunction pending appeal. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1209 (10th Cir. 2009) ("[T]he primary goal of a preliminary injunction is to preserve the pre-trial status quo . . .

."); *O Centro*, 389 F.3d at 1018 (McConnell, J., concurring) (stating that "[a] particularly important category of cases where the status quo will often be determinative of whether a court should provide preliminary relief is challenges to the constitutionality of statutes," where the statute is "newly enacted, and its enforcement will restrict rights citizens previously had exercised and enjoyed").

The fact that the government has already exempted a number of churches and church-related entities from the mandate, delayed enforcement of the mandate against many religious organizations until January 1, 2014, and given many non-religious, secular employers an open-ended exemption in the form of grandfathering or minimized the penalties on small business firms confirms that granting an injunction pending appeal would not injure the government in any way.

2. An injunction is in the public interest.

The public interest in enforcing long-standing First Amendment and religious freedom protections versus obligations of a new law that creates a substantial expansion of employer obligations but exempts millions of other employers and their employees weighs heavily in favor of injunctive relief. *Newland*, *Newland,* 881 F.Supp.2d at 1295 (finding "'there is a strong public interest in the free exercise of religion even where that interest may conflict with [another statutory scheme]'") (quoting *O Centro*, 389 F.3d at 1010); *see also, e.g., Pac. Frontier* v. *Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005) ("Vindicating First Amendment freedoms is clearly in the public interest."). *Hobby Lobby* reaffirms that the rights protected by RFRA should be treated analogously to First Amendment rights. *Hobby*

Lobby, 2013 WL 3216103 at *26 (equitable factors treat RFRA's rights "by analogy to First Amendment cases").

Furthermore, any government interest in uniform application of the Mandate is "undermined by the creation of exemptions for certain religious organizations and employers with grandfathered health insurance plans and a temporary enforcement safe harbor for non-profit organizations." *Newland,* 881 F. Supp. 2d at 1295. The government cannot claim a public interest in applying this Mandate to Plaintiffs and their few hundred employees when it is voluntarily excluding tens of millions from the Mandate's benefits, and when it could be pursuing its interests by other means but has chosen not to.

V. CONCLUSION

As to these Plaintiffs, Defendants' Mandate violates RFRA. Unless this Court issues an injunction during the pendency of this appeal, Plaintiffs face the "Hobson's choice" of being forced to continue to violate their religious beliefs or violating the Mandate and potentially suffering massive, business-ending fines, penalties, lawsuits, and other sanctions. Defendants have shown no harm to any government interest as a result of injunctions entered in at least 26 other cases.[3] Defendants cannot demonstrate any harm to itself or the public from entry of an injunction pending appeal in this case.

WHEREFORE, Plaintiffs respectfully request that this Court enter an injunction

[3] List of cases available at http://www.adfmedia.org/files/AbortionPillMandateScorecard.pdf .

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-00563-RBJ-BNB

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,

Plaintiffs,

vs.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; SETH D. HARRIS, in his official capacity as Acting Secretary of the United States Department of Labor; JACK LEW, in his official capacity as 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,

Defendants.

REPORTER'S TRANSCRIPT
HEARING ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Proceedings before the HONORABLE R. BROOKE JACKSON, Judge, United States District Court for the District of Colorado, commencing at 9 a.m., on the 10th day of May, 2013, in Courtroom A902, Alfred A. Arraj United States Courthouse, Denver, Colorado.

Proceeding Reported by Mechanical Stenography, Transcription Produced via Computer by Kara Spitler, RMR, CRR, 901 19th Street, Denver, CO, 80294, (303) 623-3080

APPEARANCES

MICHAEL NORTON, 7951 East Maplewood Avenue, Building 3, Suite 100, Greenwood Village, CO 80111, for plaintiffs.

MICHELLE BENNETT, United States Department of Justice Civil Division, Federal Programs Branch, 20 Massachusetts Avenue N.W., Room 7310, Washington, D.C. 20530, for defendants.

P R O C E E D I N G S

(In open court at 9 a.m.)

THE COURT: A little one-sided?

THE COURTROOM DEPUTY: Please be seated.

THE COURT: Good morning.

13-cv-563, Armstrong, *et al.*, vs. Sebelius, *et al.*

Appearances, for the plaintiff; we have a cast of many.

Who do we have here?

MR. NORTON: Good morning, Your Honor. Michael J. Norton on behalf of the plaintiffs. And seated at the plaintiffs' counsel table are all of the individual plaintiffs but one. That would be John May.

First of all, W. L. Bill Armstrong.

THE COURT: Good morning.

MR. NORTON: Dorothy A. Shanahan.

Bill Armstrong's wife, Ellen.

THE COURT: Hello.

MR. NORTON: Who is really here as an observer, but I

asked her to sit up here so she could be part of the family.

Will Armstrong.

Jeff May.

And John Carson who is general counsel of Cherry Creek Mortgage Company.

THE COURT: Very good.

Thank you.

And all by herself on the other side is.

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

THE COURT: All right.

So this is on the plaintiffs' motion for a preliminary injunction.

Are you planning to present evidence?

MR. NORTON: No, Your Honor. The parties have, in general, stipulated that the facts set forth in the verified complaint may be accepted as true. I will state my understanding of the stipulation. Miss Bennett can correct me to the extent that I'm misstating it.

Government agrees that the individual plaintiffs have sincerely held religious beliefs against abortion and against the abortion-inducing drugs that are covered by the HHS mandate; that the individual plaintiffs sincerely believe that those drugs, particularly plan B, Ella, and intrauterine devices or IUDs may cause abortion, may induce abortion of a

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

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.

pending appeal in favor of Plaintiffs and prohibiting Defendants from requiring Plaintiffs to provide health insurance coverage to their employees of abortion-inducing drugs and devices and related education and counseling as required by the Mandate.

Dated this 22nd day of August, 2013.

COUNSEL FOR PLAINTIFFS-APPELLANTS

s/ Michael J. Norton
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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2013, I caused the foregoing pleading to be electronically filed with the Clerk of the Court by using the court's ECF system which will send a notice of electronic filing to all ECF participants of record.

By: /s/ Michael J. Norton

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