IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable R. Brooke Jackson

Civil Action No. 13-cv-00563-RBJ

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,

v.

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;
JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES:
UNITED STATES DEPARTMENT OF LABOR; and
UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

PLAINTIFFS, by and through their undersigned counsel, respectfully move the Court, pursuant to Fed. R. Civ. P. 56(a) and D.C.COLO.LCivR 56.1, for summary judgment in favor of the Plaintiffs and against all Defendants. In support hereof, Plaintiffs state as follows:

I. INTRODUCTION AND PROCEDURAL BACKGROUND

In their Verified Complaint (Doc. 1), incorporated herein by this reference, Plaintiffs sought declaratory and injunctive relief for the Defendants' violations of, *inter alia*, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA") caused by Defendants' development and implementation of so-called "preventive services" pursuant to the Patient Protection and Affordable Care Act (Pub. L. 111-148, March 23, 2010, 124 Stat. 1029) and the Health Care and Education Reconciliation Act (Pub. L. 111-152, March 30, 2010, 124 Stat. 1029) (collectively, the "ACA") in ways that force Plaintiffs to violate their deepest held religious beliefs.

Plaintiffs also filed a motion for a preliminary injunction (Doc. 12) and a brief in support thereof (Doc. 13). These pleadings are also fully incorporated herein by this reference.

On May 10, 2013, the Court heard oral arguments on Plaintiffs' motion for preliminary injunction. For the purposes of this hearing, Defendants stipulated as to the facts alleged in Plaintiffs' Verified Complaint. Defendants have not, at any time, disputed these facts.

At the conclusion of the hearing, largely on the basis of the then-scheduled *en banc* oral argument before the U. S. Court of Appeals for the Tenth Circuit on *Hobby Lobby Stores, Inc. v. Sebelius*, __ F.3d __, 2013 WL 3216103 (10th Cir. June 27, 2013) ("*Hobby Lobby I*"), the Court denied Plaintiffs' motion for preliminary injunction.

The Court advised the parties that, should the Tenth Circuit ultimately decide in favor of the Hobby Lobby plaintiffs, the Court would revisit its order at an appropriate time. At that point, Plaintiffs filed their Notice of Appeal (Doc. 39). Thereafter, on June 27, 2013, the Tenth Circuit decided largely in favor of the Hobby Lobby plaintiffs and remanded two preliminary injunction prong issues to the U.S. District Court for the Western District of Oklahoma. When those two issues were also resolved in favor of the Hobby Lobby plaintiffs (*see Hobby Lobby Stores, Inc. v. Sebelius,* Case No. CIV-12-1000-HE, 2013 WL 3869832 (W.D. Okla. July 19, 2013) ("*Hobby Lobby II*")), on September 5, 2013, the Tenth Circuit remanded this case to this Court for further proceedings, and true to its word, on September 17, 2013, this Court entered a preliminary injunction in favor of Plaintiffs (Doc. 56).

Defendants' primary contentions that (a) the relationship between the HHS Mandate's requirements and Plaintiff's religious belief is too indirect and attenuated to constitute a substantial burden and (b) Cherry Creek Mortgage does not qualify as a "person" pursuant to RFRA have been soundly rejected by the Tenth Circuit in *Hobby Lobby I.* Thus, there is no material fact in dispute in this case and judgment should be entered in favor of Plaintiffs as a matter of law on their RFRA claim. Plaintiffs are entitled to a permanent injunction in their favor on their RFRA claim and to their attorney's fees and costs.

II. UNDISPUTED FACTS

On March 5, 2013, Plaintiffs filed their Verified Complaint ("VC"). Salient facts from Plaintiffs' VC are:

1. The individual Plaintiffs are owners and all of the voting shareholders of Plaintiff Cherry Creek Mortgage, Co., Inc., a Colorado corporation ("Cherry Creek Mortgage"). VC ¶¶ 2, 3, 31.
2. 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.
3. 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.
4. 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.
5. 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.

6. 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 (emphasis in original sign in main conference room).

7. This "primary 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.

8. 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, amounts to the wrongful taking of the life of an unborn child and is a sin against God. VC ¶¶ 4, 45, 46, 48.

9. 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.

10. 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 certain intrauterine devices. VC ¶¶ 6, 7, 8, 52, 53.

11. 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.

12. Plaintiffs thereupon 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.

13. 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.

14. 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.

15. 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.

16. In March 2010, Congress passed, and President Obama signed into law the ACA. The PPACA attempts to regulate the national health insurance market by regulating group health insurance plans and health insurance issuers.

17. As enacted, the PPACA requires "preventive care and screenings" for women at no cost sharing, but did not specify just what constituted "preventive care and screenings." Thereafter, Defendants administratively 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.

18. "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 certain intrauterine devices.

19. While the Defendants have 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 was, until this Court's preliminary injunction order, required to cover abortion-inducing drugs and devices in their employee health insurance plans.

20. Section 1563 of the PPACA incorporates PPACA's "preventive care services" requirement into the Internal Revenue Code ("IRC") and into the Employee Retirement Income Security Act ("ERISA"). *See* "Conforming Amendments," Pub. L. 111-148, §1563(e)-(f).

21. As a result, crippling penalties may be imposed on employers of 50 or more persons (like Plaintiffs) if such employers refuse to include abortion-inducing drugs and devices in their health insurance. VC ¶ 76.

22. 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.

23. Since Plaintiffs employ more than 730 employees, these penalties would amount to as much as $25.5 million per year to Plaintiffs. VC ¶ 79.

24. 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.

25. Such fines would drive Plaintiffs out of business and result in the discharge of their 730 employees. VC ¶ 80.

26. 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.

27. 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.

28. 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. STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A court, in considering a motion for summary judgment, views the facts "in the light most favorable to the nonmoving party." *Rezaq v. Nalley,* 677 F.3d 1001, 1010 (10th Cir. 2012).

The trial court shall "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Schneider v. City of Grand Junction Police Dept.*, Nos. 12-1086, 12-1115, 2013 WL 2421071, at *4 (10th Cir. June 5, 2013) (*citing Ribeau v. Katt*, 681 F.3d 1190, 1194 (10th Cir. 2012)). "[T]he burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "[T]he nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (internal citations omitted). The nonmoving party "cannot rely entirely on pleadings, but must present significant probative evidence to support its position." *Hansen v. PT Bank Negara Indonesia (Persero)*, 706 F.3d 1244, 1247 (10th Cir. 2013). If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986) (a court must consider "whether the evidence presents a sufficient

disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law").

IV. ARGUMENT

A. There is no genuine dispute as to any material fact.

There is no genuine dispute as to any material fact in this case and judgment should be granted to the Plaintiffs as a matter of law. The facts of this case are "substantially the same" as the facts in *Hobby Lobby I*, 2013 WL 3216103 at *67. This Court is bound by the Tenth Circuit's holding in that case. Indeed, the *Hobby Lobby I* decision, coupled with the *Hobby Lobby II* decision, supplies all of the necessary factual and legal conclusions to enable this Court to resolve this case in Plaintiffs' favor.

B. Plaintiffs are entitled to summary judgment on all issues.

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),[1] applies to actions of the federal

[1] 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.

government.[2] *See also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 n.1 (2006); *Hobby Lobby I*.

RFRA requires courts to apply the pre-*Smith Sherbert*[3] 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-

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[2] 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.

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

5(7)(A). Religious exercise involves "not only belief and profession but the performance of (or abstention from) physical acts." *Smith*, 494 U.S. at 877 (Free Exercise claim).[4]

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. In contrast, the HHS Mandate demands that Plaintiffs directly violate their religious principles, clearly triggering RFRA's protection.

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

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[4] *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.

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. The Tenth Circuit 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, a closely-held secular for-profit corporation, are protected under RFRA.

Just as in *Hobby Lobby I*, Cherry Creek Mortgage is a closely-held corporation owned and operated by the individual Plaintiffs as an S-corporation. Plaintiffs here, as in *Hobby Lobby I*, have organized their business with express religious principles and seek to apply their "faith to guide business decisions." *Hobby Lobby I*, 2013 WL 3216103 at *2. For example, 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.

Both the individual Plaintiffs and Cherry Creek Mortgage are "persons" protected by RFRA. It is of no consequence under RFRA that the individual Plaintiffs' company is a secular, closely held, for-profit S-corporation, as opposed to a house of worship. Importantly, in both *Hobby Lobby I* and *Hobby Lobby II* 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 I*, 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 Hobby Lobby plaintiffs. 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 I*, Plaintiffs also allege a "sincere religious objection to providing coverage for certain contraceptives [Plan B drugs, ella, and certain 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 Hobby Lobby plaintiffs, 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.* Just as with the plaintiffs in *Hobby Lobby I*, 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.*

Next, as did the Tenth Circuit in *Hobby Lobby I*, this Court should determine that the HHS Mandate constitutes a substantial burden on the Plaintiffs' religious beliefs. As in *Hobby Lobby I*, 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, or
- Pay as much as $25.5 million in fines or penalties.

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. 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.*

The Tenth Circuit stated in *Hobby Lobby I* that the government failed to prove a compelling interest for two reasons. 2013 WL 3216103 at *59. First, the government's stated interests are insufficient because they are too "broadly formulated" to "justify[]" as a compelling interest. *Id.* (quoting *O Centro*, 546 U.S. at 431). Second, the HHS Mandate "cannot be compelling" because of the millions of people the government has already exempted. *Id.* Since the compelling interests claimed in *Hobby Lobby I* are identical to the compelling interests here, Defendants cannot possibly show any compelling interest in the instant case.

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

Even assuming, *arguendo,* a compelling government interest, the HHS Mandate is not the least restrictive means of achieving the government's purported 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.

The Tenth Circuit in *Hobby Lobby I* concluded that "[e]ven if the government had stated a compelling interest in public health or gender equality, it has not explained how those larger interests would be undermined by granting [plaintiffs] their requested exemption." *Hobby Lobby I*, 2013 WL 3216103 at *61. Although this Court's preliminary injunction order applies to all twenty listed "FDA-approved contraceptives,"

as with the Hobby Lobby plaintiffs, Plaintiffs here object to providing insurance to four abortifacients on this list, to wit: (i) Ella; (ii) Plan B, Plan B One-Step, and Next Choice (Levonorgestrel); (iii) the Copper IUD; and (iv) the IUD with Progestin. *Id.* Such a "limited request" for substantially fewer employees than employed by the Hobby Lobby plaintiffs could not possibly frustrate the government's broader goals. *Id.*

V. CONCLUSION

There is no remaining ambiguity as to the strengths of Plaintiffs' claims or the urgency of their need. Speedy and final resolution of this case by summary judgment is warranted. Plaintiffs are entitled to a permanent injunction in their favor and to their attorney's fees and costs pursuant to either 42 U.S.C. § 1988(b) or 5 U.S.C. § 504.

For the forgoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Summary Judgment as follows:

1. Judgment declaring the HHS Mandate and its application to Plaintiffs to be an unconstitutional violation of their rights protected by RFRA and therefore invalid in any way applicable to them;

2. A permanent injunction prohibiting Defendants from applying the HHS Mandate to Plaintiffs in any way that substantially burdens the religious beliefs of Plaintiffs in violation of RFRA and the Constitution, and prohibiting Defendants from continuing to illegally discriminate against Plaintiffs by

requiring them to provide health insurance coverage for abortion-inducing drugs and devices and related education and counseling; and

3. The award to Plaintiffs of their court costs and reasonable attorney's fees, as provided either 42 U.S.C. § 1988(b) or 5 U.S.C. § 504. Upon request of the Court or at an appropriate time, an affidavit of attorney's fees and costs will be presented to the Court.

DATED this 27th day of September, 2013.

Attorneys for Plaintiffs:

s/ Michael J. Norton
Michael J. Norton
Alliance Defending Freedom
7951 E. Maplewood Avenue, Suite 100
Greenwood Village, CO 80111
(O) 720-689-2410
(F) 303-694-0703
mjnorton@alliancedefendingfreedom.org

CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiffs, Michael J. Norton, hereby certifies that, on September 27, 2013, the foregoing was served on all parties or their counsel of record through the Court's CM/ECF system, all of whom are registered users, to wit:

bradley.p.humphreys@usdoj.gov
mbowman@alliancedefendingfreedom.org
natalie@denverlawsolutions.com
dcortman@alliancedefendingfreedom.org
sadden@alliancedefendingfreedom.org
msilverstein@aclu-co.org
bamiri@aclu.org

s/ Michael J. Norton
Michael J. Norton