IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:13-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,

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; the UNITED
STATES DEPARTMENT OF HEALTH AND HUMAN
SERVICES; the UNITED STATES DEPARTMENT OF LABOR;
and the UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Table of Authorities iii

Introduction 1

Factual Background 1

Argument 4

I. The HHS Mandate 4

II. The Plaintiffs and their religious beliefs 9

III. The Plaintiffs' religious exercise is protected by RFRA 10

1. RFRA applies to Plaintiffs' religious exercise. 11

2. The Plaintiffs, including Plaintiff Cherry Creek Mortgage Co., Inc., are protected by RFRA 14

3. The HHS Mandate substantially burdens Plaintiffs' exercise of religion 23

4. The HHS Mandate, as applied to these Plaintiffs, violates RFRA 26

a. The HHS Mandate does not further a compelling government interest 26

b. The HHS Mandate is neither neutral nor generally applicable 36

c. The HHS Mandate is not the least restrictive means of achieving the purported interest 37

IV. The HHS Mandate Also Violates the First Amendment Free Exercise Clause 40

1. The HHS Mandate is not generally applicable 41

2. The HHS Mandate is not neutral towards religion 43

V. The HHS Mandate Also Violates the First Amendment Establishment Clause 45

VI. The HHS Mandate Also Violates the First Amendment Free Speech Clause 48

VII. Plaintiffs are entitled to a preliminary injunction an Injunction 49

1. Plaintiffs will suffer irreparable harm absent an injunction 51

2. An injunction will cause no harm to Defendants....................................51

3. The public interest favors a preliminary injunction without bond................................52

Conclusion 52

TABLE OF AUTHORITIES

Cases

Abdulhaseeb v. Calbone......13, 18, 24
600 F.3d 1301 (10th Cir. 2010)

Abood v. Detroit Bd. of Ed.......49
431 U.S. 209 (1977)

Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.......22, 35
2012 U.S. Dist. LEXIS 182307 (W.D. Mo. Dec. 20, 2012)

Anderson v. Celebrezze......40
460 U.S. 780 (1983)

Annex Medical, Inc. v. Sebelius......22
2013 U.S. App. LEXIS 2497 (8TH Cir. Feb 1, 2013)

Att'y Gen. of Okla. v. Tyson Foods, Inc.......50
565 F.3d 769 (10th Cir. 2009)

Autocam Corp. v. Sebelius......23
2012 U.S. Dist. LEXIS 184093 (W.D. Mich. Dec. 24, 2012),
appeal docketed, 2012 U.S. App. LEXIS 26736 (6th Cir. Dec. 28, 2012)

Awad v. Ziriax......51
670 F.3d 1111, 1126 (10th Cir. 2012)

Blackhawk v. Pennsylvania......40, 42
381 F.3d 202 (3d Cir. 2004)

Braunfeld v. Brown......14, 16, 44
366 U.S. 599 (1961)

Briscoe v. Sebelius......23
No. 1:13-cv-00285-WYD-BNB (D. Colo., Feb. 27, 2013)

Brown v. Entm't Merchs. Ass'n......27, 28, 32
131 S.Ct. 2729 (June 27, 2011)

Cal. Democratic Party v. Jones......26, 32
530 U.S. 567 (2000)

Cheema v. Thompson 50
67 F.3d 883 (9th Cir. 1995)

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah .... *passim*
508 U.S. 520 (1993)

Citizens United v. Federal Election Comm'n 20
558 U.S. 310, 130 S.Ct. 876 (2010)

City of Boerne v. Flores 11, 25
521 U.S. 507 (1997)

Colo. Christian U. v. Weaver 46, 47, 48
534 F.3d 1245 (10th Cir. 2008)

Commack Self-Service Kosher Meats, Inc. v. Hooker 16-17
680 F.3d 194 (2012)

Conestoga Wood Specialties Corp v. Sebelius 23
2012 U.S. Dist. LEXIS 4449 (E.D. Pa. Jan. 11, 2013),
appeal docketed, 2013 U.S. App. LEXIS 2706 (3d Cir. Feb. 7, 2013)

Consol. Edison Co. v. Pub. Serv. Comm'n 27
447 U.S. 530 (1980)

Davis v. Mineta 50
302 F.3d 1104 (10th Cir. 2009)

EEOC v. Hosanna-Tabor Evangelical Lutheran Church and Sch. 15
597 F.3d 769 (6th Cir. 2010)

EEOC v. Sunbelt Rentals, Inc. 21
521 F.3d 306 (4th Cir. 2008)

EEOC v. Townley Eng'g & Mfg. Co. 14, 16
859 F.2d 610 (9th Cir. 1988)

Elrod v. Burns 51
427 U.S. 347 (1976)

Employment Div., Dep't of Human Res. of Or. v. Smith..11, 12
494 U.S. 872 (1990)

First National Bank of Boston v. Bellotti 20
435 U.S. 765 (1978)

Fraternal Order of Police v. City of Newark 13
170 F.3d 359 (3d Cir. 1999)

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal .... *passim*
546 U.S. 418 (2006)

Good News Club v. Milford Central School 21
533 U.S. 98 (2001)

Grote v. Sebelius 22, 50
2013 U.S. App. LEXIS 2112 (7th Cir. Jan. 30, 2013)

Hartmann v. Stone 44
68 F.3d 973 (6th Cir. 1995)

Hobby Lobby Stores, Inc. v. Sebelius 23, 50
870 F.Supp.2d 1278 (W.D. Okla. 2012)

Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC 15
132 S.Ct. 694 (2012)

Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston 48
515 U.S. 557 (1995)

Jolly v. Coughlin 50, 51
76 F.3d 468 (2d Cir 1996)

Kikumura v. Hurley 11, 51
242 F.3d 950 (10th Cir. 2001)

Know v. Service Employees Int'l Union 49
132 S.Ct. 2277 (June 21, 2012)

Korte v. U.S. Dep't of Health & Human Servs. 17, 22, 23, 25, 50
2012 U.S. App. LEXIS 26734 (7th Cir. Dec. 28, 2012)

Lamb's Chapel v. Center Moriches Union Free School Dist. 21
508 U.S. 384 (1993)

Larson v. Valente 46
456 U.S. 228 (1982)

Legatus v. Sebelius..........17, 22
2012 U.S. Dist. LEXIS 156144 (E.D. Mich. Oct. 31, 2012)

Lovelace v. Lee..........13
472 F.3d 174 (4th Cir. 2006)

McClure v. Sports and Health Club, Inc...........17
370 N.W.2d 844 (Minn. 1985)

Monell v. Dept. of Social Services..........20
436 U.S. 658 (1987)

Monaghan v. Sebelius..........4, 17, 23
Case No. 12-cv-15488-LPZ-MJH (E.D. Mich. Mar. 14, 2013)

Newland v. Sebelius.......... *passim*
881 F.Supp.2d 1287 (D. Colo. July 27, 2012)

New York Times Co. v. Sullivan..........20
376 U.S. 254 (1964)

O'Brien v. U.S. Dep't of Health & Human Servs...........22
2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012)

O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft..........15
389 F.3d 973 (10th Cir. 2004)

Pacific Frontier v. Pleasant Grove City..........52
414 F.3d 1221 (10th Cir. 2005)

Pac. Gas & Elec. v. Pub. Utils. Comm'n..........20
475 U.S. 1 (1986)

Planned Parenthood v. Casey..........10
505 U.S. 833 (1992)

Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc...........38, 40
487 U.S. 781 (1988)

RoDa Drilling Co. v. Siegal..........52
552 F.3d 1203 (10th Cir. 2009)

Roe v. Wade 10
410 U.S. 113 (1973)

Rosenberger v. Rector and Visitors of U. of Va....21
515 U.S. 819 (1995)

Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs. 22, 23
2012 U.S. Dist. LEXIS 182942 (E.D. Mo. Dec. 31, 2012)

Sherbert v. Verner... *passim*
374 U.S. 398 (1963)

Sioux Chief Mfg. Co., Inc. v. Sebelius..23
No. 13-0036-CV-W-ODS (W.D. Mo. Feb. 28, 2013)

Stenberg v. Carhart..10
530 U.s. 914 (2000)

Stormans, Inc. v. Selecky...4, 14, 16, 51
586 F.3d 1109 (9th Cir. 2009)

Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly..44
309 F.3d 144 (3d Cir. 2002)

Thomas v. Review Board...13, 18, 24
450 U.S. 707 (1981)

Thomas v. Collins...26
323 U.S. 516 (1945)

Triune Health Group v. U.S. Dep't of Health & Human Servs. 24
No. 1:12-cv-06756, slip op. (N.D. Ill. Jan. 3, 2013)

Turner Broad. Sys., Inc. v. FCC 48
512 U.S. 624 (1994)

Tyndale House Publ'rs v. Sebelius 14, 23, 25, 29, 35
2012 U.S. Dist. LEXIS 163965 (D.D.C. Nov. 16, 2012)

United States v. Ali...25
68 F.3d 705 (8th Cir. 2012)

United States v. Friday 35
525 F.3d 938 (10th Cir. 2008)

United States v. Hardman 12
297 F.3d 1116 (10th Cir. 2002) (en banc)

United States v. Lee...16
455 U.S. 252 (1982)

United States v. Playboy Entm't Group, Inc. 28, 40
529 U.S. 803 (2000)

United States v. Rice 17-18
52 F.3d 843 (10th Cir. 1995)

United States v. Robel ....
389 U.S. 258 (1967)

United States v. United Foods 49
533 U.S. 405 (2001)

Utah Licensed Beverage Ass'n v. Leavitt...52
256 F.3d 1061 (10th Cir. 2001)

Washington v. Klem 13
497 F.3d 272 (3d Cir. 2007), *cert. denied* 505 U.S. 1218 (1992)

Wilson v. NLRB 46
920 F.2d 1282 (6th Cir. 1990)

Wisconsin v. Yoder...12, 15, 25, 27
406 U.S. 205 (1972)

Wooley v. Maynard 48
430 U.S. 705 (1977)

W.V. State Bd. of Educ. v. Barnette 48
319 U.S. 624 (1943)

Zorach v. Clauson..14, 37
343 U.S. 306 (1952)

Statutes

1 U.S.C. § 1 22

26 U.S.C. § 501(a) 6

26 U.S.C. § 4980D 8

26 U.S.C. § 4980H 8

29 U.S.C. § 1132 9

42 U.S.C. § 300gg-13 ....4, 5

42 U.S.C. § 2000bb .... *passim*

42 U.S.C. § 2000cc 12, 13

42 U.S.C. § 18011 ....5, 30

Pub. L. 111-148 ....4, 8

Pub. L. 111-152 4

C.R.S. § 7-101-401(17) 19

C.R.S. § 7-101-401(24) 18

C.R.S. § 7-102-102(4) 18

C.R.S. § 7-103-101(1) 18

C.R.S. § 7-103-101(1)(m) 19

C.R.S. § 7-103-104 19

C.R.S. § 7-108-101(2) 19

C.R.S. § 25-6-102(9) 19

Regulations

26 C.F.R. § 54.9815-1251T 5

29 C.F.R. § 2590.715-1251 5

45 C.F.R. § 147.130(a) 6, 31

45 C.F.R. § 147.140(a) 5

75 Fed. Reg. 34,542 29

75 Fed. Reg. 41,726 5

76 Fed. Reg. 46,621 .... *passim*

77 Fed. Reg. 8,725 .... 7, 8, 30, 42

77 Fed. Reg. 16,501 .... 7, 39

78 Fed. Reg. 8,456 31

Other Authorities

ACLU Press Release, "ACLU Applauds CA Supreme Court Decision Promoting Women's Health and Ending Gender Discrimination in Insurance Coverage" (Mar. 1, 2004) 45

CBS News "Feds to stop funding Texas women's health program" (Mar. 9, 2012) 33

Contraception in American, *Unmet Needs Survey, Executive Summary* (2012) 34

Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act,* 73 Tex. L. Rev. 209 40-41

FDA, Birth Control Guide (Aug. 2012) 6

Guttmacher Institute, "Facts on Publicly Funded Contraceptive Services in the United States" (May 2012) 33

Guttmacher Institute, "Facts on Contraceptive Use in the United States" (June 2010) 33

HealthCare.gov, Small Business 31

HHS, "A statement by U.S. Department of Health and Human 33
Services Secretary Kathleen Sebelius," (Jan. 20, 2012) ....

HHS, Guidance on the Temporary Enforcement Safe Harbor 31
(Feb. 10, 2012)

HHS, HealthReform.gov, Fact Sheet: Keeping the Health..30
Plan You Have: The Affordable Care Act and
Grandfathered Plans

HHS, Revised Guidelines on the Temporary Enforcement 8
Safe Harbor for Certain Employers, Group Health Plans and Group
Health Insurance Issuers with Respect to the Requirement to Cover
Contraceptive Services Without Cost Sharing

HRSA, Women's Preventive Services: Required 5
Health Plan Coverage Guidelines

Institute of Medicine, *Clinical Preventive Services*.. 5-6
for Women: Closing the Gaps (July 19, 2011)

New York Times, Rule Shift on Birth Control is Concession 35
to Obama Allies

WhiteHouse.Gov, The Affordable Care Act Increases..31
Choice and Saving Money for Small Business

INTRODUCTION

Plaintiffs ask this Court to enter a preliminary injunction against Defendants' enforcement of the "preventive services" coverage provision of the Patient Protection and Affordable Care Act ("ACA") and the related implementing regulations.

FACTUAL BACKGROUND

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.[1] 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.

One of the Bible's teachings, which each individual Plaintiff embraces, is that a preborn child is, from the moment of conception, *i.e.,* 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, 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

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[1] The Factual Background section is drawn from Plaintiffs' Verified Complaint which is fully incorporated herein by reference.

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 abortion-inducing drugs and devices and to provide the required education and counseling, all as is required by the HHS Mandate. VC ¶¶ 4, 48, 50.

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.

The Articles of Incorporation of Cherry Creek Mortgage provide that, among other things, Cherry Creek Mortgage "is organized [for] the transaction of all lawful business for which corporations may be incorporated pursuant to the Colorado Corporation Code . . . [,] shall have all of the rights, privileges and powers now or hereafter conferred upon corporations by the Colorado Corporation Code . . . [and] may exercise all powers necessary or convenient to effect any of the purposes for which the corporation has been organized." VC ¶ 31.

In the exercise of Plaintiffs' religious beliefs and in pursuit of Cherry Creek Mortgage's "lawful" purposes, Plaintiffs have established as the 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 to praise him d for his manifest blessings on Plaintiffs, their company, and their employees.

During 2012, the Plaintiffs became more knowledgeable 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 plan 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 drugs and devices that are, in fact, abortion-inducing, *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.

At that time, Plaintiffs instructed Cherry Creek Mortgage's insurer, *i.e.,* 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 this Court. VC ¶¶ 9, 10, 54, 57.

So as to avoid regulatory violations to which Cherry Creek Mortgage would, as a mortgage banking company, be in "violation" of a federal law and thus be subject to potential sanctions, Plaintiffs had no choice but to comply with the HHS Mandate, include abortion-inducing drugs and devices in the January 1, 2013 plan, and seek relief from this Court. VC ¶¶ 11, 55.

Defendants HHS Mandate substantially burdens Plaintiffs' deeply held religious beliefs by requiring coverage of contraceptives, 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.

Clearly, the individual Plaintiffs incorporate their religious beliefs into the daily operation and the goals and objectives of Cherry Creek Mortgage. Cherry Creek Mortgage is merely the instrument through and by which the individual Plaintiffs express their religious beliefs. *Monaghan v. Sebelius*, Case No. 12-cv-15488-LPZ-MJH (E.D. Mich. Mar. 14, 2013) (citing *Stormans, Inc. v. Selecky,* 586 F.3d 1109, 1120 (9th Cir. 2009) (preliminary injunction against HHS Mandate granted in favor of Monaghan and Domino's Fars Corp., a for-profit corporation).

ARGUMENT

I. The HHS Mandate

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 purports to regulate the national health insurance market by regulating group health insurance plans and health insurance issuers.

The ACA required "preventive care and screenings" for women at no cost sharing, but did not specifically require coverage of abortion-inducing drugs and devices which were later included by the government as "preventive care and screenings."[2]

[2] (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 . . . (4) with respect to women, such additional

On July 19, 2010, the Defendants issued interim final regulations implementing the ACA's preventive care services provision. *See* Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the ACA, 75 Fed. Reg. 41,726 (Jul. 19, 2010) ("first interim final regulations"). VC ¶ 5. These first interim final regulations required all group health plans and health insurance issuers offering nongrandfathered[3] group or individual health insurance coverage to cover, without charging a co-payment, co-insurance, or deductible to the plan participant, the preventive care services outlined in 42 U.S.C. § 300gg-13. Additionally, the first interim final regulations directed HHS, in conjunction with the Institute of Medicine ("IOM"), to determine what was to be included as "preventive cares services." On July 19, 2011, the IOM reported its findings to HRSA and recommended that the HRSA include, as preventive cares services, *inter alia,* "[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."[4] VC ¶

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preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration ["HRSA" for purposes of this paragraph. 42 U.S.C. § 300gg-13; VC ¶ 5.

[3] The preventive services provision does not apply to health plans that are "grandfathered." A plan is grandfathered if: (1) at least one person was enrolled on March 23, 2010; (2) the plan continuously covered at least one individual since that date; (3) the plan provides annual notice of its grandfathered status; and (4) the plan has not be subject to significant changes as outlined in the regulations. *See* 42 U.S.C. § 18011; 26 C.F.R. §§ 54.9815-1251T(a), (g); 29 C.F.R. §§ 2590.715-1251(a), (g); 45 C.F.R. §§ 147.140(a), (g).

[4] HRSA, *Women's Preventive Services: Required Health Plan Coverage Guidelines*, available at http://www.hrsa.gov/womensguidelines/; Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps,* available at

5. FDA-approved "contraceptive methods" include birth-control pills, Plan B drugs (also known as the "morning-after pill"), ulipristal acetate (also known as "ella" or the "week-after pill"), intrauterine devices.[5]

On August 1, 2011, HRSA adopted guidelines and issued second interim final regulations ("second interim final regulations"). *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the ACA, 76 Fed. Reg. 46,621 (Aug. 3, 2011). The second interim final regulations carve out a limited exemption for certain religious employers, essentially houses of worship, which, it was proposed, would not be required to provide insurance coverage for the objected to items. 76 Fed. Reg. 46,621, 46,626; 45 C.F.R. § 147.130(a)(1)(iv)(B).[6] Thereafter, on February 15, 2012, Defendants adopted the definition of religious employer as proposed in the August 1, 2011, second interim final regulations without

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http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx (last visited Feb. 21, 2013) ("IOM Report") at 10.

[5] FDA, *Birth Control Guide* (Aug. 2012), available at www.fda.gov/ForConsumers/ByAudience/ForWomen/ucm18465.

[6] The religious employer exemption defines religious organizations as those employers that meet the following criteria: (1) The inculcation of religious values is the purpose of the organization; (2) The organization primarily employs persons who share the religious tenets of the organization; (3) The organization serves primarily persons who share the religious tenets of the organization; and (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended ["IRC"]. The sections of the IRC cited in subsection (4) define nonprofit organizations as "churches, their integrated auxiliaries, and conventions or associations of churches," and "the exclusively religious activities of any religious order" that are exempt from taxation pursuant to 26 U.S.C. § 501(a).

change ("final regulations"). *See* Group Health Planss Under the ACA, 77 Fed. Reg. 8,725-30 (Feb. 15, 2012). VC ¶¶59, 60, 61.

Thus, all but a sliver of employers, *i.e.,* houses of worship, were required, pursuant to these final regulations, to cover FDA-approved "contraceptive methods" including abortion-inducing drugs and devices in their employee health insurance plans. In addition, the final regulations carved out a "temporary enforcement safe harbor" for nongrandfathered plans that did not qualify for the narrow religious employer exemption. This safe harbor provision provided that Defendants would not take any enforcement action against a nonexempt, nongrandfathered 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 August 1, 2013." HHS, Guidance on the Temporary Enforcement Safe Harbor (Feb. 10, 2012) at 3.[7] Thus, at present, nonexempt religious non-profits have an additional year – until the first plan year beginning on or after August 1, 2013 – to comply with the HHS Mandate.[8]

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[7] To qualify for the safe harbor provision, an organization must meet the following criteria: (1) The organization is organized and operates as a non-profit entity; (2) From February 10, 2012 onward, contraceptive coverage has not been provided at any point by the group health plan established or maintained by the organization, consistent with any applicable State law, because of the religious beliefs of the organization; (3) [T]he group health plan established or maintained by the organization (or another entity on behalf of the plan, such as a health insurance issuer or third-party administrator) must provide [notice] to participants . . . which states that contraceptive coverage will not be provided under the plan for the first plan year beginning on or after August 1, 2012; and (4) The organization self-certifies that it satisfies criteria 1-3 above, and documents its self-certification in accordance with the procedures detailed [elsewhere in the HHS Guidance]. *See* HHS Guidance at 3. A similar safe harbor provision applies to student health insurance coverage provided by nonprofit institutions of higher education that satisfy similar criteria. 77 Fed. Reg. 16,501, 16,504.

[8] On February 1, 2013, Defendants issued proposed rules which purport to accommodate nonexempt religious non-profits. Most religious non-profit experts have expressed substantial

Section 1563 of the ACA incorporates ACA's "preventive care services" requirement into the Internal Revenue Code and into ERISA. *See* "Conforming Amendments," Pub. L. 111-148, §1563(e)-(f). As a result, crippling penalties may be imposed on employers with at least 50 employees, like Plaintiffs, if they refuse, so as to not violate their religious beliefs, 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 $25,500,000 per year to Plaintiffs. Verified Complaint ("VC") ¶ 79. Alternatively, Plaintiffs could choose to drop employee insurance entirely and incur an annual assessment of penalties of $1,400,000 per year. 26 U.S.C. § 4980H.[9] VC ¶ 77.

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doubt that the proposed rules would broaden the exemption as it currently defined in the final regulations which currently require nonexempt religious non-profits to comply with the HHS Mandate on the first plan year that begins on or after August 1, 2013. However, courts have uniformly dismissed, without prejudice, lawsuits brought by nonexempt religious non-profits on grounds the government has promised to "accommodate," presumably prior to August 1, 2013, the objections of nonexempt religious non-profits. To date, there has been no government accommodation of religiously-motivated secular, for-profit businesses. On August 15, 2012, HHS updated its guidance bulletin by providing "(1) that the safe harbor is also available to non-profit organizations with religious objections to some but not all contraceptive coverage . . .; (2) that group health plans that took some action to try to exclude or limit contraceptive coverage that was not successful as of February 10, 2012, are not for that reason precluded from eligibility for the safe harbor . . .; and (3) that the safe harbor may be invoked without prejudice by non-profit organizations that are uncertain whether they qualify for the religious employer exemption." HHS, Revised Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing, at n. 1, available at http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf (last visited Feb. 21, 2013).

[9] *See also* 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012).

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.

While the exact magnitude of fines on Plaintiffs is derived from complex statutory and regulatory formulae, the potential fines on Plaintiffs and their business for failure to provide insurance coverage of the objectionable abortion-inducing drugs and devices is estimated to be from $1,400,000 to $25,500,00 per year. VC ¶¶ 77, 79. Such fines would drive Plaintiffs out of business and result in the discharge of its 730 employees. VC ¶ 80.

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 federal law) by Plaintiffs would put Plaintiffs' company at risk of being forced out of business. 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 determined and provided. VC ¶¶ 69, 70, 71, 74, 75, 92, 93, 94, 95, 96.

II. <u>The Plaintiffs and their religious beliefs.</u>

Each of the Plaintiffs is an Evangelical Christian who sincerely believes, as a foundational biblical doctrine, that human life begins at conception, that each human life is created in the image of God, and therefore that each human life is intrinsically valuable. Plaintiffs are committed to operating their lives and their business in accord with their Christian faith and simply ask that they be permitted to operate their company – a residential mortgage

business which Plaintiffs own and operate as an S-corporation - without having to violate their sincerely held religious beliefs.

Plaintiffs, as do nearly all Evangelical Christians, object to Plan B drugs, ella, and IUDs on the basis that they prevent implantation of a fertilized egg (and can even destroy an implanted fertilized egg) and, in destroying a preborn child, constitute abortions.

The U.S. Supreme Court has long-recognized that abortion implicates sincerely-held religious beliefs. In *Roe v. Wade,* 410 U.S. 113, 116 (1973), the Supreme Court acknowledged that "the sensitive and emotional nature of the abortion controversy" provokes "vigorous opposing views" and inspires "deep and seemingly absolute convictions." *See also Planned Parenthood v. Casey,* 505 U.S. 833, 850 (1992) (abortion has "profound moral and spiritual implications" upon which "men and women of good conscience can disagree" and find "offensive to [their] most basic principles of morality." As recently as 2000, the Supreme Court acknowledged that "[m]illions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child." *Stenberg v. Carhart,* 530 U.S. 914, 920 (2000).

By forcing Plaintiffs to violate their sincerely held religious beliefs by requiring them to directly fund, arrange for, and facilitate coverage of these objectionable drugs and devices, under pain of penalty, merely because Plaintiffs own and operate a for-profit business in the United States of America Defendants' HHS Mandate substantially burdens Plaintiffs' religious exercise and disregards religious conscience rights that are long-enshrined in federal statutory and constitutional law.

III. The Plaintiffs' Religious Exercise is protected by RFRA.

1. RFRA applies to Plaintiffs' religious exercise.

The Religious Freedom Restoration Act of 1993 ("RFRA"), by which Congress restored the strict scrutiny test to governmental action which was deemed to have been modified by the Supreme Court in *Employment Div., Dep't of Human Res. of Or. v. Smith,* 494 U.S. 872 (1990),[10] applies to actions of the federal government.[11] *See also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 424 n.1 (2006).

RFRA requires that courts apply the pre-*Smith Sherbert*[12] 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

[10] 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.

[11] 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.

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

"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 the performance of (or abstention from) physical acts." *Smith,* 494 U.S. at 877 (Free Exercise claim).[13]

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 *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court deemed it a substantial burden when parents who refused to send their children to high school "were fined the sum of $5 each." 406 U.S. at 208. *See also Washington v. Klem,* 497 F.3d 272, 280 (3d Cir. 2007) (Congress intended "to create a broad definition of substantial burden").

[13] *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.

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).

In the Tenth Circuit, a law is deemed to impose a "substantial burden" on religious exercise when it: (a) "requires participation in an activity prohibited by a sincerely held religious belief;" (b) "prevents participation in conduct motivated by a sincerely held religious belief;" or (c) "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief[.]" *Abdulhaseeb v. Calbone,* 600 F.3d 1301, 1315 (10th Cir. 2010) (quoting *Lovelace v. Lee,* 472 F.3d 174, 187 n.2 (4th Cir. 2006) (interpreting the "substantial burden" test in RLUIPA, 42 U.S.C. § 2000cc-1(a), to mean "when a government . . . places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief. . . .").

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

Neither the Supreme Court nor the Tenth Circuit has determined whether for-profit, secular corporations possess the free exercise rights held by individuals. Other courts have, however, found that for-profit corporations can maintain some religious objectives. *Tyndale House Publ'rs v. Sebelius,* 2012 WL 5817323,at *5-7 (quoting *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988); *Stormans,* 586 F.3d 1109 (where the beliefs of a closely-held corporation and its owner are indistinguishable, "united by their [] faith . . . [and] shared, religious objectives[,]" the corporation has standing to assert the free exercise rights of its owners).

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. 3006, 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").

The Supreme Court has long-recognized religious liberty rights for people earning a living, including in some cases for business owners. *See, e.g., Sherbert,* 374 U.S. 398 (Seventh Day Adventist who was unable to accept jobs requiring Saturday work); *Braunfeld v. Brown,* 366 U.S. 599 (1961) (recognizing religious burden imposed on Jewish store-owner by Sunday closing law).

The Supreme Court has also repeatedly recognized that the corporate form of a business is not in itself inherently incompatible with religious exercise, at least in the context of non-profit corporations. *See, e.g., O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft,* 389 F.3d 973 (10th Cir. 2004), *aff'd by Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S 418 (2006) (a church suing as "a New Mexico corporation on its own behalf" prevailed under RFRA claim before the *en banc* Tenth Circuit and a unanimous Supreme Court); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 525 (1993) (a "not-for-profit corporation organized under Florida law" prevailed on a free exercise claim); *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and Sch.,* 597 F.3d 769, 772 (6th Cir. 2010), *rev'd by Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC,* 132 S.Ct. 694 (2012) (an ecclesiastical corporation's free exercise rights were vindicated).

The burden on religious exercise is not somehow diluted because an individual engages in business in a corporate form. Corporations are no more purely "secular' or purely "religious" than are the people who run them. A business does not make decisions on its own or in a vacuum, but only through human agency, *i.e.,* through its owners pursuant to policies established by those owners. If the owners feel pressure, even if the sanction falls on the owners' business, that is a violation of the owners' faith and religious exercise. *Cf. Yoder,* 406 U.S. at 218 (pressure from a five dollar fine on the business was "severe" and "inescapable").

For-profit businesses are widely understood as capable of forming subjective intentions for their actions.[14] No precedent supports the idea that, because individuals function in a corporate form, there is any dilution on the burden on the owners' religious exercise. Indeed, courts have repeatedly recognized that individuals may assert religious claims in the context of operating businesses. *See, e.g., United States v. Lee,* 455 U.S. 252, 256-57 (1982) (Amish employer could object to social security taxes imposed on his business); *Braunfeld,* 366 U.S. at 605 (Jewish merchants in Philadelphia engaged in retail sale of clothing and home furnishings could challenge Sunday closing law because it "ma[d]e the practice of their religious beliefs more expensive").[15]

Likewise, in *Stormans,* 586 F.3d at 1119-20 & n.9 (allowing for-profit pharmacy to bring Free Exercise claims on behalf of its family owners) and *EEOC v. Townley,* 859 F.2d at 620 n. 15 (same for manufacturer), the Ninth Circuit recognized that individual owners of for-profit, "secular" corporations had standing to assert the free exercise rights of its owners and had their religious beliefs burdened by regulation of that corporation. Moreover, the corporation in each case was entitled to sue to protect those beliefs. *Id.*; *see also Commack Self-Service Kosher*

[14] It is well-settled that corporations are capable of forming mental intent for crimes; may be held liable for racial, sexual, or religious discrimination; and may speak with a particular viewpoint.

[15] Importantly, the law at issue in *Braunfeld* did not require plaintiffs to engage in an activity prohibited by their religion, nor did it prohibit an activity mandated by their religion. The Jewish merchants simply argued that their being forced by the government to close on Sundays gave non-Jewish merchants an economic advantage since Jewish merchants would thus be closed both on Saturday (the Jewish Sabbath) and on Sunday (because of the law). *Id.* at 608. The Supreme Court held the law burdened their religious exercise, but ultimately ruled against the merchants. *Id.* at 603.

Meats, Inc. v. Hooker, 680 F.3d 194, 200 (2012) (allowing a corporate kosher deli and its owners to bring Free Exercise and Establishment Clause claims); *McClure v. Sports and Health Club, Inc.,* 370 N.W.2d 844, 850 (Minn. 1985) (finding that a health club and its owners could assert free exercise of religion claims).

As the Seventh Circuit declared in granting an injunction against the HHS Mandate for another family-run business, "[t]hat the Kortes operate their business in the corporate form is not dispositive of their claim. The contraception mandate applies to K & L Contractors as an employer of more than 50 employees, and the Kortes would have to violate their religious beliefs to operate their company in compliance with it." *Korte v. U.S. Dep't of Health & Human Servs., 2012 U.S. App. LEXIS 26734* at *9 (7th Cir. Dec. 28, 2012). *See also Monaghan,* Case No. 12-cv-15488-LPZ-MJH (the mandate forces Monaghan to violate his beliefs and modify his behavior or else pay substantial penalties for noncompliance; "the Court sees no reason why [Domino Farms Corp.] cannot be secular and profit-seeking, and maintain rights, obligations, powers, and privileges distinct from those of Monahan, while at the same time being an instrument through which Monaghan may assert a claim under RFRA"); *Legatus v. Sebelius,* 2012 U.S. Dist. LEXIS 156144 (E.D. Mich. Oct. 31, 2012) ("[plaintiff corporation] was founded as a family business and remains a closely held family corporation. Accordingly, the court need not, and does not, decide whether [plaintiff], as a for-profit business, has an independent First Amendment right to free exercise of religion.") (granting preliminary injunction); Thus, whether the burden and pressure is on an individual or on the individual's business, the pressure on the owner is inescapable. *See United States v. Rice,* 52 F.3d 843, 844 (10th Cir. 1995) (the

government implicitly recognizes this concept when it treats income generated by S-corporations as individual income to the owners).

In any event, the Supreme Court has rejected the distinction between "direct" and "indirect" burden. In *Sherbert,* 374 U.S. at 403, and in *Thomas v. Review Board,* 450 U.S. at 717, plaintiffs' religious exercise was penalized indirectly through loss of employment benefits. In both cases, the Supreme Court rejected the government's argument that the burden was "only the indirect consequence of public welfare legislation." As *Thomas v. Review Board* explained, "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." 450 U.S. at 718. The Tenth Circuit has expressly adopted this language from *Thomas v. Review Board* in *Abdulhaseeb,* 600 F.3d at 1315.

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).

Moreover, the government has no statutory right to object that Cherry Creek Mortgage exercises religion. Only shareholders (and others in very limited additional situations) can raise this objection. Thus, except in limited situations, "the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act." C.R.S. § 7-103-104. Notably, Colorado law acknowledges that an "institution" or "facility" can have a "religious" objection to providing contraception without requiring it to be a non-profit. C.R.S. § 25-6-102(9) ("No private institution or physician, nor any agent or employee of such institution or physician, shall be prohibited from refusing to provide contraceptive procedures, supplies, and information when such refusal is based upon religious or conscientious objection, and no such institution, employee, agent, or physician shall be held liable for such refusal.").

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 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. Federal 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).

There is no doubt that a business has the free speech right to display a sign, either in or outside of its headquarters office, that the business's purpose is to "honor God." "First Amendment protection extends to corporations," and a First Amendment right "does not lose First Amendment protection simply because its source is a corporation." *See Citizens United,* 130 S.Ct. at 899 (recognizing free speech right of corporations); *Pac. Gas & Elec. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16 (1986) (same); *see also Monell v. Dept. of Social Services,* 436 U.S. 658, 687 (1987) ("corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis"). For-profit corporations such as the New York Times could never have won seminal cases without possessing First Amendment rights. *See New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

It makes no sense to say that a business would not have a free exercise right to follow the teaching "honor God" and seek an exemption from a law requiring it to not do so. Every company has a mission or purpose statement expressing the values its owners strive to achieve.

Religious values, except for their substantially higher level of protection under RFRA and the First Amendment's Free Exercise Clause, are no different than other values a business might pursue. 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 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.

To suggest that corporations can adopt ethics as long as they are not religious ethics amounts to unconstitutional viewpoint discrimination. *Good News Club v. Milford Central School,* 533 U.S. 98, 107-12 (2001) (activities of any kind, whether "social," "civic," "recreational," or educational, are not different kinds of activities when religious, they are the same kind of activity simply done from a religious perspective); *see also Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384 (1993) and *Rosenberger v. Rector and Visitors of U. of Va.,* 515 U.S. 819, 831 (1995). "Free religious exercise would mean little if restricted to places of worship or days of observance, only to disappear the next morning at work." *EEOC v. Sunbelt Rentals, Inc.,* 521 F.3d 306, 319 (4th Cir. 2008).

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 "grandfathered" organization, a small business that need not abide by the HHS Mandate, or another organization that Defendants have 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").

There are more than forty-five ongoing federal lawsuits wherein for-profit and non-profit employers have asserted that the HHS Mandate substantially burdens their religious exercise and is thus protected by, among other laws, RFRA. At present, for-profit plaintiffs are protected by preliminary injunctions preventing application of the HHS Mandate to them in twelve cases, including in this District in *Newland v. Sebelius,* 881 F.Supp.2d 1287 (D.Colo. July 27, 2012) (Kane, J.),[16] while injunctive relief has been denied in three cases[17] in other Districts and in one

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[16] *Newland v. Sebelius,* 881 F.Supp.2d 1287 (D. Colo. July 27, 2012) (granting preliminary injunction); .*Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.,* 2012 U.S. Dist. LEXIS 182307 (W.D. Mo. Dec. 20, 2012) (granting preliminary injunction); *Annex Medical, Inc. v. Sebelius*, 2013 U.S. App. LEXIS 2497 (8TH Cir. Feb 1, 2013) (granting injunction pending appeal); *Monaghan v. Sebelius,* Case No. 12-cv-15488-LPZ-MJH (E.D. Mich. Mar. 14, 2013) (granting preliminary injunction and citing *Newland v. Sebelius* with approval); *Grote v. Sebelius,* 2013 U.S. App. LEXIS 2112 (7th Cir. Jan. 30, 2013) (granting injunction pending appeal); *Korte v. U.S. Dep't of Health & Human Servs.,* 2012 U.S. App. LEXIS 26734 (7th Cir. Dec. 28, 2012) (granting injunction pending appeal); *Legatus v. Sebelius,* 2012 U.S. Dist. LEXIS 156144 (E.D. Mich. Oct. 31, 2012) (granting preliminary injunction); *O'Brien v. U.S. Dep't of Health & Human Servs.*, 2012 U.S. App. LEXIS 26633 (8thCir. Nov. 28, 2012) (granting injunction pending appeal); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.,* 2012 U.S. Dist. LEXIS 182942 (E.D. Mo. Dec. 31, 2012) (granting temporary restraining order);

case in this District.[18] Many of these courts have found the corporate form immaterial to a business owner's ability to assert religious claims.[19]

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

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Sioux Chief Mfg. Co., Inc. v. Sebelius, No. 13-0036-CV-W-ODS (W.D. Mo. Feb. 28, 2013) (unopposed motion for preliminary injunction granted); *Triune Health Group v. U.S. Dep't of Health & Human Servs.,* No. 1:12-cv-06756, slip op. (N.D. Ill. Jan. 3, 2013) (granting preliminary injunction); *Tyndale House Publ'rs v. Sebelius*, 2012 U.S. Dist. LEXIS 163965 (D.D.C. Nov. 16, 2012) (granting preliminary injunction).

[17] *Autocam Corp. v. Sebelius,* 2012 U.S. Dist. LEXIS 184093 (W.D. Mich. Dec. 24, 2012) (denying preliminary injunction), *appeal docketed,* 2012 U.S. App. LEXIS 26736 (6th Cir. Dec. 28, 2012) (denying injunction pending appeal); *Conestoga Wood Specialties Corp v. Sebelius,* 2012 U.S. Dist. LEXIS 4449 (E.D. Pa. Jan. 11, 2013) (denying preliminary injunction after granting temporary restraining order), *p*, 2013 U.S. App. LEXIS 2706 (3d Cir. Feb. 7, 2013) (denying injunction pending appeal); *Hobby Lobby Stores v. Sebelius*, 870 F.Supp. 2d 1278 (W.D. Okla. 2012) (denying preliminary injunction), *appeal pending,* No. 12-6294 (10th Cir.). On December 20, 2012, a two judge motions panel denied Hobby Lobby's motion for injunction pending appeal. ON December 26, Justice Sotomayor, in chambers, likewise denied Hobby Lobby's request for injunction on appeal. *See* 2012 U.S. LEXIS 9594 (Dec. 26, 2012).

[18] *Briscoe v. Sebelius,* No. 1:13-cv-00285-WYD-BNB (D. Colo., Feb. 27, 2013) (motion for temporary restraining order denied).

[19] *See, e.g., Korte*, 2012 WL 6757353, at *3 ("That the Kortes operate their business in the corporate form is not dispositive of their claim."); *Grote*, 2013 WL 362725 (same); *Tyndale,* 2012 WL 5817323, at *7 ("[T]he case law is replete with examples of such organizations asserting cognizable free exercise and RFRA challenges."); *Monaghan*, 2012 WL 6738476, at *4 (In granting a temporary restraining order (later converted to a preliminary injunction the court said, "[T]he Court is in no position to declare that acting through his company to provide certain health care coverage to his employees does *not* violate Monaghan's religious beliefs. They are, after all, *his* religious beliefs); *Sharpe Holdings, Inc.,* Slip Op. at 6 ("[T]he court concludes that plaintiffs have shown that the . . . mandate, and its substantial financial penalties, on their health plan, would substantial burden their religious beliefs.").

exercise and "compel a violation of conscience" is a quintessential substantial burden. *Thomas v. Review Board,* 450 U.S. at 717.

As a threshold matter, it is important to note that "[n]either this court nor defendants are qualified to determine that" the HHS Mandate "should satisfy [Plaintiffs'] religious beliefs." *Abdulhaseeb,* 600 F.3d at 1314 n.7.

The HHS Mandate coerces Plaintiffs to run their company in violation of their faith and, should they choose not to comply, places them in violation of the ACA, imposes crippling fines of millions of dollars per year on them and their company, and subjects them and their company to severe sanctions from regulatory authorities. Federal and state regulatory requirements on Cherry Creek Mortgage also put Plaintiffs at risk in innumerable arrangements, such as contracts and government regulations that require Plaintiffs to certify current compliance with "all federal laws."

Under both the first and third prongs of the *Abdulhaseeb* test, the HHS Mandate substantially burdens Plaintiffs' religious exercise, to wit: it requires participation in a religiously forbidden activity by requiring Plaintiffs to provide insurance coverage of abortion-inducing drugs and devices in violation of Plaintiffs' religious beliefs (prong 1) and it places substantial pressure on Plaintiffs to engage in conduct contrary to sincerely held religious beliefs by imposing crippling fines unless Plaintiffs provide insurance coverage contrary to their beliefs (prong 3).

"The religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not* – or perhaps more precisely,

not only – in the later purchase or use of contraception or related services. *Korte,* 2012 U.S. App. LEXIS 26734, at *10 (emphasis in original); *see also Tyndale,* 2012 U.S. Dist. LEXIS 163965, at *44 ("Because it is the coverage, not just the use, of the contraceptives at issue to which the plaintiffs object, it is irrelevant that the use of the contraceptives depends on the independent decisions of third parties.").

There cannot be a religious conflict more direct and immediate than this. *See United States v. Ali,* 68 F.3d 705 (8th Cir. 2012) (finding a substantial burden on religious exercise where the RFRA claimant refused to take an action pursuant to her religious beliefs in the face of exacting penalties). Plaintiffs are, in adherence to their religious beliefs, opposed to abortion and abortion-inducing drugs and devices. The substantial burden on Plaintiffs' religious exercise here is a textbook violation of RFRA and cannot survive strict scrutiny.

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

Under both RFRA, in order for the HHS Mandate to trump Plaintiffs' religious objections, Defendants must prove that the HHS Mandate, **as applied to these** Plaintiffs, furthers a compelling government interest and uses the least restrictive means to accomplish that interest.

The strict scrutiny test is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). *See also O Centro Espirita*, 546 U.S. at 420, 430–32 (quoting 42 U.S.C. § 2000bb-1(b) (RFRA's test can only be satisfied "through application of the challenged law 'to the person'—the particular claimant").

When the Supreme Court applied strict scrutiny in both *Sherbert* and *Yoder,* it "looked beyond broadly formulated interests justifying the general applicability of government mandates

and scrutinized the asserted harm of granting specific exemptions to particular claimants." *O Centro Espirita,* 546 U.S. at 431.

It is not therefore 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 Lukumi,* 508 U.S. at 546 (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.

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.

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). In 2011, the Supreme Court described a compelling interest as a "high degree of necessity," noting that "[t]he State must specifically indentify an 'actual problem' in

need of solving, and the curtailment of [the asserted right] must be actually necessary to the solution" *Brown v. Entm't Merchs. Ass'n,* 131 S.Ct. 2729, 2738-39, 2741 (2011) (citations omitted) (the government bears the burden of proof and "ambiguous proof will not suffice[;]" the government must show that substantially burdening plaintiffs' free exercise of religion is "actually necessary to the solution."). The "[m]ere speculation of harm does not constitute a compelling state interest." *Consol. Edison Co. v. Pub. Serv. Comm'n,* 447 U.S. 530, 543 (1980).

To be compelling, the government's evidence must show not merely a correlation but a "caus[al]" nexus between their Mandate and the grave interest it supposedly serves. *Brown,* 131 S.Ct. at 2739. 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 their burden under RFRA with speculation and generalizations. *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. *Yoder,* 406 U.S. at 230. In this context, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Sherbert,* 374 U.S. at 406.

Neither the regulations nor the statute reference any scientific and compelling data about Plaintiffs' employees or even other Americans, and no data even about the broader category of objecting religious employers' employees. Defendants cannot show a crisis among those

employees. The government's lack of particular evidence here similarly cannot satisfy their compelling interest burden. If the government's "evidence is not compelling," it fails to satisfy its burden. *Brown,* 131 S.Ct. at 2739.

And under *Brown*, Defendants must additionally demonstrate a *causal* connection between some allegedly grave harm to Plaintiffs' employees, and Plaintiffs' failure to comply with the HHS Mandate. Defendants have not and cannot connect the HHS Mandate to *causation* of grave harm among Plaintiffs' employees or even others. *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 821-22 (2000).

But even if gravely at-risk employees do exist, which Defendants have not demonstrated, it is possible that they all may obtain the mandated items by other means separate and apart from mandated coverage in Plaintiffs' health insurance plan. *See O Centro Espirita*, 546 U.S. at 438 (where "the Government did not even *submit* evidence addressing" the specific consequences of an alleged interest, but only offered affidavits "attesting to the general importance" of that interest, "under RFRA invocation of such general interests, standing alone, is not enough.").

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. Likewise, Defendants cite no pandemic of unwanted births causing catastrophic consequences among American employees – women or men. It is just as likely that employees of Plaintiffs and similar entities experience "zero" negative health

consequences in spite of the absence of the HHS Mandate and in fact happily give birth to their babies. At best, Defendants do not know.

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.[20] *See* 75 Fed. Reg. at 34,542 (listing ACA §§ 2704, 2708, 2711, 2712, 2715, and 2718 as applicable to grandfathered plans).

Defendants' actions in exempting millions of Americans from the HHS Mandate demonstrate that their HHS Mandate is not in furtherance of a compelling interest "of the highest order" as required by *Lukumi*, 508 U.S. at 546. Defendants have granted a plethora of secular and even religious exemptions to the HHS Mandate as a result of which over 100 million Americans, including those in "grandfathered" plans, the Amish, small employers, and churches have been exempted from the requirements of the HHS Mandate.

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

[20] 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.

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, to wit:

a. Grandfathered plans. Plans may avoid the Mandate by not making certain changes to their plans after the ACA's effective date. 42 U.S.C. § 18011(a)(2). Plans may stay grandfathered indefinitely; the government expects plans covering over 87 million people to be grandfathered at least through 2013. *See* HealthReform.gov, Fact Sheet: Keeping the Health Plan You Have: The Affordable Care Act and Grandfathered Plans (June 14, 2010).[21]

b. Small employers. Businesses which employ less than 50 people need not offer health insurance at all and can therefore avoid the HHS Mandate entirely. Such small employers

[21] *See* http://www.healthcare.gov/news/factsheets/2010/06/keepiong-the-health-plan-you-have-grandfathered.html.

employ over 34 million people. *See* WhiteHouse.Gov, *The Affordable Care Act Increases Choice and Saving Money for Small Business* at 2.[22]

c. Religious Exemption. Non-profit houses of worship have been specially exempted from the HHS Mandate due to their religious objections to coverage. 45 C.F.R. § 147.130(a)(1)(iv); *see also* 78 Fed. Reg. 8,456, 8,461 (Feb. 6, 2013) (proposing amended exemption).

d. Safe Harbor. Objecting religious non-profits not eligible for the "religious exemption" have been granted a one-year "safe harbor" to at least August 1, 2013 by which to comply with the HHS Mandate. [23] HHS, Guidance on the Temporary Enforcement Safe Harbor (Feb. 10, 2012).[24]Defendants' immense grandfathering exemption in particular has nothing to do with a determination that those more than 100 million Americans in

[22] *See* http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf. *See also* 26 U.S.C. § 4980H(c)(2) (employers are not subject to penalty for not providing health insurance coverage if they have less than 50 full-time employees); HealthCare.gov, "Small Business," *available* at http://www.healthcare.gov/using-insurance/employers/small-business/#provide (last visited Mar. 9, 2013).

[23] Even were the definition of "religious employer" amended along the lines the government proposed on February 1, 2013, the amended definition would still fail to protect the religious liberty of objecting religious non-profits. The proposed rule explicitly states that it does not intend to "expand the universe of employer[s]" beyond those who were originally exempt under the second interim final regulations (see p. 6, *supra*). "Coverage of Certain Preventive Services Under the Affordable Care Act," Notice of Proposed rulemaking, 78 Fed. Reg. 8,456, 8,461 (Feb. 6, 2013).

[24] *See* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf.

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."

If the government can toss aside such a massive number of employees on such political bases, the government's "interest" in mandating cost-free coverage of contraceptives/abortifacients cannot possibly be "paramount" or "grave" enough to justify coercing Plaintiffs to violate their religious beliefs here. *See O Centro Espirita*, 546 U.S. at 434 ("Nothing about the unique political status of the [exempted peoples] makes their members immune from the health risks the Government asserts").

To the extent Defendants claim an interest in increasing access to abortion-inducing drugs and devices on the margin, as *Brown* declared, the "government does not have a compelling interest in each marginal percentage point by which its goals are advanced." 131 S.Ct. at 2741.

Defendants likewise cannot show, as they must, a compelling interest with respect to the even-tinier fraction of American employees who work for religiously-objecting employers such as Plaintiffs. A generalized, "abstract" interest in the benefits of abortion-inducing drugs and devices for women will not suffice; Defendants must demonstrate a compelling interest with respect to Plaintiffs and Plaintiffs' own employees, *i.e.,* "in the circumstances of this case." *Cal. Democratic Party,* 530 U.S. at 584.

Likewise, 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."[25] Such "income-based support" is available through federal government subsidies in Title XIX-Medicaid, Title X-Family Planning Services and other federal programs,[26] as well as through subsidies by state governments.[27]

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.[28] According to a recent study, cost is not a prohibitive factor to

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[25] "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).

[26] 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).

[27] 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).

[28] 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).

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.[29]

In *O Centro Espirita,* the Supreme Court held that no compelling interest existed behind a law that had an arguably much more urgent goal—regulating extremely dangerous controlled substances—and that had many fewer exemptions than the broad swath of omissions from Defendants' HHS Mandate. In *O Centro Espirita*, the Court dealt with the Controlled Substances Act's prohibition on "all use," with "no exception," of a hallucinogenic ingredient in a tea along with other Schedule I substances. 546 U.S. at 423, 425 (granting relief under RFRA to a church to allow its approximately 130 members to use a Schedule I drug in their religious ceremonies because the government allowed hundreds of thousands of Native Americans to use a different Schedule I drug in their religious ceremonies). But because elsewhere in the statute there was a narrow religious exemption for Native American use of a different controlled substance, peyote, the Court held that the government could not meet its compelling interest burden even in considering its generalized interest in regulating Schedule I substances as applied to the plaintiffs in that case given this exemption. *Id.* at 433.

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

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[29] 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).

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 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)); accord *Tyndale,* 2012 WL 5817323 at *18 ("Indeed, the 191 million employees excluded from the contraceptive coverage mandate include those covered by grandfathered plans alone . . . considering the myriad of exemptions . . . the defendants have not shown a compelling interest in requiring the plaintiffs to provide the specific contraceptives to which they object."); *Am. Pulverizer,* 2012 U.S. Dist. LEXIS 182307, at *14 (explaining that the significant exemptions to the HHS Mandate "undermine any compelling interest in applying the preventative coverage mandate to Plaintiffs").

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.[30] Plaintiffs, who likewise object to the HHS

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[30] 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).

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 HHS Mandate is inconsistent on its face with the compelling interest rationale. Additionally, Defendants have used their essentially unfettered discretion to write a "religious employer" exemption into the HHS Mandate for certain houses of worship. 76 Fed. Reg. 46,621, 46,626. Defendants cannot claim that allowing exemptions to others for religious, including Plaintiffs, reasons would undermine any alleged compelling interest, when they have allowed significant religious exemptions. There is no nexus between the HHS Mandate exemption's criteria and Defendants' alleged interest.

The government has heretofore presented no evidence that a "grave" or "paramount" crisis justifies the imposition of this HHS Mandate on Plaintiffs and it cannot do so here. Defendants have not heretofore established and cannot now establish that the HHS Mandate furthers a compelling government interest. *See, e.g., Grote,* 2013 WL 362725.

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* at 542–46; *O Centro Espirita*, 546 U.S. at 432–37.

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.

Neither is the HHS Mandate the least restrictive means of achieving the government's purported interest even assuming, *arguendo,* as must be the case to survive a RFRA challenge, it is to advance 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.

The First Amendment "sponsor[s] an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach,* 343 U.S. at 313. The HHS Mandate allows government bureaucrats to determine what faith is, who the faithful are, and where and how faith may be lived out.

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.).

In *Riley v. Nat’l Fed’n of the Blind of North Carolina, Inc.,* 487 U.S. 781 (1988), North Carolina sought to curb fraud by requiring professional fundraisers to disclose during solicitations how much of the donation would go to them. *Id.* at 786. Applying strict scrutiny, the Supreme Court declared that the state’s interest could be achieved by publishing the same disclosures itself online, and prosecuting fraud. *Id.* at 799-800.

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.[31]

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"

[31] 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).

from RFRA's case law "is that the government must show something more compelling than saving money."[32]

However, political difficulty in achieving other options does not exonerate the HHS Mandate's burdens on Plaintiffs' religious beliefs, or allow the HHS Mandate to pass RFRA's strict scrutiny. Since many methods of implementation are clearly less restrictive of Plaintiffs' religious beliefs, any claim Defendants attempt to make that the HHS Mandate achieves its interest in the least restrictive means with respect to Plaintiffs' religious beliefs is fatally undermined under RFRA. *Nat'l Fed'n of the Blind,* 487 U.S. at 799-800.

If a less restrictive alternative would serve the government's purposes, "the legislature must use that alternative." *Playboy Entm't Grp., Inc.,* 529 U.S. at 813. 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).

IV. The HHS Mandate Also Violates the First Amendment Free Exercise Clause.

As is obvious from the foregoing, the HHS Mandate also violates the Free Exercise Clause of the First Amendment to the United States Constitution. Even after *Smith,* laws or regulations which are not neutral or generally applicable are required to satisfy the strict scrutiny test under the First Amendment's Free Exercise Clause. *Lukumi,* 508 U.S. at 531-32, 542-43. Strict scrutiny applies when discretionary or categorical exemptions exist but religious objections are denied. *See Blackkawk v. Pennsylvania,* 381 F.3d 202, 209-11 (3d Cir. 2004) (Alito, J.).

[32] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act,*

"At minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. When the "object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id*. at 533. The object of a law can be determined by examining its text and operation. *Id*. at 534–35.

1. The HHS Mandate is not generally applicable.

As set forth above, the HHS Mandate lacks "general applicability." Laws lack general applicability when they are under-inclusive. *Id*. at 543. "The Free Exercise Clause protects religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 542–43 (internal quotation marks and citation omitted). In *Lukumi*, the Court said that the underinclusiveness of a city's ban on animal sacrifice was "substantial" because it "fail[ed] to prohibit nonreligious conduct that endangers these interests [in public health and preventing animal cruelty] in a similar or greater degree than Santeria sacrifice does." *Id*.

The HHS Mandate is not "generally applicable" because it contains both categorical and discretionary exemptions for a variety of reasons, but refuses to exempt objectors such as Plaintiffs. In cases striking down religiously burdensome laws containing exemptions,

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73 Tex. L. Rev. 209, 224.

then-Judge Alito explained for the Third Circuit that strict scrutiny applies when discretionary or categorical exemptions exist but religious objections are denied. *Blackhawk*, 381 F.3d at 209–11 (3d Cir. 2004); *Fraternal Order of Police*, 170 F.3d at 365.

Here, in addition to the HHS Mandate's categorical exemptions, Defendants admit, by virtue of their promise to "fix" the application of the HHS Mandate to "safe-harbored" religious non-profits, that they possess virtually unfettered "discretion" to decide to which employers to apply their HHS Mandate as well as to decide who is to be covered by the HHS Mandate. HHS Mandate, 76 Fed. Reg. at 46,623–24; 77 Fed. Reg. 8,725, 8,726. Defendants effectively admit that they could have exempted Plaintiffs and other non-church religious objectors, but they chose not to do so. Meanwhile, their scheme exempts tens of millions for secular reasons.

The HHS Mandate is massively under-inclusive, yet Defendants refuse to offer Plaintiffs an exemption. More than 100 million employees are exempted from the HHS Mandate in grandfathered plans and other exempted plans. 76 Fed. Reg. 46,623 & n.4. The HHS Mandate also does not apply to small employers who have the option of dropping insurance altogether; or to religious sects opposed to insurance; or to houses of worship the Defendants have exempted. Health insurance plans covering millions of Americans can omit all items mandated by Defendants which would cause whatever harm Defendants allege in their purported purpose for the HHS Mandate; but Plaintiffs still must comply even in violation of their religious beliefs.

In the case of the grandfathering exemption, those employees are exempted from the HHS Mandate for reasons purely based on the politics of passing ACA, not based on any scientific rationale. There is no physiological difference between humans that work for exempt

employers and other humans that work for non-exempt employers that makes contraception/abortifacients beneficial for the latter but not for the former.

Defendants have chosen to offer an exemption for some religious employers based on politically-derived criteria, but they refuse to exempt Plaintiffs based on Plaintiffs' religious beliefs. The overall massive under-inclusiveness of the HHS Mandate, selectively allowing secular and religious exemptions, shows that it is a quintessential not-generally-applicable law.

2. The HHS Mandate is not neutral towards religion.

The HHS Mandate's exemptions also show it is not neutral towards religion. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Lukumi*, 508 U.S. at 533. The HHS Mandate explicitly exempts some "religious employers" but not others. This exemption is based on a variety of religious criteria including whether the "inculcation of religious values is the purpose" of the entity, whether "persons who share the religious tenets of" the group are those whom the group primarily hires or serves, and whether the group is a house of worship or "safe-harbored" religious non-profit. 76 Fed. Reg. at 46,626. Indeed, the "house of worship" employer definition in the HHS Mandate imposes Defendants' *theological* notion of which employers are "religious" enough to qualify for an exemption, *i.e.,* only those "houses of worship" who stay inside their own four walls and focus on self-serving purposes.

Defendants have thus created a caste system of religious employers, favoring one kind of objector because their religion is insular, while penalizing Plaintiffs because they pursue their religious tenets in their business and within society, instead of within the four walls of a church.

The text of the HHS Mandate itself therefore shows an unconstitutionally discriminatory "effect of a law in its real operation," thus showing "strong evidence" that religious objectors beyond Defendants' narrow definition are the "object" of the HHS Mandate, rather than that contraceptive/abortifacient access is the "object." *Lukumi*, 508 U.S. at 535; *Hartmann v. Stone,* 68 F.3d 973, 978 (6th Cir. 1995) (requiring "neutrality between religion and non-religion"); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,* 309 F.3d 144, 167 (3d Cir. 2002) (law is not neutral when secular and religious exemptions are offered to others but denied to plaintiff).

Indeed, the HHS Mandate's criteria impose a governmental view of what really "counts" as religion, even though some religions do not even use the vocabulary of "churches" and do not primarily exercise their beliefs in isolation. This lack of neutrality regarding the notion of what religion *is* bespeaks of a Free Exercise Clause violation. *See Braunfeld*, 366 U.S. at 607 (noting that "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."); *see also Lukumi*, 508 U.S. at 532 (identifying a Free Exercise Clause violation where a policy prefers some religions to others).

As in *Lukumi*, the effect of the HHS Mandate is to pick and choose between specific religious objectors. There, the Supreme Court found an ordinance against animal sacrifice not facially neutral because its operative terms included "sacrifice" and "ritual," terms not typically associated with secular meanings. *Lukumi*, 508 U.S. at 534. But in practice, it was clear that the object of the ordinance was to exclude the "religious exercise of Santeria church members." *Id.* at 535. For example, the ordinance exempted from its prohibition almost all killings of animals,

except for religious sacrifice. *Id*. at 536. The Court called this a "religious gerrymander," and an "impermissible attempt to target [the church] and their religious practices." *Id*. at 535.

As in *Lukumi*, the HHS Mandate here exempts "religious employers" that primarily engage in the "inculcation of religious values," focus on "persons who share the[ir] religious tenets," and are churches or religious orders. Yet the HHS Mandate does not apply to hundreds of millions of employees for secular reasons, including that they are in grandfathered plans or work for small employers, or for religious reasons if they are in a religious sect opposed to insurance coverage of contraceptives/abortifacients.

The fact that most employers already cover contraceptives/abortifacients, combined with the HHS Mandate's constricted definition of religion, shows that the HHS Mandate is a thinly-veiled an attempt to target society's religious "hold outs" who possess beliefs against providing such coverage not to advance health.[33] The HHS Mandate and its exemptions establish nothing less than a "religious gerrymander" designed to target most religions objectors, while letting millions of secular employers off the hook. This demonstrates the lack of neutrality. *Id*. at 537–39.

V. The HHS Mandate Also Violates the First Amendment Establishment Clause.

The HHS Mandate also violates the Establishment Clause of the First Amendment. The HHS Mandate's "religious employer" exemption, as discussed above, sets forth Defendants'

[33] The HHS Mandate's religious employer definition was reportedly drafted by the ACLU in California to exclude most religious objectors. See ACLU Press Release, "ACLU Applauds CA Supreme Court Decision Promoting Women's Health and Ending Gender Discrimination in Insurance Coverage" (Mar. 1, 2004) ("The ACLU crafted the statutory exemption [at issue]…."), *available at* http://www.aclu.org/reproductive-freedom/aclu-applauds-ca-supreme-court-decision-promoting-womens-health-and-ending-gend (last visited Apr. 28, 2012).

notion of what "counts" as religion and what doesn't for the purposes of who will be exempt under the HHS Mandate. But the government may not create a caste system of different religious organizations and belief-levels when it imposes a burden. Instead it "must treat individual religions and religious institutions 'without discrimination or preference.'" *Colo. Christian U. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008); *Larson v. Valente*, 456 U.S. 228 (1982); *see also Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990) , *cert. denied*, 505 U.S. 1218 (1992) (holding that section 19 of the National Labor Relations Act which exempts from mandatory union membership any employee who "is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations," is unconstitutional because it discriminates among religions and would involve an impermissible government inquiry into religious tenets).

Defendants used their unfettered discretion to pick and choose who qualifies as "religious" enough for an exemption and they imposed their constricted theological view of religion on all Americans. The HHS Mandate's four-pronged religious exemption emphasizing "the inculcation of religious values" necessarily requires the government to explore a religious organization's purpose in impermissible ways. The government would thus be engage in "intrusive judgments regarding contested questions of religious belief or practice" in violation of the First Amendment. *Weaver*, 534 F.3d at 1261.[34]

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[34] In *Weaver,* the Tenth Circuit held unconstitutional a discrimination-among-religions policy that is very similar to the HHS Mandate. The discrimination-among-religions policy in that case attempted to treat "pervasively sectarian" education institutions differently than other religious education institutions, based on whether: the employees and students were of one religious

The exemption deems religious organizations insufficiently "religious" if they do not focus on co-religionists in hiring and service, which, as a consequence, requires the government to probe into what exactly count as an organization's religious "tenets." This clearly disfavors religious believers such as Plaintiffs who exercise their beliefs not by only working with others, whether or not those others are followers of Jesus, but by witnessing their faith by treating everyone with dignity and fairness according to the tenets of the Holy Bible. The exemption's restriction of religious employers to tax code provisions which identify and relate to churches and religious orders, whose purpose relates to whether paperwork should be filed, bears no reasonable relation to Defendants' alleged interest and is designed to discriminate against religious objectors such as Plaintiffs.

The HHS Mandate draws its line around "religious employers" based on whether the people they "hire" or "serve" share the same "religious tenets," whether the employer's purpose is to "inculcate" values, and whether the entity is a church or affiliate of a church. The Tenth Circuit held that such a discriminatory line violates the First Amendment and rejected, as "puzzling and wholly artificial," the government's argument that their law "distinguishes not between types of religions, but between types of institutions." *Id.* at 1259–60. Indeed, the Tenth Circuit also held that "animus" towards religion is not required to find a First Amendment violation in the presence of such facial discrimination. *Id.* at 1260.

Additionally, Defendants' HHS Mandate engages in entanglement with and hostility toward religion in violation of the First Amendment's Establishment Clause. Defendants have

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persuasion; the courses sought to "indoctrinate"; the governance was tied to particular church affiliation; and similar factors. *Id.* at 1250–51.

purported to decide who is, and who is not, sufficiently "religious" to receive the largesse of their exemptions. Defendants' HHS Mandate marginalizes certain expressions of religious belief by declaring that many entities are not "religious enough" to qualify for an exemption from the HHS Mandate, an exemption bestowed, for example, upon churches or religious orders that primarily serve, hire, and inculcate beliefs upon their own adherents. This results in a "caste system" of religious believers, favoring some while punishing others, including the Plaintiffs.

This is government establishment of religion in one of the most basic senses. *Weaver*, 534 F.3d at 1257.

VI. The HHS Mandate Also Violates the First Amendment Free Speech Clause.

The HHS Mandate additionally violates the First Amendment by coercing Plaintiffs to provide for speech that is contrary to their religious beliefs. The "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Accordingly, the First Amendment protects the right to "decide what not to say." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (internal quotation marks omitted). "[L]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 624, 642 (1994). The "First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way [the government] commands, an idea they find morally objectionable." *Wooley*, 430 U.S. at 715.

The HHS Mandate unconstitutionally coerces Plaintiffs to speak a message they find morally objectionable by requiring, not only that they cover contraceptives/abortifacients in their insurance, but, beyond that, "speak" "patient education and counseling" in favor of those items. *See, e.g., Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 234-35 (1977) (forced contributions for union political speech); *United States v. United Foods,* 533 U.S. 405, 411 (2001) (forced contributions for advertising).

The Supreme Court recently reaffirmed that "compulsory subsidies for private speech" violate the First Amendment unless they involve a "mandated association" that meets the compelling interest / least restrictive means test. *Know v. Service Employees Int'l Union,* 132 S.Ct. 2277, 2289 (June 21, 2012).

Here there is no "mandated association" preventing strict scrutiny because the government omits many employer plans from the HHS Mandate; thus the HHS Mandate violates the compelling interest test.

VII. Plaintiffs Are Entitled to a Preliminary Injunction.

Defendants' illegal HHS Mandate poses an urgent threat to Plaintiffs thereby justifying injunctive relief by this Court. Plaintiffs have no adequate remedy at law. VC ¶ 102. Unless this Court provides Plaintiffs with immediate injunctive relief so as to prevent the HHS Mandate's applicability to them, Plaintiffs will be forced to continue to comply with the HHS Mandate in the January 1, 2013 plan year and in subsequent plan years thereafter, VC ¶ 97, thereby suffering irreparable 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 which 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).

Although the question is still apparently open in the Tenth Circuit, in RFRA cases, other circuit courts have applied the modified standard to injunctions that seek to stay governmental action. *See, e.g., Cheema v. Thompson,* 67 F.3d 883, 885 (9th Cir. 1995) (applying "fair chance of success on the merits" standard in RFRA challenge to school district rules required by state law); *Korte*, 2012 WL 6757353, at *2 (concluding under "sliding scale" that business owners established "a reasonable likelihood of success on the merits"); *Grote,* 2013 WL 362725 (same); *but see Jolly v. Coughlin,* 76 F.3d 468, 473-74 (2d Cir. 1996) (rejecting modified standard in RFRA case).[35]

[35] *But see Hobby Lobby,* 870 F.Supp. 2d 1278, appeal for injunction pending appellate review denied on December 20, 2013 by a 10th Circuit two judge motions panel and later by Justice Sotomayor, in chambers). Importantly, this Tenth Circuit ruling by a motions panel is not binding on this Court.

This Court need not resolve this issue, 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).

1. Plaintiffs will suffer irreparable harm absent an injunction.

Plaintiffs seek to offer their employee insurance plan, as they have been advised by their insurer they will be able to do if this Court enters a preliminary injunction, without providing abortion-inducing drugs and devices and counseling/education for the same, and without being subject to the HHS Mandate's harsh financial penalties, lawsuits and other liability. Without the requested injunction, Plaintiffs will be coerced to either violate their faith, resulting in actual and imminent loss of their religious liberties, or violate the law and risk all the sanctions and penalties that will flow from such a violation. This is irreparable injury. *Kikumura*, 242 F.3d at 963 ("a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA"); *accord Jolly*, 76 F.3d at 482 and *Stormans,* 586 F.3d at 1138. *See also 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.").

2. An injunction will cause no harm to Defendants.

The federal government has never imposed this HHS Mandate against religious objectors. Defendants can offer no evidence to show that harm will come to Plaintiffs' employees if an injunction issues preventing the HHS Mandate's applicability to Plaintiffs. The ubiquity of contraceptives/abortifacients access, massive government subsidization thereof, and the fact that the government has exempted more than 100 million employees from the HHS Mandate already,

make it impossible for Defendants to claim that a preliminary injunction in this case will cause harm.

3. The public interest favors a preliminary njunction without bond.

"Vindicating First Amendment freedoms is clearly in the public interest." *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005). *See also Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001) ("Because we have held that Utah's challenged statutes also unconstitutionally limit free speech, we conclude that enjoining their enforcement is an appropriate remedy not adverse to the public interest."). The public interest is best served by preventing government officials from compelling individuals to violate their religious conscience rights protected by RFRA and the First Amendment.

The public interest, the lack of any financial or other harm to Defendants, and all of the other factors weigh in Plaintiffs' favor regarding the entry of a preliminary injunction. Thus, Plaintiffs request that the Court impose a bond of zero dollars in this instance. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009) (court has discretion to order no bond).

CONCLUSION

Defendants' HHS Mandate violates both RFRA and the First Amendment. Unless this Court issues a preliminary injunction, Plaintiffs face the choice of continuing to violate their beliefs or violating suffering massive financial penalties, lawsuits, and potential other liabilities. Defendants have shown no harm by virtue of injunctions entered in at least 12 other cases; Defendants can demonstrate no harm from entry of a preliminary injunction in this case.

Plaintiffs respectfully request that this Court enter a preliminary injunction prohibiting Defendants from requiring Plaintiffs o provide health insurance coverage for abortion-inducing contraception drugs, abortifacient drugs, and related education and counseling to their employees as required by the HHS Mandate.

Respectfully submitted this 18th day of March, 2013.

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CERTIFICATE OF SERVICE

I, Michael J. Norton, hereby certify that on the 18th day of March, 2013, I caused the foregoing motion to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record, to wit:

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