**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:13-cv-00285-WYD-BNB

STEPHEN W. BRISCOE;
CONTINUUM HEALTH PARTNERSHIPS, INC.;
CONTINUUM HEALTH MANAGEMENT, LLC; and
MOUNTAIN STATES HEALTH PROPERTIES, LLC,

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;
NEAL WOLIN, in his official capacity as Acting 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.

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# BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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## INTRODUCTION

Plaintiffs seek entry of a preliminary injunction against Defendants' enforcement of a portion of the preventive services coverage provision of the Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010) and related implementing regulations (the "HHS Mandate"). Without such relief, Plaintiff Stephen W. Briscoe ("Mr. Briscoe") and the business entities he owns will be forced to pay for contraceptives, abortifacients, and sterilization procedures, as well as counseling related to such drugs and procedures, in violation of Mr. Briscoe's religious beliefs and the ethical standards he has instilled in the business entities he owns in order to avoid crippling monetary fines and other penalties imposed by the federal government. This Court recently granted this same relief in *Newland v. Sebelius,* 2012 WL 3069154 (D. Colo. Judge John L. Kane, July 27, 2012).

Defendants seek to force citizens to violate their sincerely held religious beliefs merely because those citizens operate for profit business in the United States of America. Defendants' national mandate that, with major exemptions, employers provide health insurance coverage of contraceptives, abortifacients, and related procedures, (herein the "HHS Mandate"[1]), disregards religious conscience rights that are enshrined in federal statutory and constitutional law. Those rights squarely protect the Plaintiffs in this case, Mr. Briscoe and the business entities he solely owns and operates. The HHS Mandate's burdens on Plaintiffs' religious beliefs cannot be reconciled with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. (herein "RFRA"), because (among many reasons) there are obvious less-religiously-restrictive means for

[1] As described below and in Plaintiffs' Verified Complaint which is incorporated herein by this reference, the HHS Mandate consists of a conglomerate of regulations, guidelines, indirect statutory authority and penalties.

the government to pursue free contraceptives, abortifacients and sterilization, such as for the government to subsidize such drugs and procedures.

Defendants' own actions show that their HHS Mandate is not in furtherance of a compelling interest "of the highest order" (as required by *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)). Defendants currently offer a multitude of secular and even religious exemptions to the HHS Mandate, but refuse to respect the religious beliefs of Plaintiffs or to offer Plaintiffs an exemption. The HHS Mandate does not apply to approximately 100 million employees in "grandfathered" plans, the Amish, small employers, self-serving churches, and others.[2]

This arbitrary regime of exemptions further illustrates that the HHS Mandate violates the religion clauses of the First Amendment. The Supreme Court insists that a law cannot burden religious exercise while offering such a wide variety of other exemptions. *See, e.g., id.* at 542–46; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432–37 (2006). Such a scheme is not "neutral" or "generally applicable."

The HHS Mandate also engages in entanglement with and hostility to religious beliefs in violation of the First Amendment's Establishment Clause. Defendants have purported to decide who is, and who is not, sufficiently "religious" to receive the largesse of their accommodations. The Mandate attempts to marginalize certain expressions of religious belief by declaring that entities do not qualify for an exemption unless they are churches or religious orders that

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[2] Indeed, Judge John L. Kane estimated in his July 27, 2012 order granting relief to plaintiffs that "191 million Americans belong to plans which may be grandfathered under the ACA." *Newland v. Sebelius*, 2012 WL 3069154 at *1 (D. Colo. July 27, 2012); accord *Tyndale House Publ'rs. v. Sebelius*, 2012 WL 5817323 at *18 (D.D.C. Nov 16, 2012).

primarily serve, hire, and inculcate beliefs upon their own adherents. This establishes a caste system of religious believers, favoring some while punishing others, such as the Plaintiffs here. This is government establishment of religion in one of the most basic senses. *Colo. Christian U. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008). Defendants are, additionally, violating Plaintiffs' freedom not to speak through the compelled "counseling" that the Mandate requires.

Defendants' illegal HHS Mandate poses an urgent threat to Mr. Briscoe and his businesses. The HHS Mandate will force Plaintiffs to implement, starting on and after April 1, 2013, the coverage at no cost of abortifacients and other objectionable items in Plaintiffs self-insured employee health plan. Moreover, if this Court does not issue preliminary injunctive relief against the applicability of the HHS Mandate to Plaintiffs prior to March 1, 2013, the date by which Plaintiffs must have health insurance plan details in place, Defendants will irreparably trample on Plaintiffs' federal rights and injure their ability to obtain final relief.

## FACTUAL BACKGROUND

As is set forth in Plaintiffs' Verified Complaint, incorporated herein by this reference, Mr. Briscoe is a believing and practicing Evangelical Christian who solely owns several separate Colorado limited liability companies and Colorado for-profit corporations which operate several senor independent living residences, assisted living centers or skilled nursing facilities and related businesses. Each limited liability company is a single member limited liability company of which Mr. Briscoe is either the member-manager or in control of the entity which is the member-manager. Likewise, each of the corporations is organized as an S Corporation of which Mr. Briscoe is either the sole shareholder or in control of the entity which is the sole shareholder.

Verified Complaint ("VC") ¶¶ 2, 25-29. As a result, Mr. Briscoe is solely responsible for all of these businesses, their management, and their operation and the approximately 200 full-time employees his businesses employ. VC ¶¶ 2, 46; *see also* VC, Exhibit A.

Mr. Briscoe, as an Evangelical Christian, strives through the management and operation of his businesses (and in other aspects of his life) to follow the teachings of the Holy Bible. VC ¶¶ 2, 4, 42-47. Mr. Briscoe's commitment to the teachings of the Holy Bible and his religious ethics permeate his ownership and management of his businesses. *Id.* Mr. Briscoe has established a mission statement for his businesses to "honor and love God by caring for people. VC ¶ 43; *see also* VC, Exhibit B). In recent years, using revenues derived from his businesses, Mr. Briscoe has donated thousands of dollars to Christian educational, evangelistic, religious and charitable efforts in his community.

As Mr. Briscoe has become more knowledgeable of and aware about the requirements of the HHS Mandate, he discovered in about January 2013 that his businesses' self-insurance plan covered "FDA-approved contraceptives" and that, unbeknownst to him, such FDA-approved "contraceptives" included drugs that are, in fact, abortifacients, i.e., Plan B drugs and ella. VC ¶ 9. In the exercise of his sincerely and deeply held religious beliefs, Mr. Briscoe instructed the insurance company with which he contracts for his self-insurance plan to omit coverage of such abortifacients in the future. However, he was informed by this insurance company that, without injunctive relief from this Court, the insurance company cannot provide health insurance for his businesses without including drugs that are, in fact, abortifacients, i.e., Plan B drugs and ella in the plan coverage and in compliance with the HHS Mandate. VC ¶ 10.

The next plan-year for Plaintiffs self-insurance plan begins April 1, 2013. VC ¶¶ 3, 16. To put the details in place for the April 1, 2013 plan year, and especially to make any coverage changes, Plaintiffs must finalize plan arrangements with the insurance company well in advance of the April 1, 2013 date. VC ¶ 3, 48-52.

Defendants have mandated that Plaintiffs violate their deeply held religious beliefs by inserting coverage of contraceptives, abortifacients, sterilization, and education and counseling in favor of the same into their employee health insurance plan starting in the April 1, 2013 plan year. VC ¶¶ 1, 5-7, 20, 30-31, 48-52, 96.

The PPACA did not require this HHS Mandate. But it did require that health plans include coverage of then as yet unspecified preventive health services, including preventive care items for women, at no cost-sharing to patients. 42 U.S.C. § 300gg-13(a)(4). Defendants issued regulations ordering HHS's Health Resources and Services Administration (herein "HRSA") to decide what would be mandated as women's preventive care. 75 Fed. Reg. 41726–60 (July 19, 2010). HRSA issued guidelines in July 2011 mandating that preventive care for women include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." http://www.hrsa.gov/womensguidelines/ . Very shortly thereafter Defendants issued an "interim final rule" endorsing HRSA's guidelines as applied to plan years beginning on or after August 1, 2012, and granting "additional discretion" to HRSA to exempt some religious objectors, according to a specific religious definition, from the HHS Mandate. 76 Fed. Reg. 46621–26 (Aug. 3, 2011). Defendants issued final regulations by adopting these August 3 regulations "without change." 77 Fed. Reg. 8725–30 (Feb. 15, 2012).

The HHS Mandate triggers a variety of penalties against Plaintiffs if they refuse to provide such coverage so as to not violate their religious beliefs. VC ¶¶ 65-69. Section 1563 of PPACA incorporates the preventive care requirement into the Internal Revenue Code as well as into ERISA. See "Conforming Amendments," Pub. L. 111-148, §1563(e)-(f). This results in penalties enforced through the Treasury Department of approximately $100 per employee *per day* on Plaintiffs if they continue providing their employees with generous health insurance coverage but omit the mandated items to which they object. 26 U.S.C. § 4980D. Furthermore, the law imposes a $2,000 per employee per year penalty on Plaintiffs if they elect not to provide health insurance altogether. 26 U.S.C. § 4980H. Meanwhile, the Labor Department as well as Plaintiffs' plan participants are authorized to sue Plaintiffs for omitting the objectionable mandated coverage, and those suits can specifically force the Plaintiffs to violate their religious beliefs by mandating provision of the objectionable coverage. 29 U.S.C. § 1132.

This Court is Plaintiffs' only recourse for relief from the HHS Mandate's assault on their religious freedom. VC ¶ 96. Plaintiffs' health insurance plan does not qualify for "grandfathered" status from the HHS Mandate nor does it meet the variety of other secular or religious exemptions Defendants and federal law have chosen to provide. VC ¶¶ 83-88. Plaintiffs have no adequate remedy at law. VC ¶ 101. Unless this Court provides Plaintiffs with preliminary injunctive relief before February 15 2013 so as to prevent the HHS Mandate's applicability to them, Plaintiffs will suffer irreparable harm by Defendants' coercion because the HHS Mandate blatantly violates longstanding religious conscience protections found in federal statute and the constitution. VC ¶ 100.

## ARGUMENT

To obtain a preliminary injunction, Plaintiffs must show: (1) likelihood of success on the merits at trial; (2) likelihood that the movant will suffer irreparable harm if the preliminary injunction does not issue; (3) the balance of equities tips in the movant's favor; and (4) the injunction is in the public interest. *Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776-77 (10th Cir. 2009). Each factor favors injunctive relief here.

### I. Plaintiffs Are Likely to Succeed on the Merits.

#### A. The HHS Mandate violates RFRA.

Defendants' HHS Mandate is a textbook violation of the Religious Freedom Restoration Act ("RFRA"). That statute provides:

> (a) In general
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. 2000bb-1. RFRA applies against actions of the federal government. *O Centro Espirita*, 546 U.S. at 424 n.1. RFRA adopts a strict scrutiny rule against federal burdens of religious exercise that Congress deemed to have been curtailed in *Employment Division v. Smith*, 494 U.S. 872 (1990). *See O Centro Espirita*, 546 U.S. at 424.

### 1. The HHS Mandate substantially burdens Plaintiffs' exercise of religion.

Plaintiffs' operation of their health insurance plan according to their religious beliefs is the "exercise of religion" under RFRA. RFRA "includes 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). This includes not merely worship but actions in accordance with one's religious beliefs.

In *Sherbert v. Verner*, 374 U.S. 398, 399 (1963), an employee's religious beliefs forbade her from working on Saturdays. In *Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972), parents had religious beliefs that prohibited them from sending their children to high school. In *Thomas v. Review Board*, 450 U.S. 707, 709 (1981), a worker objected to participating in the production of war materials.[3] *See also Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (concerning a police officer's belief that wearing a beard was religiously required).

Therefore, Mr. Briscoe's operation of his businesses in compliance with his religious beliefs against providing coverage of abortifacients, contraceptives and sterilizing items and being coerced into providing education and counseling about such drugs and procedures is part of his "exercise of religion" under RFRA. Plaintiffs' Verified Complaint is not based upon an objection to employees' life choices, or to employees' use of their own money. Rather, Plaintiffs' Verified Complaint stems from Plaintiffs' objection, based on sincere religious beliefs, to providing insurance coverage for contraceptives/abortifacients and information related thereto because Plaintiffs believe providing such coverage is immoral.

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

The HHS Mandate imposes far more than a substantial burden on Plaintiffs' religious beliefs, because it directly mandates that they violate those beliefs. 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.

Here, the coercion is even more direct: a mandate that Mr. Briscoe violate his sincerely held religious beliefs against offering coverage of abortifacients and other similar items.

In *Yoder*, 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. Here, Mr. Briscoe faces crippling fines and lawsuits unless he violates his religious principles by providing coverage of contraception, abortifacients, and related items to which he religiously objects. Defendants' HHS Mandate imposes penalties of $100 per employee per day if he omits these items from his plan, and $2,000 per employee per year if he elects to drop health insurance altogether (plus the inherent harm to his employees, and to his competitive provision of benefits, that would come from dropping coverage altogether). 26 U.S.C. §§ 4980D & 4980H. The HHS Mandate further authorizes lawsuits by plan participants and the Secretary of Labor to force the Plaintiffs to provide coverage in violation of their beliefs. 29 U.S.C. § 1132. The mere fact that the HHS Mandate creates a federal law requirement on Plaintiffs puts them at risk in

innumerable arrangements, such as contracts, that may require them to comply with "all federal laws."

The Supreme Court considered "a fine imposed against appellant" to be a quintessential burden. *Sherbert*, 374 U.S. at 403–04. That is the penalty present here.

**2. Other means would be less restrictive of Plaintiffs' religious exercise.**

Before this memorandum addresses why Defendants cannot show a compelling interest, it is worth noting that, even assuming, *arguendo,* that such a compelling interest existed, the government cannot possibly show that the HHS Mandate is "the least restrictive means of furthering" such a compelling interest under RFRA, 42 U.S.C. 2000bb-1. Defendants bear the burden to show both of these elements—compelling interest and least restrictive means—including at the preliminary injunction stage. *O Centro Espirita*, 546 U.S. at 428–30 ("[T]he burdens at the preliminary injunction stage track the burdens at trial. . . . RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the [compelling interest] test," such as for speech claims under the First Amendment.).

Defendants fail the least restrictive means test simply because the government could achieve its 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 covering all the items the HHS Mandate requires, and then allow free enrollment in that plan for whomever the government seeks to cover. Or the government could directly compensate providers of contraception or sterilization. Or the government could offer tax credits or deductions for contraceptive purchases. Or the government might impose a mandate on the contraception

manufacturing industry to give its items away for free.[4] These and other options could fully achieve Defendants' apparent goals while 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 coverage themselves.

Defendants cannot deny that the government could pursue its goal more directly. This conclusion is not only dictated by common sense, but is also proven because the federal government and many states already directly subsidize birth control coverage for many citizens through Title XIX-Medicaid, Title X-Family Planning Services funding and other government programs. Thus, the Court's RFRA analysis may stop here: the HHS Mandate is not the least restrictive means of furthering Defendants' interest. Other options may be more difficult to pass the Congress (which further illustrates the public's disbelief that the HHS Mandate's interest is "compelling"), but such other options nonetheless exist. Political difficulty in achieving these 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 which are less restrictive of Plaintiffs' religious beliefs exist, this alone fatally undermines Defendants' burden under RFRA and the HHS Mandate from applying to Plaintiffs.

**3. The HHS Mandate is not justified by a compelling interest.**

Defendants cannot establish that their coercion of Plaintiffs is "in furtherance of a compelling governmental interest." RFRA, with "the strict scrutiny test it adopted," *O Centro Espirita*, 546 U.S. at 430, imposes "the most demanding test known to constitutional law." *City*

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[4] 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. 16501–08 (Mar. 21, 2012)

*of Boerne v. Flores*, 521 U.S. 507, 534 (1997). 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).

Defendants 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. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000); *O Centro Espirita*, 546 U.S. at 430–32 (RFRA's test can only be satisfied "through application of the challenged law 'to the person'—the particular claimant"); *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"). The government must "specifically identify an 'actual problem' in need of solving" and show that coercing Plaintiffs is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (June 27, 2011). If Defendants' "evidence is not compelling," they fail their burden. *Id.* at 2739. 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. *Id.* The government "bears the risk of uncertainty . . . ambiguous proof will not suffice." *Id.*

Defendants' interest in coercing Plaintiffs into providing coverage of contraceptives, abortifacients, and sterilization is not compelling. No "grave" or "paramount" crisis justifies this HHS Mandate on Plaintiffs. Never in the history of the United States has the federal government forced religiously objecting employers to cover contraceptives, abortifacients, and sterilization in their health plans. Indeed, a large majority of Americans reportedly already have contraceptive

coverage.[5] Defendant Sebelius admitted that "contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support."[6] Such "income-based support" is available through federal government subsidies in Title XIX-Medicaid and Title X-Family Planning Services, as well as through subsidies by state governments.[7] And the availability of contraceptive items for sale is ubiquitous, now reaching even vending machines on college campuses.

Defendants therefore cannot claim a grave interest in scarcity of contraceptives and abortifacients in health insurance. To the extent they claim an interest in increasing access to contraceptives and abortifacients on the margin, *Brown* declared: "government does not have a compelling interest in each marginal percentage point by which its goals are advanced." 131 S. Ct. at 2741.

Defendants cannot show, as they must, a compelling interest with respect to the even-tinier fraction of American employees who work for religiously-objecting employers. A generalized, "abstract" interest in the benefits of contraceptives or abortifacients for women will not suffice; Defendants must demonstrate their interest with respect to Plaintiffs' own

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[5] 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 accessed Apr. 28, 2012).

[6] "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 accessed Apr. 28, 2012).

[7] 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 to not, directly or indirectly, 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 accessed Apr. 28, 2012).

employees, *see O Centro Espirita*, 546 U.S. at 430–32, proving the government has no choice but to coerce Plaintiffs. Yet the HHS Mandate references no scientific and compelling data about Plaintiffs' employees, and no data even about the broader category of objecting religious employers' employees. Defendants cannot show a crisis among those employees. In *O Centro Espirita*, the Court held evidence to be insufficient showing that Schedule I controlled substances were "extremely dangerous," because that "categorical" support could not meet the government's RFRA burden to consider the "particular" exception requested by the plaintiffs. *Id.* at 432. The government's lack of particular evidence here similarly cannot satisfy their compelling interest burden.

Defendants' burden must be supported even more precisely than this. They must show that the alleged harm to Plaintiffs' employees is not mild, but extreme: that it threatens the "gravest," "highest" and most "paramount" consequences for Plaintiffs' employees absent the HHS Mandate. But the HHS Mandate's regulations cite no rash of contraceptive/abortifacient-deprived injuries or deaths among employees of religiously-devout employers. They also cite no pandemic of unwanted births causing catastrophic consequences among such employees. It is just as likely that employees of Plaintiffs and similar entities experience zero negative health consequences absent the HHS Mandate, for any number of reasons. At best, Defendants do not know. Critically, Defendants "bear the risk of uncertainty," and cannot satisfy their burden under RFRA with speculation and generalizations.

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. But even if gravely at-risk employees exist, which Defendants have not

demonstrated, it is possible that they all may obtain the mandated items by other means separate and apart from Plaintiffs' coverage. Defendants have not and cannot connect the HHS Mandate to *causation* of grave harm among Plaintiffs' employees. *See also 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.").

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. The HHS Mandate does not apply to thousands of plans that are "grandfathered" under PPACA. See HHS Mandate, 76 Fed. Reg. at 46623 & n.4. The government estimates that close to 100 million employees will be covered by grandfathered plans *not* subject to the HHS Mandate in 2013.[8] As stated above, Judge John L. Kane estimated in his July 27, 2012 order granting preliminary injunctive relief to the Newland plaintiffs that "191 million Americans belong to plans which may be grandfathered under the ACA." *Newland v. Sebelius,* 2012 WL 3069154 at *1 (D. Colo. July 27, 2012); accord *Tyndale House Publ'rs. v. Sebelius,* 2012 WL 5817323 at *18 (D.D.C. Nov 16, 2012).

In addition, employers with less than 50 full-time employees are not required by PPACA to provide health insurance coverage at all, which may allow them to entirely avoid the HHS

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[8] HealthReform.gov, "Fact Sheet: Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans," *available at* http://www.healthreform.gov/newsroom/keeping_the_health_plan_you_have.html (last accessed Apr. 28, 2012) (estimating that 55% of 113 million

Mandate.[9] Also, the HHS Mandate does not apply to members of a "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds. 26 U.S.C. §§ 5000A(d)(2)(a)(i) and (ii). And the HHS Mandate exempts from its requirements "religious employers" defined as churches or religious orders that primarily hire and serve their own adherents and that have the purpose of inculcating their values. HHS Mandate, 76 Fed. Reg. at 46626. The federal government has decided that employers in any of these categories simply do not have to comply with the HHS Mandate.

These are massive exemptions that cannot coexist with the concept that, as against Plaintiffs, there is a compelling interest. Defendants cannot claim a "grave" or "paramount" interest to impose the HHS Mandate on Plaintiffs or other religious objectors while allowing nearly 100 million employees to be "unprotected." "[T]he government is generally not permitted to punish religious damage to its compelling interests while letting equally serious secular damage go unpunished." *United States v. Friday*, 525 F.3d 938, 958 (10th Cir. 2008). "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 520. 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." *Id.* at 546–47. The 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.

large-employer employees, and 34% of 43 million small-employer employees, will be in grandfathered plans in 2013).

[9] See 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 accessed Apr. 28, 2012).

Defendants' immense grandfathering exemption in particular has nothing to do with a determination that those nearly 100 million Americans do not need contraceptive/abortifacient coverage while Plaintiffs' employees somehow do require such coverage. The exemption was instead a purely political effort to garner votes for PPACA by which the President claimed, "If you like your health care plan, you can keep your health care plan." If the government can toss aside such a massive group of employees on such political bases, their "interest" in mandating cost-free contraceptives/abortifacients coverage cannot possibly be "paramount" or "grave" enough to justify coercing Plaintiffs to violate their religious beliefs. *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").

The HHS Mandate on its face is also inconsistent with a compelling interest rationale. Defendants have used their discretion to write a "religious employer" exemption into the HHS Mandate for certain self-focused churches. HHS Mandate, 76 Fed. Reg. at 46626. How can Defendants claim that allowing religious exemptions would undermine an 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, such that a compelling interest exists for non-exempt entities but is absent for exempt ones. On the contrary, Defendants essentially admit that employees of religious objectors do implicate their "interest," because Defendants refuse to expand their exemption to include more religious employers. Defendants have simply engaged in political line-drawing.[10] Plaintiffs cannot be denied a religious

[10] 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 accessed Apr. 28, 2012).

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 because of RFRA).

In *O Centro Espirita,* the Supreme Court held that no compelling interest existed behind a law that had a much more urgent goal—regulating extremely dangerous controlled substances—and that had many fewer exemptions than the broad swath of omissions from the HHS Mandate. In that case, 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. But because elsewhere in the statute there was a narrow religious exemption for Native American use of a different 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. *Id.* at 433. Even more so here, the government cannot satisfy its burden by pointing to general health benefits of contraception/abortifacients. Halting the use of extremely dangerous drugs is arguably far more urgent than forcing religious objectors to provide contraceptive/abortifacient coverage. Defendants' grant of secular and religious exemptions for millions of other Americans betrays any alleged compelling interest they may have in forcing Plaintiffs to comply with the HHS Mandate against their religious beliefs.

**B. The HHS Mandate violates Plaintiffs' right to Free Exercise of Religion.**

The HHS Mandate also violates the free exercise clause of the First Amendment of the United States Constitution. "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 because it disfavors religion.**

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 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 massively under-inclusive, yet Defendants refuse to offer Plaintiffs an exemption. As described above, nearly 100 million employees will be exempt from the Mandate in 2013 because their plans will be grandfathered. HHS Mandate, 76 Fed. Reg. at 46623 & n.4; see *infra* n.7. The HHS Mandate also does not apply to small employers who have the option of dropping insurance; to religious sects opposed to insurance; and to "religious employers" that the HHS Mandate defines as exempt. Thus, health insurance plans covering

millions of Americans can omit all the mandated items and cause all the same harm alleged by Defendants; 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 PPACA, not based on any scientific rationale. There is no physiological difference between humans that work for religious-minded employers and other humans that work for non-religious-minded 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 their 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.

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, then-Judge Alito explained for the Third Circuit that strict scrutiny applies when discretionary or categorical exemptions exist but religious objections are denied. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209–11 (3d Cir. 2004); *Fraternal Order of Police*, 170 F.3d at 365. Here, in addition to the HHS Mandate's categorical exemptions such as for grandfathered plans, Defendants admit that they possess "discretion" over the exemption they created for "religious employers" *and the scope of who is covered.* HHS Mandate, 76 Fed. Reg. at 46623–24; 77 Fed. Reg. at 8726. Defendants admit that they could have exempted Plaintiffs and other non-church religious

objectors, but they chose not to. Meanwhile, their scheme exempts tens of millions for secular reasons.

**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 church or religious order. HHS Mandate, 76 Fed. Reg. at 46626. The religious employer definition in the HHS Mandate imposes Defendants' *theological* notion that employers are only religious if they are churches who stay in their own four walls and focus on self-serving purposes. Defendants have essentially 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 businesses and within society instead of in 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 contraceptive/abortifacient access. *Lukumi*, 508 U.S. at 535.

The HHS Mandate constitutes "an impermissible attempt to target" religious objectors that are not insularly-focused. *Id.* 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 v. Brown*, 366 U.S. 599, 607 (1961) (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 specifically 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," 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" and focus on "persons who share the[ir] religious tenets" and are churches or religious orders. Yet the HHS Mandate also does not apply to hundreds of millions of employees for secular reasons, including that they are in grandfathered plans or work for small employers, and 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 not to advance health but to target society's religious "hold outs" who possess beliefs against providing such coverage.[11] The HHS Mandate and its exemptions establish nothing less than a "religious gerrymander" designed to target most religions objectors to contraception, while letting millions of secular employers off the hook. This demonstrates the lack of neutrality. *Id.* at 537–39.

**3. The HHS Mandate fails strict scrutiny.**

Because the HHS Mandate is neither generally applicable nor neutral it is subject to strict scrutiny. *Id.* at 546. As explained above, Defendants cannot meet this standard.

**C. The HHS Mandate violates the 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' 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) (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,

[11] 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 accessed Apr. 28, 2012).

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), *cert. denied*, 505 U.S. 1218 (1992).

Defendants used their unfettered discretion to pick and choose what criteria qualify a group 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 exemption deems religious organizations insufficiently "religious" if they do not focus on co-religionists in hiring and service, which would involve the government's probing of what exactly count as the organization's religious "tenets," and which disfavors religious believers such as Plaintiffs who exercise their beliefs not by only working with or for other followers of Jesus, but by witnessing their faith by treating everyone with dignity according to the tenets of the Holy Bible. The exemption's restriction of religious employers to a tax code provision identifying 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. These factors involve the government in "intrusive judgments regarding contested questions of religious belief or practice" in violation of the First Amendment. *Weaver*, 534 F.3d at 1261.

In *Weaver,* the Tenth Circuit held unconstitutional a discrimination- among-religions policy that is very similar to the HHS Mandate. The discrimination-among-religions 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 persuasion; the courses sought to "indoctrinate"; the governance was tied to particular church affiliation; and similar factors. *Id.* at 1250–51. The HHS Mandate here likewise 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 the Court 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. The Tenth Circuit held that "animus" towards religion is not required to find a First Amendment violation in the presence of such facial discrimination. *Id.* at 1260.

**D. The HHS Mandate violates Plaintiffs' Freedom of Speech.**

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). Thus, "[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.

Here, the HHS Mandate unconstitutionally coerces Plaintiffs to speak a message they find morally objectionable by requiring that they cover in their insurance plan not only contraceptives/abortifacients, but, beyond that, "speak" "patient education and counseling" in favor those items, forcing Plaintiffs to contradict their own religious beliefs.

## II. Plaintiffs Will Suffer Irreparable Harm Absent an Injunction.

Plaintiffs seek to continue offering their employee insurance plan without providing abortifacients, contraceptives, sterilization, 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 in violation of their rights under RFRA and the First Amendment, causing actual and imminent loss of their religious conscience rights. This is irreparable injury. *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA"); *accord Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir 1996) and *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009). *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.").

## III. 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 in violation of RFRA and the First Amendment. Both the ubiquity of contraceptives/abortifacients access and government subsidization thereof, and the fact that the government has exempted nearly 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.

## IV. The Public Interest Favors a Preliminary Injunction.

"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, the First Amendment and other laws.

## CONCLUSION

Defendants' HHS Mandate violates both RFRA and the First Amendment due to its massive inapplicability and its discrimination among religions. Unless this Court issues a preliminary injunction prior to March 1, 2013 when Plaintiffs need to implement logistics for their April 1, 2013 plan-year, Plaintiffs will face the choice of violating their beliefs or suffering massive financial penalties, lawsuits, and potential other liabilities. Defendants would face no harm from an injunction against their illegal regulatory scheme that already exempts millions of others. Plaintiffs respectfully request that this Court issue a preliminary injunction against

Defendants' requirement that Plaintiffs cover contraception, abortifacients, sterilization, and counseling and education for the same, in their health plan.

Because the public interest in this case, the lack of any financial harm to Defendants from an injunction, and all of the other factors that weigh in Plaintiffs' favor, 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).

Respectfully submitted this 15th day of February, 2013.

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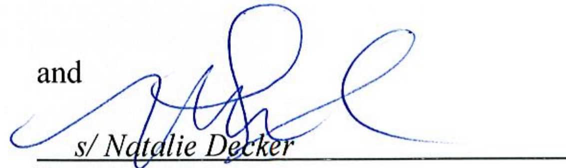

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**CERTIFICATE OF SERVICE**

The undersigned counsel for Plaintiffs, Michael J. Norton, hereby certifies that the following counsel for Defendants was served with the preceding document by the Court's ECF filing system on the 15th day of February, 2013:

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