IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Wiley Y. Daniel

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.

MOTION FOR FORTHWITH ISSUANCE OF TEMPORARY RESTRAINING ORDER WITHOUT A HEARING and CERTIFICATE OF COMPLIANCE RE: CONSULTATION ON MOTION

PLAINTIFFS STEPHEN W. BRISCOE, CONTINUUM HEALTH PARTNERSHIPS, INC., CONTINUUM HEALTH MANAGEMENT, LLC, and MOUNTAIN STATES HEALTH PROPERTIES, LLC, by and through their attorneys Michael J. Norton and the undersigned attorneys of Alliance Defending Freedom and Natalie L. Decker of the Law Office of Natalie L. Decker, LLC, hereby move the Court, pursuant to F.R.Civ.P. 65(b) to issue a temporary restraining order **FORTHWITH** and without a hearing. In support thereof, Plaintiffs state as follows:

1. CERTIFICATE OF COMPLIANCE. The undersigned counsel for the Plaintiffs certifies, pursuant to F.R.Civ.P. 65(b)(1)(B) and D.C.COLO.LCiv.R. 7.1A, that he has, before the filing of this Motion for Temporary Restraining Order, telephonically and via email consulted and conferred about this motion with counsel for the Defendants, to wit: Bradley P. Humphreys, Esq., Trial Attorney, U.S. Department of Justice, Civil Division, Federal Programs Branch, 20 Massachusetts Avenue, NW, Washington, D.C. 20001 (202-514-3367). In addition, a copy of this motion has been provided to Mr. Humphreys via email in advance of its filing.

   Mr. Humphreys, while declining to consent to the entry of a temporary restraining order, has expressed that he will cooperate in setting this motion for a expeditious hearing should the Court deem it necessary.

2. On February 5, 2013, Plaintiff Stephen W. Briscoe and the other Plaintiffs, each of which is a separate Colorado limited liability company or Colorado for-profit S-Corporation which Mr. Briscoe, directly or indirectly, owns, filed a Verified Complaint in this action. Doc. 2. Plaintiffs' Verified Complaint is incorporated herein by this reference.
3. On February 15, 2013, Plaintiffs filed a Motion for Preliminary Injunction and Certificate of Compliance Re: Consultation on Motion (herein "Preliminary Injunction Motion") (Doc. 15) and Brief in Support of Motion for Preliminary Injunction (Doc. 15-1) both of which are incorporated herein by reference. As is set forth in the Preliminary Injunction Motion, counsel for the Defendants agreed to cooperate in an expeditious setting of the Preliminary Injunction Motion.
4. Thereafter, with the cooperation of counsel for the Defendants, counsel for the Plaintiffs contacted the Court's clerk to seek a date in early March 2013 for hearing Plaintiffs'

Preliminary Injunction Motion. After first being informed by the Court's clerk that dates in the first week of March 2013 were available for such a hearing, counsel for the Plaintiffs was then informed that the Court would not set Plaintiffs' Preliminary Injunction Motion for a hearing until the motion was fully briefed and the Court had had an opportunity to review the briefs and underlying case law. It was suggested that such a hearing could be scheduled in early April 2013.

5. As is set forth in Plaintiffs' Verified Complaint, extensive planning is involved in preparing for and providing Plaintiffs' employee health insurance plan; plan details must finalized, in place, and disclosed to employees between February 26, 2013 and March 1, 2013. New plan details must be agreed to on or by March 1, 2013 so as to be included in the plan for the year beginning April 1, 2013.

6. As is demonstrated in Plaintiffs' Verified Complaint and supported by Plaintiffs' Brief in Support of Motion for Preliminary Injunction, absent issuance of a temporary restraining order **FORTHWITH**, Plaintiffs will be required to violate sincerely held religious beliefs against abortion and provide abortifacients and patient education and counseling for women with reproductive capacity as part of their employee health insurance plan beginning on and after April 1, 2013 or decline to provide insurance coverage for such abortifacients and face massive and crippling fines.

7. Plaintiffs will suffer immediate, imminent and irreparable harm absent issuance of a temporary restraining order. *See Newland v. Sebelius,* 881 F.Supp.2d 1287, 1295 (D. Colo. 2012).[1]

8. The harm to the Defendants in being temporarily prevented from "enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce . . . pales

[1] A copy of *Newland v. Sebelius* is attached hereto as a convenience to the Court.

in comparison to the possible infringement upon Plaintiffs' constitutional and statutory rights." *See Newland,* 881 F.Supp.2d at 1295.

9. Defendants' asserted public interests in improving the health of women and children is undermined by the creation of multiple exemptions for certain religious organizations and employers with grandfathered health insurance plans and the temporary safe harbor for non-profit organizations are outweighed by the public interest in the free exercise of religion. *See Newland,* 881 F.Supp.2d at 1298.

10. As is set forth in ¶ 1 above, counsel for the Defendants has been provided both with notice of this motion and a copy of this motion. Where the opposing party has notice, the "procedure and standards for issuance of a temporary restraining order mirrors those for a preliminary injunction." *Emmis Communications Corp. v. Media Strategies Inc.*, 2001 WL 111229, 2 (D. Colo. Jan. 23, 2001), *Griffith v. Meyer*, 2012 WL 5985667, 2 (D. Colo. Nov. 7, 2012). Extensive factual information to support the issuance of the requested injunctive relief is set forth in Plaintiff's Verified Complaint and Plaintiff's Brief in Support of Motion for Preliminary Injunction, both of which are incorporated herein by reference.

11. Insomuch as the Plaintiffs have, as required by F.R.Civ.P. 65(b)(2), described in Plaintiffs' Verified Complaint the injury to the Plaintiffs and the imminent and irreparable nature of the injury, so as to preserve the status quo ante bellum, Plaintiffs respectfully request that this Court **FORTHWITH** and without a hearing issue an order temporarily restraining the Defendants, their agents, officers, and employees from any application or enforcement as to the Plaintiffs of the preventive services mandate imposed in 42 U.S.C. § 300gg-13(a)(4), the application of penalties found in 26 U.S.C. § 4980 D & 4980H and 29 U.S.C. § 1132, and

any determination that these requirements are applicable to the Plaintiffs pending further order of this Court.

12. SECURITY. As there can be no damages to the Defendants upon the issuance of a temporary restraining order, Plaintiffs respectfully request that, pursuant to F.R.Civ.P. 65(c), no security be required by the Court from Plaintiffs. In the event the Court does require security, Plaintiffs suggest bond be set at $100.00. *See Newland,* 881 F.Supp.2d at 1299-1300.

13. A proposed order is attached hereto.

14. WHEREFORE, the Plaintiffs, through counsel, respectfully plead as aforesaid and request this Court to **FORTHWITH and without a hearing** issue an order temporarily restraining the Defendants, their agents, officers, and employees from any application or enforcement as to the Plaintiffs of the preventive services mandate imposed in 42 U.S.C. § 300gg-13(a)(4), the application of penalties found in 26 U.S.C. § 4980 D & 4980H and 29 U.S.C. § 1132, and any determination that these requirements are applicable to the Plaintiffs pending further order of this Court.

Respectfully submitted this 19th day of February, 2013.

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CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiffs, Michael J. Norton, hereby certifies that, on February 19, 2013, the foregoing document was served on all parties or their counsel of record through the Court's CM/ECF system if they are registered users or, if not, by placing a true and correct copy of the foregoing document in the U.S. Mail, first-class, postage prepaid to their address of record.

s/ Michael J. Norton
Michael J. Norton

881 F.Supp.2d 1287, Med & Med GD (CCH) P 304,085
(Cite as: 881 F.Supp.2d 1287)

United States District Court,
D. Colorado.
William NEWLAND; Paul Newland; James Newland; Christine Ketterhagen; Andrew Newland; and **Hercules** Industries, Inc., a Colorado corporation;
Plaintiffs,
v.
Kathleen **SEBELIUS**, in her official capacity as Secretary of the United States Department of Health and Human Services; Hilda Solis, in her official capacity as Secretary of the United States Department of Labor; Timothy Geithner, in his official capacity as Secretary of the United States Department of the Treasury; United States Department of Health and Human Services; United States Department of Labor; United Stated Department of the Treasury; Defendants.

Civil Action No. 1:12–cv–1123–JLK.
July 27, 2012.

Background: Secular, for-profit S-corporation and its owners brought action against Departments of Health and Human Services (HHS), Labor, and of the Treasury, and their respective Secretaries, challenging the women's preventive care coverage mandate of the Patient Protection and Affordable Care Act (ACA) as violative of Religious Freedom Restoration Act (RFRA), the First Amendment, the Fifth Amendment, and the Administrative Procedure Act (APA). Plaintiffs moved for preliminary injunction.

Holdings: The District Court, Kane, J., held that:
(1) plaintiffs would likely suffer irreparable harm in absence of preliminary injunction;
(2) balance of harms favored preliminary injunction;
(3) public interest in the free exercise of religion supported preliminary injunction; and
(4) plaintiffs had substantial likelihood of success on the merits of their claim that the mandate violated RFRA.

Motion granted.

West Headnotes

[1] Injunction 212 ⚿1075

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1075 k. Extraordinary or unusual nature of remedy. Most Cited Cases

Injunction 212 ⚿1095

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1094 Entitlement to Relief
212k1095 k. In general. Most Cited Cases
A preliminary injunction is an extraordinary remedy; accordingly, the right to relief must be clear and unequivocal.

[2] Injunction 212 ⚿1092

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1092 k. Grounds in general; multiple factors. Most Cited Cases
To meet its burden, a party seeking a preliminary injunction must show: (1) a likelihood of success on the merits, (2) a threat of irreparable harm, which (3) outweighs any harm to the non-moving party, and that (4) the injunction would not adversely affect the public interest.

[3] Injunction 212 ⚿1080

881 F.Supp.2d 1287, Med & Med GD (CCH) P 304,085
(Cite as: 881 F.Supp.2d 1287)

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1080 k. Mandatory preliminary injunctions. Most Cited Cases

Injunction 212 ⚿1098

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1098 k. Effect of granting full relief on merits. Most Cited Cases

If the preliminary injunction will (1) alter the status quo, (2) mandate action by the defendant, or (3) afford the movant all the relief that it could recover at the conclusion of a full trial on the merits, the movant must meet a heightened burden.

[4] **Injunction 212 ⚿1080**

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1080 k. Mandatory preliminary injunctions. Most Cited Cases

The "status quo," for purposes of heightened burden for movants seeking a preliminary injunction that alters the status quo, is the last uncontested status between the parties which preceded the controversy until the outcome of the final hearing.

[5] **Injunction 212 ⚿1080**

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1080 k. Mandatory preliminary injunctions. Most Cited Cases

In making the determination of whether a requested preliminary injunction alters the status quo, and thus is subject to heightened burden, the court must look beyond the parties' legal rights, focusing instead on the reality of the existing status and relationship between the parties.

[6] **Injunction 212 ⚿1080**

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1080 k. Mandatory preliminary injunctions. Most Cited Cases

If the requested relief would either preserve or restore the relationship and status existing ante bellum, the preliminary injunction does not alter the status quo, and thus the movant need not meet a heightened burden.

[7] **Injunction 212 ⚿1012**

212 Injunction
212I Injunctions in General; Permanent Injunctions in General
212I(A) Nature, Form, and Scope of Remedy
212k1012 k. Mandatory injunctions; restoration of status quo. Most Cited Cases

An injunction which affirmatively requires the nonmovant to act in a particular way is mandatory and disfavored.

[8] **Injunction 212 ⚿1074**

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1074 k. Preservation of status quo. Most Cited Cases

The fundamental purpose of preliminary injunctive relief is to preserve the relative positions of the parties until a trial on the merits can be held.

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(Cite as: 881 F.Supp.2d 1287)

[9] Injunction 212 ⚿1097

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1094 Entitlement to Relief
212k1097 k. Serious or substantial question on merits. Most Cited Cases

If the equities tip strongly in their favor, movants seeking a preliminary injunction may meet the requirement for showing success on the merits by showing that 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.

[10] Injunction 212 ⚿1104

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1104 k. Clear, likely, threatened, anticipated, or intended injury. Most Cited Cases

To satisfy irreparable harm element of preliminary injunction analysis, plaintiffs must establish that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.

[11] Injunction 212 ⚿1104

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1104 k. Clear, likely, threatened, anticipated, or intended injury. Most Cited Cases

The imminence of injury, required to satisfy irreparable harm element of preliminary injunction analysis, does not require immediacy, and plaintiffs need only demonstrate that absent a preliminary injunction, they are likely to suffer irreparable harm before a decision on the merits can be rendered.

[12] Civil Rights 78 ⚿1457(7)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(7) k. Other particular cases and contexts. Most Cited Cases

Owners of secular, for-profit S-corporation that maintained a self-insured group plan for its employees would likely suffer irreparable harm to their rights under the First Amendment and RFRA in the absence of preliminary injunction enjoining the government from enforcing, or applying statutory penalties under preventive care coverage mandate of the Patient Protection and Affordable Care Act (ACA) requiring group plans to provide FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity; absent injunctive relief, the corporation would be required to provide the covered services in three months' time, and extensive planning would be involved in preparing and providing employee insurance plan. U.S.C.A. Const.Amend. 1; 26 U.S.C.A. §§ 4980D, 4980H; Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C.A. § 1132; Patient Protection and Affordable Care Act, § 1001(a)(5), 42 U.S.C.A. § 300gg–13(a)(4); Religious Freedom Restoration Act of 1993, § 2 et seq.,42 U.S.C.A. § 2000bb et seq.

[13] Civil Rights 78 ⚿1457(7)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(7) k. Other particular cases and contexts. Most Cited Cases

Balance of harms favored preliminary injunction enjoining the government from enforcing, or

applying statutory penalties under preventive care coverage mandate of the Patient Protection and Affordable Care Act (ACA), which required group plans to provide FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, against owners of secular, for-profit S-corporation that maintained a self-insured group plan, who alleged the mandate violated their rights under the First Amendment and RFRA; should an injunction enter, the government would be prevented from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce, which paled in comparison to the possible infringement upon owners' constitutional and statutory rights. U.S.C.A. Const.Amend. 1; 26 U.S.C.A. §§ 4980D, 4980H; Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C.A. § 1132; Patient Protection and Affordable Care Act, § 1001(a)(5), 42 U.S.C.A. § 300gg–13(a)(4); Religious Freedom Restoration Act of 1993, § 2 et seq.,42 U.S.C.A. § 2000bb et seq.

[14] Civil Rights 78 ⚿1457(7)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(7) k. Other particular cases and contexts. Most Cited Cases

Public interest in the free exercise of religion supported preliminary injunction enjoining the government from enforcing, or applying statutory penalties under preventive care coverage mandate of the Patient Protection and Affordable Care Act (ACA), which required group plans to provide FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, against owners of secular, for-profit S-corporation that maintained a self-insured group plan, who alleged the mandate violated their rights under the First Amendment and RFRA; government's claim that injunction would undermine Congress's goals of improving health and equalizing coverage of preventive services for women and men was undermined by the creation of exemptions for certain religious organizations and employers with grandfathered health insurance plans and a temporary enforcement safe harbor for non-profit organizations. U.S.C.A. Const.Amend. 1; 26 U.S.C.A. §§ 4980D, 4980H; Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C.A. § 1132; Patient Protection and Affordable Care Act, § 1001(a)(5), 42 U.S.C.A. § 300gg–13(a)(4); Religious Freedom Restoration Act of 1993, § 2 et seq.,42 U.S.C.A. § 2000bb et seq.

[15] Civil Rights 78 ⚿1457(1)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(1) k. In general. Most Cited Cases

For purposes of issuing a preliminary injunction, there is a strong public interest in the free exercise of religion even where that interest may conflict with another statutory scheme.

[16] Injunction 212 ⚿1246

212 Injunction
212IV Particular Subjects of Relief
212IV(E) Governments, Laws, and Regulations in General
212k1246 k. Injunctions against government entities in general. Most Cited Cases

The less rigorous standard for preliminary injunctions is not applied when a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme.

[17] Civil Rights 78 ⚿1401

78 Civil Rights
78III Federal Remedies in General

78k1400 Presumptions, Inferences, and Burdens of Proof
78k1401 k. In general. Most Cited Cases

The initial burden in an action under RFRA is borne by the party challenging the law, and, once that party establishes that the challenged law substantially burdens her free exercise of religion, the burden shifts to the government to justify that burden. Religious Freedom Restoration Act of 1993, § 3(b), 42 U.S.C.A. § 2000bb–1(b).

[18] Civil Rights 78 ⚿1457(7)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(7) k. Other particular cases and contexts. Most Cited Cases

Owners of secular, for-profit S-corporation that maintained a self-insured group plan for its employees, and the corporation itself, who sought preliminary injunction enjoining enforcement of preventive care coverage mandate of Patient Protection and Affordable Care Act (ACA) requiring group plans to provide FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, had substantial likelihood of success on the merits of their claim that the mandate substantially burdened their free exercise of religion in violation of RFRA; government had exempted over 190 million health plan participants and beneficiaries from the mandate, completely undermining any compelling interest in applying the mandate to corporation and owners, and government provision of free birth control was feasible less-restrictive alternative to further that interest. Patient Protection and Affordable Care Act, § 1001(a)(5), 42 U.S.C.A. § 300gg–13(a)(4); Religious Freedom Restoration Act of 1993, § 2(b), 42 U.S.C.A. § 2000bb(b).

[19] Civil Rights 78 ⚿1032

78 Civil Rights
781 Rights Protected and Discrimination Prohibited in General
78k1030 Acts or Conduct Causing Deprivation
78k1032 k. Particular cases and contexts. Most Cited Cases

RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the person, that is, the particular claimant whose sincere exercise of religion is being substantially burdened. Religious Freedom Restoration Act of 1993, § 3(b), 42 U.S.C.A. § 2000bb–1(b).

[20] Civil Rights 78 ⚿1457(1)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(1) k. In general. Most Cited Cases

To establish a compelling interest in the uniform application of a particular program, in opposition to a preliminary injunction, the government must offer evidence that granting the requested religious accommodations would seriously compromise its ability to administer this program.

[21] Civil Rights 78 ⚿1032

78 Civil Rights
781 Rights Protected and Discrimination Prohibited in General
78k1030 Acts or Conduct Causing Deprivation
78k1032 k. Particular cases and contexts. Most Cited Cases

A law cannot be regarded as protecting an interest of the highest order, as required for the government to justify a substantial burden on the free exercise of religion under RFRA, when it leaves appreciable damage to that supposedly vital interest unprohibited. Religious Freedom Restoration Act of 1993, § 3(b), 42 U.S.C.A. § 2000bb–1(b).

[22] Civil Rights 78 ⚿1032

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78 Civil Rights
781 Rights Protected and Discrimination Prohibited in General
78k1030 Acts or Conduct Causing Deprivation
78k1032 k. Particular cases and contexts. Most Cited Cases

To show that a substantial burden on the free exercise of religion is the least restrictive means of furthering a compelling governmental interest, as required to justify that burden under RFRA, the government need not refute every conceivable alternative, but it must refute the alternative schemes offered by the challenger. Religious Freedom Restoration Act of 1993, § 3(b), 42 U.S.C.A. § 2000bb–1(b).

West Codenotes
Recognized as Unconstitutional42 U.S.C.A. §§ 2000bb, 2000bb-1, 2000bb-2, 2000bb-3, 2000bb-4.
Validity Called into Doubt42 U.S.C.A. § 300gg-13(a)(4).***1290** David Andrew Cortman, Alliance Defending Freedom, Lawrenceville, GA, Erik William Stanley, Kevin H. Theriot, Alliance Defending Freedom, Leawood, KS, Gregory S. Baylor, Matthew Scott Bowman, Steven H. Aden, Alliance Defending Freedom, Washington, DC, Michael Jeffrey Norton, Alliance Defending Freedom, Greenwood Village, CO, for Plaintiffs.

Michelle Renee Bennett, U.S. Department of Justice–DC–Federal Programs, Washington, DC, for Defendants.

ORDER

KANE, District Judge.

This matter is currently before me on Plaintiffs' Motion for Preliminary Injunction (doc. 5). Based on the forthcoming discussion, Plaintiffs' motion is GRANTED.

***1291** BACKGROUND

The Patient Protection and Affordable Care Act

Signed into law on March 23, 2010, the Patient Protection and Affordable Care Act ("ACA"), Pub.L. No. 111–148, 124 Stat. 119 (2010), instituted a variety of healthcare reforms. Among its many provisions, it requires most U.S. citizens and legal residents to have health insurance, creates state-based health insurance exchanges, and requires employers with fifty or more full-time employees to offer health insurance.[FN1] *Id.* The ACA also implemented a series of provisions aimed at insuring minimum levels of health care coverage.[FN2] Most relevant to the instant suit, the ACA requires group health plans to provide no-cost coverage for preventive care and screening for women. 42 U.S.C. § 300gg–13(a)(4).[FN3]

FN1. In a recent decision, the Supreme Court upheld the constitutionality of the so-called individual mandate, but invalidated the portion of the Affordable Care Act threatening loss of existing Medicaid funding if a state declines to expand its Medicaid programs. *Nat'l Fed'n of Indep. Bus. v. Sebelius,* —— U.S. ——, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012).

FN2. Termed the "Patient's Bill of Rights" these provisions require health plans to: provide coverage to persons with pre-existing conditions, protect a patient's choice of doctors, allow adults under the age of twenty-six to maintain coverage under their parent's health plan, prohibit annual and lifetime limits on most healthcare benefits, and end pre-existing condition exclusions for children under the age of nineteen. *See* Patient's Bill of Rights *available at* http:// www. healthcare. gov/ law/ features/ rights/ bill- of- rights/ index. html (last viewed on July 27, 2012). As discussed *infra* at n. 4, not all health plans are required to meet these conditions.

FN3. The ACA did not, however, specifically delimit the contours of preventive care. Instead, it delegated that responsibility to the Health Resources and Services Administration ("HRSA"). On August 1,

2011, HRSA adopted Required Health Plan Coverage Guidelines that defined the scope of women's preventive services for purposes of the ACA coverage mandate. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines *available at* http:// www. hrsa. gov/ womens guidelines/ (last visited July 27, 2012). The HRSA guidelines include, among other things, "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id.*

Unlike some other provisions of the ACA, however, the preventive care coverage mandate does not apply to certain healthcare plans existing on March 23, 2010. [FN4] *See* Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed.Reg. 34538,34540 (June 17, 2010). This gap in the preventive care coverage mandate is significant. According to government estimates, 191 million Americans belong to plans which may be grandfathered under the ACA. *Id.* at 34550. Although there are many requirements for maintaining grandfathered status, *see* 26 C.F.R. § 54.9815–1251T(g), if those requirements are met a plan may be grandfathered for an indefinite period of time.

FN4. Numerous provisions of the ACA apply to grandfathered health plans: the prohibition on pre-existing condition exclusions (group health plans only), the prohibition on excessive waiting periods (both group and individual health plans), the prohibition on lifetime (both) and annual (group only) benefit limits, the prohibition on rescissions (both), and the extension of dependent care coverage (both) to name a few. 75 Fed.Reg. at 34542. For a comprehensive summary of the applicability of ACA provisions to grandfathered health plans, see Application of the New Health Reform Provisions of Part A of Title XXVII of the PHS Act to Grandfathered Plans, *available at* http:// www. dol. gov/ ebsa/ pdf/ grandfather regtable. pdf. (last visited July 26, 2012).

***1292** In addition to grandfathering under the ACA, the preventive care guidelines exempt certain religious employers from any requirement to cover contraceptive services.[FN5] *See* Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed.Reg. 46621 (Aug. 3, 2011). The guidelines also contain a temporary enforcement "safe-harbor" for plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage that do not qualify for the religious employer exemption. *See* Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act 77 Fed.Reg. 8725, 8726–8727 (Feb. 15, 2012). The preventive care guidelines take effect on August 1, 2012.

FN5. In order to qualify as a "religious employer" eligible for this exemption, an employer must 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.

(4) The organization is a non-profit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i)

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or (iii) of the Internal Revenue Code of 1986, as amended.

76 Fed.Reg. 46621, 46626 (Aug. 3, 2011); *See* 77 Fed.Reg. 8725 (Feb. 15, 2012).

Hercules Industries, Inc.

Plaintiff Hercules Industries, Inc. is a Colorado s-corp engaged in the manufacture and distribution of heating, ventilation, and air conditioning ("HVAC") products and equipment. Hercules is owned by siblings William, Paul and James Newland and Christine Ketterhagen, who also comprise the company's Board of Directors. Additionally, William Newland serves as President of the company and his son, Andrew Newland serves as Vice President.[FN6]

FN6. Throughout this opinion, I will refer to William Newland, Paul Newland, James Newland, Christine Ketterhagen, and Andrew Newland as the "Newlands."

Although Hercules is a for-profit, secular employer, the Newlands adhere to the Catholic denomination of the Christian faith. According to the Newlands, "they seek to run Hercules in a manner that reflects their sincerely held religious beliefs" Amended Complaint (doc. 19) at ¶ 2. Thus, for the past year and a half the Newlands have implemented within Hercules a program designed to build their corporate culture based on Catholic principles. *Id.* at ¶ 36. Hercules recently made two amendments to its articles of incorporation, which reflect the role of religion in its corporate governance: (1) it added a provision specifying that its primary purposes are to be achieved by "following appropriate religious, ethical or moral standards," and (2) it added a provision allowing members of its board of directors to prioritize those "religious, ethical or moral standards" at the expense of profitability. *Id.* at ¶ 112. Furthermore, Hercules has donated significant amounts of money to Catholic organizations and causes. *Id.* at ¶ 35.

According to Plaintiffs, Hercules maintains a self-insured group plan for its employees "[a]s part of fulfilling their organizational mission and Catholic beliefs and commitments." *Id.* at ¶¶ 37. Significantly, because the Catholic church condemns the use of contraception, Hercules self-insured plan does not cover abortifacent drugs, contraception, or sterilization. *Id.* at ¶ 41.

***1293** Hercules' health insurance plan is not "grandfathered" under the ACA. Furthermore, notwithstanding the Newlands' religious beliefs, as a secular, for-profit corporation, Hercules does not qualify as a "religious employer" within the meaning of the preventive care regulations. Nor may it seek refuge in the enforcement "safe harbor." Accordingly, Hercules will be required to either include no-cost coverage for contraception in its group health plan or face monetary penalties. Faced with a choice between complying with the ACA or complying with their religious beliefs, Plaintiffs filed the instant suit challenging the women's preventive care coverage mandate as violative of RFRA, the First Amendment, the Fifth Amendment, and the Administrative Procedure Act.

Believing the alleged injury to their constitutional and statutory rights to be imminent, Plaintiffs filed the instant Motion for Preliminary Injunction.

DISCUSSION

[1][2][3] A preliminary injunction is an extraordinary remedy; accordingly, the right to relief must be clear and unequivocal. *See, e.g., Flood v. ClearOne Commc'ns, Inc.*, 618 F.3d 1110, 1117 (10th Cir.2010). To meet this burden, a party seeking a preliminary injunction must show: (1) a likelihood of success on the merits, (2) a threat of irreparable harm, which (3) outweighs any harm to the non-moving party, and that (4) the injunction would not adversely affect the public interest. *See, e.g., Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir.2012). Although this inquiry is, on its face, relatively straightforward, there are a variety of exceptions. If the injunction will (1) alter the status quo, (2) mandate action by the defendant, or (3) afford

the movant all the relief that it could recover at the conclusion of a full trial on the merits, the movant must meet a heightened burden. *See O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft,* 389 F.3d 973, 975 (10th Cir.2004) (en banc), aff'd and remanded, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006).

[4][5][6] In determining whether an injunction falls into one of these "disfavored" categories, courts often focus on whether the requested injunctive relief will alter the status quo. The "status quo" is "the last uncontested status between the parties which preceded the controversy until the outcome of the final hearing." *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.,* 269 F.3d 1149, 1155 (10th Cir.2001). In making this determination, however, I must look beyond the parties' legal rights, focusing instead on the reality of the existing status and relationship between the parties. *Schrier v. Univ. of Colo.,* 427 F.3d 1253, 1260 (10th Cir.2005). If the requested relief would either preserve or restore the relationship and status existing ante bellum, the injunction does not alter the status quo.

[7] This determination is not, however, necessarily dispositive. An injunction restoring the status quo ante bellum may require action on behalf of the nonmovant. Such an injunction, one which "affirmatively require[s] the nonmovant to act in a particular way," is mandatory and disfavored. *Id.* at 1261.

[8] Although I follow the Tenth Circuit's guidance in determining whether Plaintiffs seek to disturb the status quo or require affirmative action by Defendants, I am careful to avoid uncritical adherence to the "status quo-formula" and the "mandatory/prohibitory formulation." In making this determination, I must be mindful of "the fundamental purpose of preliminary injunctive relief under our Rules of Civil Procedure, which is 'to preserve the relative positions of the parties until a trial on ***1294** the merits can be held.' " *Bray v. QFA Royalties, LLC,* 486 F.Supp.2d 1237, 1243–44 (D.Colo.2007) (citing *O Centro,* 389 F.3d at 999–1001 (Seymour, C.J., concurring)).

Before the instigation of this lawsuit, Plaintiffs maintained an employee insurance plan that excluded contraceptive coverage. Although Defendants have passed a regulation requiring Plaintiffs to include such coverage in their coverage for the plan-year beginning on November 1, 2012, that regulation, as it applies to Plaintiffs, has not yet taken effect. Should the requested injunction enter, Defendants will be enjoined from enforcing the preventive care coverage mandate against Plaintiffs pending the outcome of this suit. The status quo will be preserved, and Defendants will not be required to take any affirmative action.

[9] Because Plaintiffs do not seek a "disfavored" injunction, I must consider whether Plaintiffs are entitled to rely on an altered burden of proof. *Cf. O Centro,* 389 F.3d at 976. If the equities tip strongly in their favor, Plaintiffs "may meet the requirement for showing success on the merits by showing that 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." [FN7] *Okla. ex rel. Okla. Tax Comm'n v. Int'l Registration Plan, Inc.,* 455 F.3d 1107, 1113 (10th Cir.2006).

FN7. Although some courts in this district have questioned the continued validity of this relaxed likelihood-of-success-on-the-merits standard in light of the Supreme Court's decision in *Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (holding that a plaintiff seeking a preliminary injunction "must establish that he is likely to succeed on the merits"), because the Tenth Circuit has continued to refer to this relaxed standard I assume it still governs the issuance of preliminary injunctions in this circuit. *See RoDa Drilling Co. v. Siegal,* 552 F.3d

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1203, 1209 n. 3 (10th Cir.2009).

Accordingly, I begin by considering the equities before turning to Plaintiffs' likelihood of success on the merits.

1. Irreparable Harm

[10][11] Although it is well-established that the potential violation of Plaintiffs' constitutional and RFRA rights threatens irreparable harm, *see Kikumura v. Hurley,* 242 F.3d 950, 963 (10th Cir.2001), Plaintiffs must also establish that "the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Heideman v. S. Salt Lake City,* 348 F.3d 1182, 1189 (10th Cir.2003) (emphasis in original). Imminence does not, however, require immediacy. Plaintiffs need only demonstrate that absent a preliminary injunction, "[they] are likely to suffer irreparable harm before a decision on the merits can be rendered." *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948. 1, p. 139 (2d ed. 1995)).

[12] Absent injunctive relief, Plaintiffs will be required to provide FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity as part of their employee insurance plan. Per the terms of the preventive care coverage mandate, that coverage must begin on the start date of the first plan year following the effective date of the regulations, November 1, 2012. Defendants argue this harm, three months in the future, is not sufficiently imminent to justify injunctive relief. In light of the extensive planning involved in preparing and providing its employee insurance plan, and the ***1295** uncertainty that this matter will be resolved before the coverage effective date, Plaintiffs have adequately established that they will suffer imminent irreparable harm absent injunctive relief. This factor strongly favors entry of injunctive re- lief.

2. Balancing of Harms

[13] I must next weigh the irreparable harm faced by Plaintiffs against the harm to Defendants should an injunction enter. Should an injunction enter, Defendants will be prevented from "enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas,* 540 F.Supp.2d 61, 61 (D.D.C.2008).

This harm pales in comparison to the possible infringement upon Plaintiffs' constitutional and statutory rights. This factor strongly favors entry of injunctive relief.

3. Public Interest

[14] Defendants argue that entry of the requested injunction is contrary to the public interest, because it would "undermine [their] ability to effectuate Congress's goals of improving the health of women and children and equalizing the coverage of preventive services for women and men so that women who choose to do so can be part of the workforce on an equal playing field with men." Defendants' Response (doc. 26) at 73. This asserted interest is, however, undermined by the creation of exemptions for certain religious organizations and employers with grandfathered health insurance plans and a temporary enforcement safe harbor for non-profit organizations.

[15] These interests are countered, and indeed outweighed, by the public interest in the free exercise of religion. As the Tenth Circuit has noted, "there is a strong public interest in the free exercise of religion even where that interest may conflict with [another statutory scheme]." *O Centro,* 389 F.3d at 1010. Accordingly, the public interest favors entry of an injunction in this case.

[16] On balance, the threatened harm to Plaintiffs, impingement of their right to freely exercise their religious beliefs, and the concommittant public interest in that right strongly favor the entry of injunctive relief. Although the less rigorous standard for preliminary injunctions is not applied

when "a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme," *Aid for Women v. Foulston*, 441 F.3d 1101, 1115 (10th Cir.2006), the government's creation of numerous exceptions to the preventive care coverage mandate has undermined its alleged public interest.[FN8] Accordingly, I find the general rule disfavoring the relaxed standard inapplicable. Plaintiffs need only establish that their challenge presents "questions going to the merits ... so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Okla. Tax Comm'n*, 455 F.3d at 1113.

FN8. *See* discussion *supra* at pp. 1291–92 and *infra* at pp. 1297–98.

4. Likelihood of Success on the Merits

Plaintiffs raise a variety of constitutional and statutory challenges. Because Plaintiffs' RFRA challenge provides adequate grounds for the requested injunctive relief, I decline to address their challenges under the Free Exercise, Establishment and Freedom of Speech Clauses of the First Amendment. *See, e.g., United States v. Hardman*, 297 F.3d 1116, 1135–36 (10th Cir.2002) (en banc).

Passed in 1993, the Religious Freedom Restoration Act ("RFRA") sought to "restore*1296 the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b). Although unconstitutional as applied to the states, *see City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), it remains constitutional as applied to the federal government. *See United States v. Wilgus*, 638 F.3d 1274, 1279 (10th Cir.2011).

[17] Under RFRA, the government may 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(a). This general prohibition is not, however, without exception. The government may justify a substantial burden on the free exercise of religion if the challenged law: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* at § 2000bb–1(b). The initial burden is borne by the party challenging the law. Once that party establishes that the challenged law substantially burdens her free exercise of religion, the burden shifts to the government to justify that burden. The nature of this preliminary injunction proceeding does not alter these burdens. *Gonzales*, 546 U.S. at 429, 126 S.Ct. 1211. Thus, I must first consider whether Plaintiffs have demonstrated that the preventive care coverage mandate substantially burdens their free exercise of religion. If so, I must then consider whether the government has demonstrated that the preventive care coverage mandate is the least restrictive means to achieve a compelling interest.

Substantial Burden of Free Exercise

[18] Plaintiffs argue that providing contraception coverage violates their sincerely held religious beliefs. Although the government does not challenge the sincerity of the Newlands' religious beliefs, it argues that Plaintiffs have failed to demonstrate a substantial burden on their free exercise of religion. This argument relies upon two key premises. First, the government asserts that the burden of providing insurance coverage is borne by Hercules. Second, the government argues that as a for-profit, secular employer, Hercules cannot engage in an exercise of religion. Accordingly, the argument concludes, the preventive care coverage mandate cannot burden Hercules' free exercise of religion.[FN9] Plaintiffs counter, arguing that there exists no law forbidding a corporation from operating according to religious principles.

FN9. In the alternative, the government argues that because Plaintiffs routinely contribute to other schemes that violate the religious beliefs alleged here, the preventive

> care coverage mandate does not substantially burden Plaintiffs' free exercise of religion. This argument requires impermissible line drawing, and I reject it out of hand. *See Thomas v. Review Bd. of Ind. Emp't Sec.*, 450 U.S. 707, 715, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981).

These arguments pose difficult questions of first impression. Can a corporation exercise religion? Should a closely-held subchapter-s corporation owned and operated by a small group of individuals professing adherence to uniform religious beliefs be treated differently than a publicly held corporation owned and operated by a group of stakeholders with diverse religious beliefs? Is it possible to "pierce the veil" and disregard the corporate form in this context? What is the significance of the pass-through taxation applicable to subchapter-s corporations as it pertains to this analysis? These questions merit more deliberate investigation.

***1297** Even if, upon further examination, Plaintiffs are able to demonstrate a substantial burden on their free exercise of religion, however, the government may justify its application of the preventive care coverage mandate by demonstrating that application of that mandate to Plaintiffs is the least restrictive means of furthering a compelling interest.

Compelling Interest

In order to justify a substantial burden on Plaintiffs' free exercise of religion, the government must show that its application of the preventive care coverage mandate to Plaintiffs furthers "interests of the highest order." *Hardman*, 297 F.3d at 1127. It is well-settled that the interest asserted in this case, the promotion of public health, is a compelling government interest. *See Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir.1998). The government argues that the preventive care coverage mandate, as applied to Plaintiffs and all similarly situated parties, furthers this compelling interest.

[19] Assuming, *arguendo*, that application of the preventive care coverage mandate to Plaintiffs *and all similarly situated parties* furthers a compelling government interest,[FN10] that argument does not justify a substantial burden on *Plaintiffs'* free exercise of religion: "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the person—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales*, 546 U.S. at 430–31, 126 S.Ct. 1211.

> FN10. Plaintiffs strenuously challenge whether the preventive care coverage mandate actually furthers the promotion of public health. I need not address that argument to resolve the instant motion, and I decline to do so.

[20] I do not mean to suggest that the government may not establish a compelling interest in the uniform application of a particular program. To make such a showing, however, the government must "offer[ ] evidence that granting the requested religious accommodations would seriously compromise its ability to administer this program." *Id.* at 435, 126 S.Ct. 1211. Any such argument is undermined by the existence of numerous exemptions to the preventive care coverage mandate. In promulgating the preventive care coverage mandate, Congress created significant exemptions for small employers and grandfathered health plans.[FN11] [FN12] 26 U.S.C. § 4980H(c)(2) (exempting from health care provision requirement employers of less than fifty full-time employees); ***1298**42 U.S.C. § 18011 (grandfathering of existing health care plans). Even Defendants created a regulatory exemption to the contraception mandate. 76 Fed.Reg. 46621, 46626 (Aug. 3, 2011) (exempting certain religious employers from the contraception requirement of the preventive care coverage mandate).

> FN11. The government's attempt to characterize grandfathering as "phased implementation" is unavailing. As noted above,

health plans may retain their grandfathered status indefinitely. Most damaging to the government's alleged compelling interest, even though Congress required grandfathered health plans to comply with certain provisions of the ACA, it specifically exempted grandfathered health plans from complying with the preventive care coverage mandate. *See* 42 U.S.C. § 18011(a)(3–4) (specifying those provisions of the ACA that apply to grandfathered health plans).

FN12. The government argues that because these provisions are generally applicable, and not specifically limited to the preventive services coverage regulations, they are not exemptions from the preventive care coverage mandate. This is a distinction without substance. By exempting employers from providing health care coverage, these provisions exempt those employers from providing preventative health care coverage to women. If the government has a compelling interest in ensuring no-cost provision of preventative health coverage to women, that interest is compromised by exceptions allowing employers to avoid providing that coverage—whether broadly or narrowly crafted.

[21] "[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 547, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *see also United States v. Friday,* 525 F.3d 938, 958 (10th Cir.2008). The government has exempted over 190 million health plan participants and beneficiaries from the preventive care coverage mandate; [FN13] this massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs.[FN14]

FN13. Even if, as is estimated under the government's high-end estimate, 69% of health plans lose their grandfathered status by the end of 2013, millions health plan participants and beneficiaries will continue to be exempted from the preventive care coverage mandate. *See* 75 Fed.Reg. 34538, 34553.

FN14. To the extent the government argues creating an exemption for Plaintiffs threatens to undermine the preventive care coverage mandate, that argument is inconsistent with RFRA and irrelevant in this context. *See Gonzales,* 546 U.S. at 436, 126 S.Ct. 1211 (rejecting "slippery slope" argument as inconsistent with RFRA).

Least Restrictive Means

Even if the government were able to establish a compelling interest in applying the preventive care coverage mandate to Plaintiffs, it must also demonstrate that there are no feasible less-restrictive alternatives. *Wilgus,* 638 F.3d at 1289. The government need not tilt at windmills; it need only refute alternatives proposed by Plaintiffs. *Id.*

Plaintiffs propose one alternative, government provision of free birth control, that could be achieved by a variety of methods: creation of a contraception insurance plan with free enrollment, direct compensation of contraception and sterilization providers, creation of a tax credit or deduction for contraceptive purchases, or imposition of a mandate on the contraception manufacturing industry to give its items away for free. Defendants argue Plaintiffs' "misunderstand the nature of the 'least restrictive means' inquiry." Brief in Opposition (doc. 26) at 43. According to Defendants, this inquiry should be limited to whether Plaintiffs and other similarly situated parties could be exempted without damaging Defendants' compelling interest.

[22] It is, however, not Plaintiffs but Defendants who misunderstand the least restrictive means inquiry. Defendants need not refute every conceivable alternative, but they "must refute the alternat-

ive schemes offered by the challenger." FN15 *Wilgus*, 638 F.3d at 1289.

> FN15. Furthermore, both parties impermissibly expand the scope of this determination. As noted above, my inquiry is limited to the parties before me; I do not consider all other "similarly situated parties." To the extent Plaintiffs' alternative would apply to other parties, it is overinclusive. Because the parties frame this discussion, however, I analyze the alternative as presented by Plaintiffs and responded to by Defendants.

Despite their categorical argument, Defendants attempt to refute Plaintiffs' proposed alternative. First, Defendants argue that because Plaintiffs' alternative "would impose considerable new costs and other burdens on the Government and are otherwise impractical," they should be rejected as not "feasible" or "plausible." ***1299** Brief in Opposition (doc. 26) at 44. Although a showing of impracticality is sufficient to refute the adequacy of a proposed alternative, Defendants have failed to make such a showing in this case. As Plaintiffs note, "the government already provides free contraception to women." Reply Brief in Support (doc. 27) at 38.

Defendants also argue Plaintiffs' alternative would not adequately advance the government's compelling interests. They acknowledge that Plaintiffs' alternative would achieve the purpose of providing contraceptive services to women with no cost sharing, but argue that Plaintiffs' alternative will not "ensur[e] that women will face minimal logistical and administrative obstacles to receiving coverage of their care." Brief in Opposition (doc. 26) at 45. Although Plaintiffs argue that this amounts to a redefinition of Defendants' compelling interest, it is instead a logical corollary thereto. FN16 Nonetheless, Defendants have failed to adduce facts establishing that government provision of contraception services will necessarily entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women. Once again, the current existence of analogous programs heavily weighs against such an argument.

> FN16. To be clear, I do not believe Defendants have sufficiently demonstrated a compelling interest in enforcing the preventive care coverage mandate against Plaintiffs. For purposes of my analysis under "least restrictive means" prong of RFRA, however, I assume the existence of such an interest.

Defendants bear the burden of demonstrating that refusing to exempt Plaintiffs from the preventive care coverage mandate is the least restrictive means of furthering their compelling interest. Given the existence of government programs similar to Plaintiffs' proposed alternative, the government has failed to meet this burden.

Conclusion

The balance of the equities tip strongly in favor of injunctive relief in this case. Because this case presents "questions going to the merits ... so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation," I find it appropriate to enjoin the implementation of the preventive care coverage mandate as applied to Plaintiffs. Accordingly,

Defendants, their agents, officers, and employees, and their requirements that Plaintiffs provide FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, are ENJOINED from any application or enforcement thereof against Plaintiffs, including the substantive requirement imposed in 42 U.S.C. § 300gg–13(a)(4), the application of the penalties found in 26 U.S.C. §§ 4980D & 4980H and 29 U.S.C. § 1132, and any determination that the requirements are applicable to Plaintiffs.

Pursuant to Fed.R.Civ.P. Rule 65(c), Plaintiffs shall post a $100.00 bond as security for any costs

and damages that may be sustained by Defendants in the event they have been wrongfully enjoined or restrained.

Such injunction shall expire three months from entry of an order on the merits of Plaintiffs' challenge. In order to expedite the resolution of this case, the parties shall file a Joint Case Management Plan on or before August 27, 2012.

And, finally, I take this opportunity to emphasize the *ad hoc* nature of this injunction. The government's arguments are largely premised upon a fear that granting ***1300** an exemption to Plaintiffs will necessarily require granting similar injunction to all other for-profit, secular corporations voicing religious objections to the preventive care coverage mandate. This injunction is, however, premised upon the alleged substantial burden on Plaintiffs' free exercise of religion—not to any alleged burden on any other party's free exercise of religion. It does not enjoin enforcement of the preventive care coverage mandate against any other party.

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