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.

PLAINTIFFS' REPLY TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

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, respectfully request permission of the Court to file this reply to Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order and, in support hereof, state as follows:

I. Introduction

This essence of this case is whether Mr. Briscoe, as a religious business owner, forfeits his faith as a cost of doing business because, though he is the sole owner, he operates his businesses through Colorado limited liability companies and Colorado S Corporations.

For the purposes of the Court's hearing on Plaintiffs' Motion for Temporary Restraining Order, the material facts in Plaintiffs' Verified Complaint are not in dispute.

The HHS Mandate at issue forces Mr. Briscoe and his businesses (herein "Mr. Briscoe") to offer health insurance that Mr. Briscoe sincerely believes entangles him and his businesses in the practice of abortion. The HHS Mandate forces Mr. Briscoe's self-funded employee health plan to offer coverage at no cost to plan beneficiaries for drugs or devises that could risk killing a newly-conceived human being, including Plan B, Ella, and certain intrauterine devices. While Mr. Briscoe has no objection to other contraceptives, Mr. Briscoe does object to covering these abortifacient drugs and devices.

In its Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order (herein "Government Memo"), the primary contentions of the government are:

1. Insomuch as Mr. Briscoe's businesses are for-profit, secular entities, those entities cannot exercise religion. Memo at 1.
2. Mr. Briscoe has not established a likelihood of success on the merits. Memo at 2.
3. With respect to Mr. Briscoe's Religious Freedom Restoration Act (herein "RFRA") claim, Mr. Briscoe cannot show that the HHS Mandate imposes a substantial burden on Plaintiffs' religious exercise. Memo at 2.

4. The burden on Mr. Briscoe, himself, is only indirect as any burden imposed is on Mr. Briscoe's business entities and thus does not affect Mr. Briscoe's personal religious beliefs. Whatever burden is imposed on Mr. Briscoe's business entities is too attenuated to qualify as a substantial burden. Memo at 3.
5. Even if there is a substantial burden to any of the Plaintiffs, the regulations do not violate RFRA (or the Free Exercise Clause pursuant to strict scrutiny) because the because the regulations are neutral, generally applicable, and narrowly tailored to serve compelling government interests, to wit: "improving the health of women and children, and equalizing the provision of preventive care for women and men so that women who can choose to can be a part of the workforce on an equal playing field with men." Memo at 4.
6. Mr. Briscoe is somehow seeking to impose his religious beliefs on his employees. Memo at 4.
7. By delaying the filing of his lawsuit, Mr. Briscoe has somehow waived his right to assert immediate, irreparable harm for violation of his constitutional rights. Memo at 4.

These and related issues raised in the Memo are addressed below.

II. <u>Mr. Briscoe is entitled to a temporary restraining order</u>

The procedure and standards for issuance of a temporary restraining order mirror those for a preliminary injunction. *Griffith v. Meyer,* 2012 WL 5985672 (D. Colo. 2012) (Boland, M.J.).

To obtain a preliminary injunction, a movant must show:

a. A substantial likelihood of prevailing on the merits;

b. Irreparable harm unless the injunction is issued;

c. That the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and

d. That the injunction, if issued, will not adversely affect the public interest

Davis v. Mineta, 302 F.3d 1104, 1111 (10th Cir. 2009).

If the movant can establish that the latter three requirements tip strongly in the movant's favor, a modified version of the traditional likelihood of success test applies which requires a showing that the questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation. *Davis,* 3-2 F/3d at 1111; *see also Newland v. Sebelius,* 881 F. Supp 2d 1287, 1294 (D. Colo. 2012) (Kane, J.) (enjoining HHS Mandate under modified standard).

Although the question is still apparently open in the Tenth Circuit,[1] in Religious Freedom Restoration Act (RFRA) cases, other circuits have applied the modified standard to injunctions that seek to stay governmental action. *See, e.g., Cheema v. Thompson,* 67 F.3d 993, 885 (9th Cir. 1995) (applying "fair chance of success on the merits" standard in RFRA challenge to school district rules required by state law); *Korte v. Sebelius,* No. 12-3841, 2012 WL 6757353, at *2 (7th Cir. Dec. 28, 2012) (concluding under "sliding scale" that business owners established "a reasonable likelihood of success on the merits"); *Grote v. Sebelius,* No. 13-1077, 2013 WL

[1] The ruling of a Tenth Circuit motions panel (as well as the ruling by Justice Sotomayor) in *Hobby Lobby Stores, Inc. v. Sebelius,* No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012), *app. For inj. Pending appellate review denied,* No. 12A644, 2012 WL 6698888 (Sotomayor, J., in chambers) is **not, as the government acknowledges, binding on this Court**.

362725 (7th Cir. Jan. 30, 2013) (same); *see also Newland,* 881 F. Supp 2d 1287; *but see Jolly v. Coughlin,* 76 F.3d 468, 473-74 (2d Cir. 1996) (rejecting modified standard in RFRA case).

This Court need not resolve this issue, however, because Mr. Briscoe and the Plaintiffs are entitled to an injunction under either the traditional or the modified standard. *Awad v. Ziriax,* 670 F.3d 1111, 1126 (10th Cir. 2012) (not resolving issue because free exercise movant met heightened standard).

III. Mr. Briscoe and his businesses exercise religion

Threatening to harm Mr. Briscoe and his businesses unless he violates his faith severely burdens his faith. That burden is not somehow diluted by the business's entity form – here Colorado limited liability companies and Colorado S Corporations.

A corporation or a limited liability company acts only when the individuals who own and operate the corporation or the limited liability company direct it to act – here, Mr. Briscoe and Mr. Briscoe alone.

If the owner feels pressure, even if the sanction falls on his business, that is a violation of the owner's faith and religious exercise. *Cf. Wisconsin v. Yoder,* 406 U.S. 205, 218 (1972) (pressure from a five dollar fine was "severe" and "inescapable"); *Sherbert v. Verner,* 374 U.S. 398, 404 (1963).

Whether the pressure is on a limited liability company, an S Corporation, all of which in this case are owned and directed by Mr. Briscoe, the pressure on the owner is inescapable.[2] No

[2] The government implicitly recognizes this concept when it treats income generated by S Corporations and limited liability companies as individual income to the owners or members. *See United States v. Rice,* 52 F.3d 843, 844 (10th Cir. 1995).

precedent supports the idea that the corporate form dilutes any burden on the owner's religious exercise. Indeed, Courts have repeatedly recognized that individuals may assert religious claims in the context of operating businesses. *See, e.g., United States v. Lee,* 455 U.S. 252, 256-57 (1982) (Amish employer could object to social security taxes); *Braunfeld v. Brown,* 366 U.S. 599, 605 (1961) (Jewish merchants in Philadelphia who engaged in retail sale of clothing and home furnishings could challenge Sunday closing law because it "ma[d]e the practice of their religious beliefs more expensive"); *Stormans, Inc. v. Selecky,* 586 F.3d 1109, 1120-21 (9th Cir. 2009) (relying on *EE0C v. Townley Eng'g & Mfg. Co.,* 859 F.2d 610, 619-20 (9th Cir. 1988) ("a corporation has standing to assert the free exercise right of its owners").

Likewise, RFRA protects "persons" without distinguishing between natural or artificial persons or between non-profit and for-profit entities. *See* 42 U.S.C. § 2000bb-1(b) (protecting "a person's" religious exercise). A limited liability company or a corporation, such as those owned and operated by Mr. Briscoe, is simply a group of people acting together, here just one person.

The federal Dictionary Act confirms that, by broadly protecting "persons," Congress presumptively intended to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals. . ." 1 U.S.C. § 1.

Usually the entity form is selected for liability and tax purposes. *See, e.g., NLRB v. Greater Kansas City Roofing,* 2 F.3d 1047, 1051 (10th Cir. 1993) (corporate forms are state-law constructs designed primarily "to create an incentive for investment by limiting exposure to personal liability").

Importantly, in fourteen other cases by business owners challenging the HHS Mandate, eleven courts have found the corporate form immaterial to a business owner's ability to assert religious claims.[3]

Likewise, in *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 776 (1978), the Supreme Court explained that "[t]he proper question . . . is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead the question must be whether [the challenged law] abridges expression that the First Amendment was meant to protect." *See also Citizens United v. Fed. Election Comm'n,* 130 S.Ct. 876, 899-900 (2010) (explaining that "political speech does not lose First Amendment protection 'simply because its source is a corporation'") (quoting *Bellotti,* 435 U.S. at 784).

This Circuit and the Supreme Court have vindicated religious exercise claims on behalf of corporately-organized entities. *See O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft,* 389 F.3d 973 (10th Cir. 2004), *aff'd by Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S 418 (2006) (a church suing as "a New Mexico corporation on its own behalf" prevailed under RFRA claim before the *en banc* Tenth Circuit and a unanimous Supreme Court); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 525

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[3] *See, e.g., Korte v. Sebelius,* No. 12-3841, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012) ("That the Kortes operate their business in the corporate form is not dispositive of their claim."); *Grote v. Sebelius,* No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013) (same); *Tyndale,* 2012 WL 5817323, at *7 ("[T]he case law is replete with examples of such organizations asserting cognizable free exercise and RFRA challenges."); *Monaghan v. Sebelius,* No. 12-cv-15488, 2012 WL 6738476, at *4 (E.D. Mich. Dec. 30, 2012) ("[T]he Court is in no position to declare that acting through his company to provide certain health care coverage to his employees does *not* violate Monaghan's religious beliefs. They are, after all, *his* religious beliefs); *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs.,* No. 2:12-cv-92, Slip Op. at 6 (E.D. Mo. Dec. 31, 2012) ("[T]he court concludes that plaintiffs have shown that the . . . mandate, and its substantial financial penalties, on their health plan, would substantial burden their religious beliefs.").

(1993) (a "not-for-profit corporation organized under Florida law" prevailed on a free exercise claim); *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and Sch.,* 597 F.3d 769, 772 (6th Cir. 2010), *rev'd by Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC,* 132 S.Ct. 694 (2012) (an ecclesiastical corporation's free exercise rights were vindicated).

IV. Mr. Briscoe and his businesses' religious exercise is directly and substantially burdened by the HHS Mandate

The government does not question the sincerity of Mr. Briscoe's religious beliefs. Thus, the issue then is whether the HHS Mandate substantially burdens the religious beliefs of both Mr. Briscoe and his businesses.

In the Tenth Circuit, a law imposes a "substantial burden" on religious exercise when it: (a) "requires participation in an activity prohibited by a sincerely held religious belief;" (b) "prevents participation in conduct motivated by a sincerely held religious belief;" or (c) "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief[.]" *Abdulhaseeb v. Calbone,* 600 F.3d 1301, 1315 (10th Cir. 2010) (quoting *Thomas,* 450 U.S. at 717-18).

Under both the first and third prongs of the test set forth in *Abdulhaseeb*, the HHS Mandate substantially burdens the religious exercise of both Mr. Briscoe and his businesses, to wit: it requires participation in a religiously forbidden activity by requiring Mr. Briscoe to assure his businesses provide insurance coverage of abortifacients in violation of his religious beliefs (prong 1) and it places substantial pressure on Mr. Briscoe to manage and direct his businesses in conduct contrary to a sincerely held religious belief by imposing crippling fines unless he provides coverage contrary to his beliefs (prong 3).

To date, including Judge Kane's order in *Newland,* 881 F. Supp. 2d 1287, fourteen cases

have raised similar claims of substantial burden by for-profit business owners. In eleven of fourteen, courts have granted the plaintiffs preliminary relief.[4]

In any event, the Supreme Court has rejected the distinction between "direct" and "indirect" burden. In *Sherbert,* 374 U.S. at 403, and in *Thomas v. Review Bd.,* 450 U.S. 707, 717 (1981), plaintiffs' religious exercise was penalized indirectly through loss of employment benefits. In both cases, the Supreme Court rejected the government's argument that the burden was "only the indirect consequence of public welfare legislation." As *Thomas* explained, "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." 450 U.S. at 718. The Tenth Circuit has expressly adopted this language from *Thomas. See Abdulhaseeb,* 600 F.3d at 1315.

The HHS Mandate does, in fact, directly and substantially burden Mr. Briscoe's religious exercise because it coerces him to run his businesses in violation of his faith. The HHS Mandate imposes a substantial burden on Mr. Briscoe and his businesses because it pressures him and his businesses to cover abortifacient drugs in violation of his religious beliefs on pain of millions of dollars of fines per year – estimated to be as much as $5.47 million per year.

[4] *See* Order, *Annex Med., Inc. v. Sebelius,* No. 13-1118 (8th Cir. Feb. 1, 2013) (granting injunction pending appeal); *Grote v. Sebelius,* No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013) (same); *Korte v. Sebelius,* No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) (same); Order, *O'Brien v. U.S. Dep't of Health & Human Servs.,* No. 12-3357 (8th Cir. Nov. 28, 2012) (same); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs.,* No. 12-cv-6756 (N.D. Ill. Jan. 3, 2013) (granting preliminary injunction); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.,* No. 12-cv-3459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012) (same); *Tyndale House Publishers, Inc. v. Sebelius,* NO. 12-cv-1635, 2012 WL 5817323 (D.D.C. Nov. 16, 2012) (same); *Legatus v. Sebelius,* No. 12-cv-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012) (same); *see also* Order, *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs.,* No. 2:12-cv-92 (E.D. Mo. Dec. 31, 2012) (granting temporary restraining order); *Monaghan v. Sebelius,* No. 12-cv-15488, 2012 WL 6738476 (E.D. Mich. Dec. 30, 2012) (same); but see Order, *Conestoga Wood Specialties Corp. v. Sebelius,* No. 13-1144 (3d Cir. Feb. 7, 2013) (denying relief); Order, *Autocam Corp. v. Sebelius,* No. 12-2673 (6th Cir. Dec. 28, 2012) (same).

V. **Having shown substantial burden, the Court must apply strict scrutiny to both the RFRA violations and the Free Exercise violations**

Under RFRA, the federal 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(b); *United States v. Hardman,* 297 F.3d 1116, 1126 (10th Cir. 2002) (en banc) (discussing RFRA).

RFRA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). A plaintiff makes a prima facie case under RFRA by showing the government substantially burdens the plaintiff's sincere religious exercise of those beliefs. *Kikumura v. Hurley,* 242 F.3d 950, 960 (10th Cir. 2001).

Religious exercise involves "not only belief and profession but the performance of (or abstention from) physical acts." *Employment Div., Dept. of Human Res. of Ore. v. Smith,* 494 U.S. 872, 877 (1990) (Free Exercise claim).

Once a substantial burden has been shown, the burden then shifts to the government to show 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", *i.e.,* the strict scrutiny analysis. *Gonzales v. O Centro,* 546 U.S.at 420 (quoting 42 U.S.C. § 2000bb-1(b)).

Likewise, laws or regulations which are not neutral or generally applicable face strict scrutiny under the Free Exercise Clause. *Lukumi,* 508 U.S. at 531-32. This is "the most demanding test known to constitutional law." *City of Boerne v. Flores,* 521 U.S. 507, 534 (1997).

Insomuch as the procedure and standards for issuance of a temporary restraining order mirror those for a preliminary injunction, even at the temporary restraining order stage, RFRA requires the government to prove that the HHS Mandate's burden on Mr. Briscoe and his businesses is "the least restrictive means of advancing a compelling interest." *Gonzales v. O Centro,* 546 U.S.at 429 (citing 42 U.S.C. § 2000bb-1(b)).

As other courts have found, "the government has not, at this juncture, made an effort to satisfy strict scrutiny." *See, e.g., Grote v. Sebelius,* No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013).

VI. The HHS Mandate is not neutral or generally applicable

The Mandate is neither neutral nor generally applicable as it discriminates among religious objectors, penalizes Mr. Briscoe for his religious conduct, and allows extensive exemptions from its provisions.

The First Amendment "sponsor[s] an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson,* 343 U.S. 306, 313 (1952).

As other courts have recognized, the government has allowed numerous employers and plans to avoid the Mandate, including:

a. Grandfathered plans. Plans may avoid the Mandate by not making certain changes after the ACA's effective date. 42 U.S.C. § 18011(a)(2). Plans may stay grandfathered indefinitely and the government expects plans covering over 87 million people to do so through 2013. *See* HealthCare.gov, Keeping the Health Plan You Have (June 14, 2010),

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

b. Small employers. Businesses which employ less than 50 people need not offer health insurance at all and can therefore avoid the Mandate. Such small employers employ over 34 million people. *See* WhiteHouse.Gov, *The Affordable Care Act Increases Choice and Saving Money for Small Business* at 2, http://www.whitehouse.gov/files/docu8metns/health_reform_for_small_businesses.pdf.

c. Religious Groups. Certain non-profit "religious employers" – essentially houses of worship under the tax code – have been specially exempted from the Mandate. 45 C.R.R. § 147.13-0(a)(1)(iv); *see also* 78 Fed.Reg. 8456, 8461 (Feb. 6, 2013) (proposing amended exemption).[5]

d. Safe Harbor. Other objecting non-profit organizations have been granted a one-year "safe harbor." HHS, Guidance on the Temporary Enforcement Safe Harbor (Feb. 10, 2012), http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf.

"The government has exempted over 190 million health plan participants and beneficiaries from the preventive care coverage mandate; this massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs." *Newland,* 881 F. Supp. 2d at 1298.

Even if Mr. Briscoe did not operate through limited liability companies or S Corporations, he would not qualify for any of these exemptions.

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[5] Even were the definition of "religious employer" amended along the lines the government proposed on February 1, 2013, the amended definition would still fail to protect religious liberty. The proposed rule explicitly states that it does not intent to "expand the universe of employer[s]" beyond those who were originally exempt. "Coverage of Certain Preventive Services Under the Affordable Care Act," Notice of Proposed rulemaking, 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013).

VII. The government cannot demonstrate a compelling interest

To demonstrate a compelling interest, the government must show the HHS Mandate furthers interests "of the highest order." *Lukumi,* 508 U.S. 546; *Hardman,* 297 F.3d 1127.

This determination "is not to be made in the abstract" but rather "in the circumstances of this case." *Cal. Democratic Party v. Jones,* 530 U.S. 567, 584 (2000); *see also Lukumi,* 508 U.S. at 546 (rejecting public health interest as compelling "in the context of" the relevant ordinances). "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" of religious exercise. *Thomas v. Collins,* 323 U.S. 516, 530 (1945).

Further, the government "must demonstrate that the recited harms are real, not merely conjectural and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 624, 664 (1994).

Moreover, an interest cannot be compelling where the government, as here, has exempted millions of Americans and thus has failed "to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Gonzales v. O Centro,* 546 U.S. at 434-37; *Lukumi,* 508 U.S. at 422.

RFRA requires courts to "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro,* 546 U.S.at 431. The HHS Mandate is just such a "broadly formulated interest" which does not meet the compelling interest test. *Gonzales v. O Centro,* 546 U.S. at 432.

The government has not presented "*any* proof that mandatory insurance coverage for the specific contraceptives to which [Mr. Briscoe] object[s] – Plan B, ella, and the intrauterine

devices – furthers the government's compelling interests." *Tyndale House Publishers, Inc. v. Sebelius,* No. 12-cv-1635, 2012 WL 5817323, at *16 (D.D.C. Nov. 16, 2012).

And the "massive exemption[s]" the government has authorized "completely undermine[] any compelling interest in applying the preventive care coverage mandate" to Mr. Briscoe and his businesses. *Newland,* 881 F. Supp. 2d at 1298 (citing 42 U.S.C. § 18011; 26 U.S.C. § 4980H(c)(2)).

Moreover, the government has not even "advanced an argument that the contraception mandate is the least restrictive means of further" its "general interest" in ensuring access to the objectionable products and services. *Korte v. Sebelius,* No. 12-3841, 2012 WL 6757353, at *4 (7th Cir. Dec. 28, 2012); *accord Grote v. Sebelius,* No. 13-1077, 2013 WL 362725, at *3 (7th Cir. Jan. 30, 2013) (holding the government "has not demonstrated that requiring religious objectors to provide cost-free contraception coverage is the least restrictive means of increasing access to contraception.")

Moreover, the government has offered no proof that Mr. Briscoe's exclusion of a small fraction of all FDA-approved contraceptives threatens the health of his employee at all. *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 821-22 (2000).

Thus, RFRA demands an exemption. *Newland,* 881 F. Supp. 2d at 1298 (since "[t]he government has exempted over 190 million health plan participants and beneficiaries from the [HHS] mandate[,] this massive exemption completely undermines any compelling interest in applying the . . . mandate to Plaintiffs").

VIII. The government has numerous less restrictive means of furthering its supposed interest

The HHS Mandate also fails strict scrutiny because there are multiple alternate means of providing FDA-approved contraception coverage that would not violate Mr. Briscoe's rights.

The government has not even "advanced an argument that the contraception mandate is the least restrictive means of furthering" its "general interest" in insuring FDA-approved contraceptive access. *Korte v. Sebelius,* No. 12-3841, 2012 WL 6757353, at *4 (7th Cir. Dec. 28, 2012).

The government could:

a. Expand federal Medicare, Medicaid or other federal programs to provide these objectionable drugs and devices at federal taxpayer dollar expense.
b. Authorize a tax credit to employees who buy emergency contraceptives and devices with their own funds.
c. Directly provide emergency contraceptives and devices with their own funds.
d. Provide emergency contraceptives and devices free of cost through state health insurance exchanges or federally facilitated exchanges.
e. Enable and subsidize companies, doctors or others to distribute emergency contraceptives and devices and provide education and counseling, all at federal expense.

See Newland, 881 F. Supp. 2d at 1299 (concluding that the government had "failed to adduce facts establishing that government provision of contraceptive services will necessarily entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women").

IX. Mr. Briscoe and his businesses are likely to succeed on both the RFRA Claim and the Free Exercise Claim

1. The HHS Mandate is not generally applicable.

When a regulation "creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection," the regulation fails general applicability. *Fraternal Order of Police v. City of Newark,* 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.); *see also Blackhawk v. Pennsylvania,* 381 F.3d 202, 211 (3d Cir. 2004) (Alito, J.).

2. The HHS Mandate is not neutral.

The HHS Mandate treats religious objectors differently by creating a "religiousity" scale. Favored religious employers are exempt; less-favored religious non-profits have a save harbor; religious for-profits, like Mr. Briscoe and his businesses must comply with the HHS Mandate. The government cannot treat people with identical religious objections disparately. *See Colorado Christian Univ. v. Weaver,* 534 F.3d 1245, 1257 (10th Cir. 2008).

Likewise, the HHS mandate is not neutral in that it exempts employers for secular reasons while rejecting Mr. Briscoe's religious reasons.

3. Mr. Briscoe and his businesses will suffer irreparable harm absent a temporary restraining order.

Mr. Briscoe's self-funded employee health insurance plan year begins April 1, 2013. 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.

Mr. Briscoe is in an impossible position. He must either comply with the HHS Mandate and violate his faith, or refuse to comply with the HHS Mandate and face potential penalties of from $340,000 per year to $5.5 million per year. *See, e.g., Kikumura,* 242 F.3d at 963 (noting "courts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA"); *Korte,* 2012 WL 6757353, at *4 ("RFRA protects the same religious liberty protected by the First Amendment, and it does so under a more rigorous standard of judicial scrutiny; the loss of First Amendment rights 'for even minimal periods of time, unquestionably constitutes irreparable injury.'") (quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality op.)).

The government argues that a "delay in filing this suit" negates any irreparable harm to Mr. Briscoe. While the government cites no cases involving deprivation of a constitutional right, the issue of any alleged delay in seeking injunctive relief is but one factor considered in the irreparable harm analysis, along with other factors such as whether the other party was disadvantaged by any delay or whether the delay caused any harm. *Roda Drilling v. Siegal*, 552 F.3d 1203, 1211 (10th Cir. 2009) (finding that "…delay is but one factor in the irreparable harm analysis…" and specifically rejecting, in footnote 4, an argument that delay "defeats a finding of irreparable harm as a matter of law."); *see also Nilson v. JPMorgan Chase Bank*, 690 F.Supp.2d 1231 (D. Utah, Dec. 23, 2009) (finding that any delay in seeking injunctive relief, neither disadvantaged the other party nor altered the outcome of the proceeding).

The government has not even alleged any disadvantage or harm as a result of what the government characterizes as a "delay" in this case. As stated, neither case cited by the government involved deprivation of constitutional rights. Moreover, one of the cases cited by the government found that any delay was not fatal and caused no disadvantage to the other party.

Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Social & Rehabilitation Servs., 31 F.3d 1536, 1544 (10th Cir. 1994).

The government essentially argues, without authority or facts, that Mr. Briscoe's alleged delay in the filing of his lawsuit somehow means that it should be determined that he has waived his right to seek injunctive relief, and has, thereby, waived his constitutional rights. Constitutional rights cannot be waived. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) ("There is a presumption against the waiver of constitutional rights, *see, e.g., Glasser v. United States*, 315 U.S. 60, 70-71 (1942), and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)."); *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972) ("In the civil area, the Court has said that '(w)e do not presume acquiescence in the loss of fundamental rights,' *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937). Indeed, in the civil no less than the criminal area, 'courts indulge every reasonable presumption against waiver.' *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).").

4. The balance of equities tips decidedly in Mr. Briscoe's favor.

The harm to the government in being "prevented from 'enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce . . . pales in comparison to the possible infringement upon Plaintiffs' constitutional and statutory rights." *Newland,* 881 F. Supp. 2d at 1295 (citing *Cornish v. Dudas,* 540 F. Supp. 2d 61 (D.D.C. 2008).

5. A temporary restraining order is in the public interest.

The government's purported interests in "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 a part of the workforce on an equal playing field with men . . . are countered, and indeed outweighed, by the public interest in the free exercise of religion." *Newland,* 881 F. Supp. 2d at 1295 (citing *O Centro v. Ashcroft,* 389 F.3d at 1010).

X. Mr. Briscoe does not seek to impose his faith beliefs on others

The government argues that Mr. Briscoe is seeking to impose his beliefs on his employees. Mr. Briscoe does not assert a religious exercise claim regarding the actions of his employees or their doctors. Mr. Briscoe's lawsuit does not seek to keep his employees from using such drugs if they so desire. What Mr. Briscoe's faith demands is that he refrain from "participating in, providing access to, paying for, training others to engage in, or otherwise supporting abortion-causing drugs and devices which the HHS Mandate forces him to do. Faith beliefs call this moral reasoning "facilitation," "material assistance," or "material cooperation" – the principle that someone may be culpably involved in another's actions. Indeed, it is the government forcing its "faith" beliefs on Mr. Briscoe.

The "religious-liberty violation at issue here inheres in the *coerced coverage* of . . . abortifacients . . ., not – or perhaps more precisely, *not only* – in the later purchase or use of [abortifacients]." *Korte v. Sebelius,* No. 12-cv-12061, 2012 WL 6577353, at *3 (7th Cir. Dec. 28, 2012); *see also Grote v. Sebelius,* No. 13-1077, 2013 WL 362725, at *3 (7th Cir. Jan. 30, 2013). "[I]t is the coverage, not just the use, of the contraceptives at issue to which the plaintiffs object, it is irrelevant that the use of the contraceptives depends on the independent decisions of third

parties." *Tyndale House Publishers, Inc. v. Sebelius,* No. 12-cv-1635, 2012 WL 5817323, at *6 (D.D.C. Nov. 16, 2012).

"[T]he government's minimalist characterization of the burden continues to obscure the substance of the religious-liberty violation asserted." *Grote v. Sebelius,* No. 13-1077, 2013 WL 362725, at *31 (7th Cir. Jan. 30, 2013). *See also Legatus v. Sebelius,* No. 12-cv-12061, 2012 WL 5359630, at *6 (E.D. Mich. Oct. 31, 2012), (deferring to plaintiffs' assertion that HHS Mandate "substantially burdens the observance of the tenets of Catholicism"); *Monaghan v. Sebelius,* No. 12-cv-15488, 2012 WL 6738476, at *4 (E.D Mich. Dec. 30, 2012) (same); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.,* 2012 WL 6951316, at *4 (W.D. Mo. Dec. 20, 2012)(rejecting argument that "any causation between the [plaintiffs] and the use of the provided contraceptive services would be broken by the individual's own decision to use the contraceptive services" because "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial") (citation omitted).

Four of the seven district court decisions which have declined to rule in favor of a plaintiff's business have been enjoined on appeal. *See Korte,* 2012 WL 6757353, at *3; *Grote v. Sebelius,* No. 13-1077, 2013 WL 362725, at *3 (7th Cir. Jan. 30, 2013); *O'Brien v. U.S. Dep't of Health & Human Servs.,* No. 12-3357 (8th Cir. Nov. 28, 2012); Order, *Annex Med., Inc., v. Sebelius,* No. 13-1118 (8th Cir. Feb. 1, 2013).

XI. Conclusion

For the reasons set forth herein and in Plaintiffs' Verified Complaint, in Plaintiffs' Motion for Preliminary Injunction and Brief in Support of Motion for Preliminary Injunction,

each of which is incorporated herein by this reference, Plaintiffs respectfully renew their request that the Court issue a temporary restraining order as previously requested.

Respectfully submitted this 22nd day of February, 2013.

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CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiffs, Michael J. Norton, hereby certifies that, on February 22, 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
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