UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

SHARPE HOLDINGS, INC., et al.,)
)
Plaintiffs,)
)
vs.) Case No. 2:12-cv-00092-DDN
)
UNITED STATES DEPARTMENT)
OF HEALTH AND HUMAN SERVICES,)
et al.,)
)
Defendants.)

MEMORANDUM OF CNS INTERNATIONAL MINISTRIES, INC. AND HEARTLAND CHRISTIAN COLLEGE IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION AND SUMMARY OF ARGUMENT

The central question presented by this case is this: Can the federal government force conscientious religious objectors to aid and abet what they believe to be the taking of innocent life?

No one in this case disputes that the religious nonprofit plaintiffs ("these Plaintiffs") sincerely believe that they must not abet abortions. And no one disputes that the contraceptive mandate (in this case the abortifacient mandate) makes these Plaintiffs, as employers, part of the mechanism by which employees and their dependents obtain coverage for drugs and devices to which these Plaintiffs object. The disagreement in this case concerns whether the Defendants' "accommodation" has solved the moral problems of complicity and facilitating evil. It has not.

The accommodation works as follows: religious nonprofits objecting to the contraceptive mandate must certify that they object to providing health coverage to employees for contraceptives and then provide their third party administrator with a list of female employees. The third party administrator then is expected to provide contraceptive coverage to the female employees at, allegedly, no cost to the employers. The Defendants acknowledge that they have no authority to force compliance with this plan by third party administrators, placing the burden on these Plaintiffs to find a third party administrator who will provide such religiously abhorrent coverage to its female employees.

The government will argue that its "accommodation" puts moral distance between these Plaintiffs and the provision of the objectionable drugs and devices to their employees, and that this moral distance dooms these Plaintiffs' claims of a substantial burden on their religious exercise. But this argument fails for several reasons. First, the government cannot tell these Plaintiffs and others what they believe—these Plaintiffs, not the government, are the arbiters of

whether a particular set of actions is immoral in their own eyes. Second, these Plaintiffs are inescapably part of the mechanism for obtaining the drugs and devices. Without these Plaintiffs' hiring and retaining employees and otherwise acting to trigger the accommodation mechanism, the employees and dependents would not receive the abortion-causing items. Third, the government cannot command these Plaintiffs and other religious organizations to outsource their consciences to third party administrators or others; as the Supreme Court stated just last Term, government cannot force religious groups to express their beliefs "only at the price of evident hypocrisy." *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2331 (2013).

Indeed, the moral dilemma confronted by these Plaintiffs is not unlike the one faced by a person who is solicited to commit a crime, or invited to join a conspiracy or a fraud. The law makes individuals culpable for their decisions to participate as accomplices or co-conspirators. Similarly, the moral law that CNS International Ministries, Inc. ("CNS Ministries") and Heartland Christian College ("HCC") follow makes them culpable for a decision to act as the government's accomplice or co-conspirator in committing what they believe to be the taking of innocent human life. The government should not be allowed to tell these Plaintiffs not to use their own standard of culpability, especially when federal standards of culpability are so similar.[1]

The religious liberty rights of these Plaintiffs are accordingly substantially burdened,

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[1] Judge Gorsuch explained the problem well in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d. 1114 (10th Cir. 2013) (*en banc*):

> All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability. The [plaintiffs] are among those who seek guidance from their faith on these questions. Understanding that is the key to understanding this case.

Id. at 1152 (Gorsuch, J., concurring).

triggering strict scrutiny. As several Courts of Appeals have already held, the Mandate cannot pass that test.[2] The government invokes no compelling interest to justify the Mandate's application to these Plaintiffs, the Mandate does not actually further the interests the government has identified, and the Mandate does not employ the least restrictive means.

One federal district court has addressed the issue of whether the Mandate and the Defendants' "accommodation" violate RFRA, finding in favor of religious nonprofits similar to CNS Ministries and HCC. *Zubik v. Sebelius*, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013). The court found that the accommodation did not "absolve or exonerate" the Plaintiffs regarding their religious concerns with facilitating abortifacients. *Id*. at *49. Further, the court found it difficult to understand why the government requires non-church religious nonprofit organizations to comply with the accommodation's requirement, but completely exempts churches from the Mandate. *Id*. at *52. "Why should religious employers who provide the charitable and educational services of the Catholic Church be required to facilitate/initiate the provision of contraceptive products, services, and counseling, through their health insurers or TPAs, when religious employers who operate the houses of worship do not?" *Id*. at *50.

CNS Ministries and HCC do not provide and never have provided abortifacient coverage to their employees. Because the Mandate will soon change the status quo and coerce these Plaintiffs to trigger such coverage, a temporary restraining order and preliminary injunction should issue protecting these Plaintiffs from the Mandate during the pendency of litigation. If churches are exempt from the Mandate, and for-profit companies such as Sharpe Holdings and

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[2] In a Colorado case that also involves a challenge to the accommodation, the Defendants conceded that the Tenth Circuit's ruling in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), which found that the Mandate did not pass strict scrutiny, is binding upon the Colorado district court as to the strict scrutiny issue. *Little Sisters of the Poor v. Sebelius*, No. 13-cv-02611-WJM-BNB (D.C. Colo. 2013), Doc. 30, p. 14. Similarly, the Eighth Circuit's decisions in *Annex Med. v. Sebelius*, 2013 WL 1276025 (8th Cir. 2013) and *O'Brien v. U.S. Dep't of HHS*, Order, No. 12-3357 (8th Cir. Nov. 28, 2012), which necessarily found that the Mandate did not pass strict scrutiny, control here.

O'Brien Industrial Holdings are now judicially exempt, then certainly religious nonprofits such as these Plaintiffs should be exempt.

STATEMENT OF FACTS

I. The HHS Mandate

A. Promulgation of the Mandate and the "Religious Employer" Exemption

Signed into law by President Obama in March of 2010, the Patient Protection and Affordable Care Act, Pub. L. 111-148 (March 23, 2010) and the Health Care and Education Reconciliation Act, Pub. L. 111-152 (March 30, 2010) (collectively, "ACA") instituted a number of significant changes to our nation's health care and health insurance systems. Among other things, the ACA mandates that any "group health plan" or "health insurance issuer offering group or individual health insurance coverage" must provide coverage for certain "preventive care and screening" services without "any cost sharing." 42 U.S.C. § 300gg-13(a). The ACA leaves the task of defining "preventive care and screening" to the Health Resources and Services Administration (HRSA), a division of Defendant Department of Health and Human Services (HHS). 42 U.S.C. § 300gg-13(a)(4); 75 Fed. Reg. 41726, 41728 (July 19, 2010).

On July 19, 2010, HHS published an interim final rule under the Affordable Care Act, (First Interim Final Rule). 75 Fed. Reg. 41726. The First Interim Final Rule, enacted without prior notice of rulemaking or public comment, provided that at a later date HRSA would publish guidelines specifying what would constitute preventive care. 75 Fed. Reg. at 41759. The First Interim Final Rule explained that "cost sharing" refers to "out-of-pocket" expenses for plan participants and beneficiaries, 75 Fed. Reg. 41730, and acknowledged that those expenses would be "covered by group health plans and issuers" which would, in turn, result in "higher average premiums for all enrollees[,]" *id.*, and "an increase in premiums," *id.* at 41737. In other words,

the prohibition on cost sharing was a way "to distribute the cost of preventive services more equitably across the broad insured population." *Id.*

On August 1, 2011, HRSA issued guidelines stating that preventive services would include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines, *available at* http://www.hrsa.gov/womensguidelines/ (last visited Dec. 7, 2013). FDA-approved contraceptive methods include "emergency contraception" such as Plan B (the "morning-after pill") and ulipristal ("ella" or the "week-after pill"). FDA Birth Control Guide (August 2012), *available at* http://www.co.burke.nc.us/vertical/sites/%7BDF44FA7A-21E3-466A-A30D-00122906F160%7D/uploads/FDA_Birth_Control_Guide-_Updated_August_2012.pdf (last visited Dec. 8, 2013). The FDA birth control guide specifically notes that Plan B and ella (and certain intrauterine devices (IUDs)) may work by preventing "attachment (implantation)" of a fertilized egg in a woman's uterus. *Id.*

On the same day that HRSA issued these guidelines, HHS promulgated an amended interim final rule (Second Interim Final Rule) that reiterated the mandate and added a narrow exemption for "religious employer[s]." 76 Fed. Reg. 46621 (Aug. 3, 2011); 45 C.F.R. § 147.130. The Second Interim Final Rule granted HRSA "*discretion* to exempt certain religious employers from the Guidelines where contraceptive services are concerned." 76 Fed. Reg. at 46623 (emphasis added). A "religious employer" was restrictively defined as one that (1) has as its purpose the "inculcation of religious values"; (2) "primarily employs persons who share the religious tenets of the organization"; (3) "primarily serves persons who share its religious tenets"; and (4) "is a nonprofit organization as described in section 6033(a)(1) and section

6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 76 Fed. Reg. at 46626. The fourth of these requirements refers to "churches, their integrated auxiliaries, and conventions or associations of churches" and the "exclusively religious activities of any religious order." 26 U.S.C. § 6033. Like the First Interim Final Rule, the Second Interim Final Rule went into effect immediately, without prior notice or comment. 76 Fed. Reg. 46621.

B. The Safe Harbor

Hundreds of thousands of public comments were filed in response to the mandate and the religious employer exemption. *See* 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012).[3] In response, Secretary Sebelius announced in January 2012 that certain non-exempt religious objectors would be granted an "additional year" before the mandate was enforced against them, in order to "allow these organizations more time and flexibility to adapt to this new rule." January 20, 2012 Statement of HHS Secretary Kathleen Sebelius, *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Dec. 8, 2013).

Accordingly, on February 10, 2012, HHS issued a bulletin describing a "Temporary Enforcement Safe Harbor" from the mandate. HHS, *Guidance on the Temporary Enforcement Safe Harbor for Certain Employers* (updated June 28, 2013), *available at* http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventive-services-guidance-6-28-2013.pdf (last visited Dec. 8, 2013). The bulletin advised that Defendants would not enforce the mandate for one additional year against certain non-profit organizations who have religious objections to covering the mandated services but who did not qualify for the religious employer exemption. *Id*. at 3. Under the safe harbor, the mandate would not apply until an organization's

[3] Additionally, in 2011, religious organizations that did not qualify for the exemption began filing lawsuits challenging the interim final rules. *See, e.g.*, *Belmont Abbey College* v. *Sebelius*, No. 11-1989 (D.D.C. Nov. 10, 2011), *dismissed as moot*, Dkt. 41 (Aug. 19, 2013) (first lawsuit filed). To date, 40 lawsuits have been filed by nonprofit religious organizations and 44 lawsuits have been filed by business owners. Their status is updated often at HHS Mandate Information Central, www.becketfund.org/hhsinformationcentral.

first insurance plan year that began after August 1, 2013 (as opposed to August 2012 under the Second Interim Final Rule). *Id*. The safe harbor was available to non-profit organizations that self-certify that they have not offered the offending coverage "from February 10, 2012 onward" and that provide notice to plan participants. *Id.* at 4. The safe harbor did not alter the religious employer (primarily for churches) exemption, however. On that same afternoon, Defendants issued regulations adopting that exemption "as a final rule without change." 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012).

C. The Advance Notice Of Proposed Rulemaking

On March 16, 2012, Defendants announced an "Advance Notice of Proposed Rulemaking" (ANPRM). 77 Fed. Reg. 16501, 16503 (March 21, 2012). The ANPRM announced the Defendants' intention to finalize an accommodation by the end of the safe harbor period. 77 Fed. Reg. at 16503. The ANPRM did not announce any intention to alter the mandate. *Id.* In vague terms, the ANPRM proposed that "health insurance issuers" for objecting religious employers could be required to "assume the responsibility for the provision of contraceptive coverage without cost sharing." *Id.* For self-insured plans, the ANPRM suggested that third party plan administrators "assume this responsibility." *Id.* For the first time, the ANPRM suggested that the cost for the separate contraceptive coverage could not result in increased premiums for conscientious objectors. *Id.* at 16503. Defendants recognized "approximately 200,000 comments" submitted in response to the ANPRM, which for the most part objected to the scheme. 78 Fed. Reg. 8456, 8459 (Feb. 6, 2013).

D. The Notice Of Proposed Rulemaking

On February 1, 2013, HHS issued a Notice of Proposed Rulemaking (NPRM). 78 Fed. Reg. 8456. The NPRM proposed two major changes to the then-existing regulations. 78 Fed.

Reg. at 8458-59. First, it proposed revising the religious employer (church) exemption by eliminating the requirements that religious employers have the purpose of inculcating religious values and primarily employ and serve persons of their own faith. *Id.* It did not, however, "expand the universe of employer plans that would qualify for the exemption." *Id.* Second, it proposed to "accommodate" non-exempt religious organizations like CNS Ministries and HCC by requiring those religious employers to have their insurers and third party administrators provide "separate . . . coverage" for the free contraceptive and abortifacient drugs and services. 78 Fed. Reg. 8463. "[O]ver 400,000 comments" were submitted in response to the NPRM. 78 Fed. Reg. 39870, 39871 (July 2, 2013). On the same day the notice-and-comment period ended, Defendant Sebelius answered questions about the contraceptive and abortifacient services requirement at Harvard University.[4] In response to a question, she explained that "religious entities will be providing coverage to their employees starting August 1st." *Sebelius Q&A*, n.6 at 51:30-52:00.

E. The Final Form Of The Mandate

On June 28, 2013, Defendants issued a final rule (the "Mandate"). Under the Mandate, the "religious employer" exemption remains limited to institutional churches and religious orders "organized and operate[d]" as nonprofit entities "referred to in section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code." 78 Fed. Reg. at 39874(a). The Mandate creates a separate "accommodation" for certain non-exempt, non-church religious organizations. 78 Fed. Reg. at 39874; 45 C.F.R. § 147.131(b). A non-church organization is eligible for the accommodation if it (1) "opposes providing coverage for some or all of the contraceptive services required"; (2) "is organized and operates as a nonprofit entity"; (3) "holds itself out as a religious organization";

[4] The Forum, *A Conversation with Kathleen Sebelius, U.S. Secretary of Health & Human Services* (April 8, 2013) *available at* http://theforum.sph.harvard.edu/events/conversation-kathleen-sebelius/ (last visited Dec. 10, 2013).

and (4) "self-certifies that it satisfies the first three criteria." 78 Fed. Reg. at 39874; 45 C.F.R. § 147.131(b). The final rule extends the current safe harbor through the end of 2013. 78 Fed. Reg. at 39889. An eligible organization would need to execute its self-certification "prior to the beginning of the first plan year" which begins on or after January 1, 2014, and deliver it to the organization's insurer, or, if the organization has a self-insured plan, to the plan's third party administrator. *Id.* at 39875.

The delivery of the self-certification would trigger the insurer's or third party administrator's obligation to make "separate payments for contraceptive services directly for plan participants and beneficiaries." *Id.* at 39875-76; *see* 45 C.F.R. § 147.131(c). This obligation would continue only "for so long as the participant or beneficiary remains enrolled in the plan." 78 Fed. Reg. 39876; see 45 C.F.R. § 147.131(c)(2)(i)(B).

Insurers and third party administrators would be required to notify plan participants and beneficiaries of the contraceptive payment benefit "contemporaneous with (to the extent possible) but separate from any application materials distributed in connection with enrollment" in a group health plan. *Id.* at 39876; 45 C.F.R. § 147.131(d). The insurers and third party administrators are expected to provide the emergency contraceptives "in a manner consistent" with the provision of other covered services, 78 Fed. Reg. at 39876-77, and "may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization." *Id.* at 39896; 45 C.F.R. § 147.131(c)(2)(ii). The burden remains on the objecting religious organization to find a third party administrator who will agree to provide free access to the same contraceptive and abortifacient services the religious organization cannot provide directly. 78 Fed. Reg. at 39880 ("[T]here is no [legal] obligation for a third party administrator to

enter into or remain in a contract with the eligible organization if it objects to any of these responsibilities.").

Defendants state in the final rule that they "have evidence to support" that providing payments for contraceptive and abortifacient services will be "cost neutral for issuers." *Id.* at 39877. Nevertheless, even if the payments were, over time, to become cost neutral, it is undisputed that there will be up-front costs for making the payments. *Id.* at 39877-78 (addressing ways insurers can cover up-front costs). The final rule suggests that issuers may ignore this fact and "set the premium for an eligible organization's large group policy as if no payments for contraceptive services had been provided to plan participants." *Id.* at 39877. Another suggestion Defendants have provided is to "treat the cost of payments for contraceptive services . . . as an administrative cost that is spread across the issuer's entire risk pool, excluding plans established or maintained by eligible organizations." *Id.* at 39878.

The Mandate requires that, even if the third party administrator consents, the religious organization—via its self-certification—must expressly designate the third party administrator as "an ERISA section 3(16) plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." *Id.* at 39879. The self-certification must specifically notify the third party administrator of its "obligations set forth in the[ ] final regulations, and will be treated as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of ERISA." *Id.* at 39879.

Employers with fewer than fifty employees are not required to provide health insurance to their employees. 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d). If they do provide health insurance, however, they must provide for contraceptive coverage unless they are exempt by

executive or judicial order. Nearly 34 million individuals are employed by firms with fewer than fifty employees. WhiteHouse.Gov, *The Affordable Care Act Increases Choice and Saving Money for Small Business*, p. 3, *available at* http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf (last visited Dec. 8, 2013).

Exempt from the Mandate are employers who provide "grandfathered" health care plans. 42 U.S.C. § 18011. The government itself has estimated that "98 million individuals will be enrolled in grandfathered group health plans in 2013." 75 Fed. Reg. 41726, 41732 (July 19, 2010).

F. Delay Of Employer Mandate

On July 2, 2103, due to "the complexity of the requirements and the need for more time to implement them effectively," the government announced "that it will provide an additional year before the ACA mandatory employer and insurer reporting requirements begin." U.S. Dept. of the Treasury, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, *available at* http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx (last visited Dec. 10, 2013). The Mandate, given this extension, will now take effect on January 1, 2015. *Id.*

II. CNS International Ministries, Inc. And Heartland Christian College[5]

CNS Ministries provides full-time residential services to men, women and children who suffer from alcohol or drug dependencies or other behavioral problems. CNS Ministries operates a school, originally intended for children of individuals in the recovery program, although it is not restricted to those students.

HCC is a Missouri non-profit corporation that provides post-secondary higher education

[5] The factual averments in this section and the next are supported by the Declaration of Charles N. Sharpe, Ex. 1, and the Declaration of David R. Melton, Ex. 2.

to employees and residents of CNS Ministries and their dependents, in addition to others. It is part of the same community in which CNS Ministries and Sharpe Holdings participate.

Charles N. Sharpe is the president, founder, chairman of the board and chief executive officer of CNS Ministries and the founder of HCC. Mr. Sharpe is responsible for providing leadership regarding the policies governing the conduct of all phases of the activities of CNS Ministries. He strives to make sure CNS Ministries' activities are in accordance with Christian principles and coinciding sincerely held religious beliefs. As part of these beliefs, Mr. Sharpe and CNS Ministries oppose and cannot collaborate in the use, funding, provision, facilitation or support of abortion on demand as a matter of sincerely held religious belief and practice. HCC is governed by a board of directors, all of whom are professing Christians who subscribe to its statement of faith. HCC holds a position opposing and refusing to collaborate in the use, funding, provision, facilitation or support of abortion on demand as a matter of sincerely held religious belief and practice.

Christian belief and practice are integral to the identities of the CNS Ministries and HCC, and adherence to Christian tenets is a deeply and sincerely integral aspect of these Plaintiffs. These Plaintiffs seek to defend and promote certain moral and ethical standards in their employees, including not just teaching them a life-sustaining work ethic but also promoting a belief in the sanctity and quality of life which precludes abortion on demand through abortifacient drugs and devices or otherwise.

As part of their religious missions, CNS Ministries and HCC promote the well-being and health of their employees. In furtherance of these commitments, these Plaintiffs ensure that their employees have comprehensive medical coverage. These Plaintiffs utilize the same self-insured plan, along with all the other plaintiffs in this case. The plan purposely excludes

coverage for abortions or abortifacient drugs or devices.

CNS Ministries and HCC cannot provide, collaborate in, fund or in any way be a participant in the provision or facilitation of coverage for abortions or abortifacient drugs and devices, or related education and counseling, without violating their deeply and sincerely held religious beliefs. These Plaintiffs cannot provide, collaborate in, fund or in any way be a participant in the provision or facilitation of information or guidance to others about locations at which they can access abortifacients, or related education and counseling, without violating their deeply and sincerely held religious beliefs.

By issuing their self-certifications pursuant to the government's accommodation, CNS Ministries and HCC would have to identify their participating employees to their third-party administrator for the distinct purpose of enabling the government's scheme to facilitate free access to abortifacients. CNS Ministries and HCC cannot participate in, collaborate in, or facilitate the government's scheme in this manner without violating their religious convictions. CNS Ministries and HCC, and the individuals who lead them, oppose on religious grounds coverage for use of drugs or devices that prevent a fertilized egg from attaching to the wall of the uterus. These drugs and devices include Plan B, ella and copper IUDs.

The health insurance plan year for CNS Ministries and HCC begins on January 1, 2014. These Plaintiffs wish to maintain the status quo and continue to provide their employees with health insurance that does not include or trigger the provision of abortifacient coverage.

III. The Mandate's Impact On CNS Ministries And HCC

Because of the Mandate, CNS Ministries and HCC have three unsatisfactory options related to employee health insurance: (1) they can abide by the accommodation's requirements and facilitate abortifacient insurance coverage in violation of their sincerely held religious

beliefs, (2) they can stop providing health insurance altogether—but in the case of CNS Ministries, which has more than 50 employees, only until January 1, 2015—and violate religious and moral duties to employees as well as risk damage to their ability to hire and retain employees,[6] or (3) they can continue providing the plan they have, which excludes contraceptive coverage, and face ruinous fines of $100 per day, per employee.

Although these Plaintiffs have no objection to including free coverage for non-abortifacient contraceptive services, their religious convictions forbid them from including, collaborating in, or facilitating free coverage for abortifacient drugs, devices or services in their employee healthcare plans. These Plaintiffs cannot take advantage of the religious employer exemption. In order to comply with the Mandate under the "accommodation," these Plaintiffs would need to execute their self-certifications prior to January 1, 2014. The third party administrator for the Plaintiffs has no legal obligation to cooperate in providing the Plaintiffs with the accommodation, and it is up to these Plaintiffs to make sure it finds an administrator that will. 78 Fed. Reg. at 39880. These Plaintiffs' beliefs preclude them from soliciting, contracting with, or designating a third party to provide these drugs and services.

Expressly designating a third party administrator as "an ERISA section 3(16) plan administrator" and notifying the third party administrator of its "obligations set forth in the[] final regulations" would make these Plaintiffs morally complicit in providing coverage for the objectionable drugs and services. 78 Fed. Reg. 39879.

If they were to violate their beliefs and designate a new insurer or designate a third party administrator for the distinct purpose of facilitating access to free abortifacients, these Plaintiffs

[6] The plaintiff in *Annex Med. v. Sebelius*, 2013 WL 1276025 (8th Cir. 2013) had fewer than 50 employees and thus did not have to provide insurance coverage to its employees, but the company and its owner—as with the plaintiffs in the case at bar—believed that they had a moral and religious duty to provide coverage to employees. *Id*. at *1. The Eighth Circuit issued a preliminary injunction enjoining enforcement of the Mandate. *Id*. at *3.

would have to identify their employees to that entity. Both CNS Ministries and HCC would have to coordinate with their designees regarding when they added or removed employees and beneficiaries from their healthcare plan and, as a result, from the contraceptive and abortifacient services payment scheme. 78 Fed. Reg. 39876. Both of these Plaintiffs would also be required to coordinate notices with their designees. 78 Fed. Reg. 39876.

Thus, under the accommodation, the burden remains on these Plaintiffs to find an insurer or third party administrator that will agree to provide free access to the abortifacient drugs and devices that these Plaintiffs object to—something that may or may not even be possible. There is no way to ensure that the cost of administering the abortifacient services would not be passed down to the Plaintiffs through increased premiums or fees.

Moreover, the "accommodation" burdens these Plaintiffs' religious freedom in that under the Mandate, these Plaintiffs cannot hire new employees or retain current employees without thereby facilitating the provision of abortifacient coverage to these current and future employees.

ARGUMENT

Standard For Preliminary Relief

"In determining a litigant's right to preliminary injunctive relief the Court considers four factors: (1) the threat of irreparable injury to the plaintiff; (2) the balance of harm to the plaintiff if relief is not granted and harm to the defendant if an injunction is issued; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." *Dataphase Systems. Inc. v. C.L. Systems, Inc.,* 640 F.2d 109, 113 (8th Cir. 1981). This is the same standard that applies when a court considers whether a temporary restraining order should be issued. *True LD LLC v. S.W. Commun., Inc.*, 2005 WL 3190396 (W.D. Mo. 2005) (citing *S.B. McLaughlin & Co. Ltd. v. Tudor Oaks Condominium Project, ABIO,* 877 F.2d 707, 708 (8th Cir. 1989)).

I. Plaintiffs Have A Substantial Likelihood Of Success On The Merits.

A. These Plaintiffs Are Likely To Prevail On Their Religious Freedom Restoration Act Claim.

Under the Religious Freedom Restoration Act ("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).

RFRA thus restored strict scrutiny to religious exercise claims. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 431 (2006); *see also* 42 U.S.C. § 2000bb (b)(1) (RFRA "restore[s] the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)"). A plaintiff makes a prima facie case under RFRA by showing the government substantially burdens its sincere religious exercise. *O Centro*, 546 U.S. at 428. 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." *Id.* at 430-31 (quoting 42 U.S.C. § 2000bb-1(b)).[7]

1. These Plaintiffs' Abstention From Facilitating Access To Abortion-Causing Drugs And Devices Is Sincere Religious Exercise.

RFRA broadly 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. § 2000bb-2(4), *as amended by* 42 U.S.C. § 2000cc-5(7)(A).

These Plaintiffs have alleged and supported with declarations their sincere commitment

[7] These burdens are the same at the preliminary injunction stage as at trial. *O Centro*, 546 U.S. at 429-30 (citing *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)).

to the Christian faith, and specifically to Christian teachings on the sanctity of life. CNS Ministries and HCC cannot, in good conscience, support activities or products they believe to be immoral. The Mandate requires these Plaintiffs to actively participate in a scheme to provide their employees with coverage for drugs and devices that risk destroying human life. Their religious beliefs forbid them from participating in that scheme. Under the accommodation, these Plaintiffs' self-certification, and their decision to hire or retain employees, sets in motion a chain of events that results in their employees receiving free abortifacients through the health plans that these Plaintiffs provide and pay for. 78 Fed. Reg. at 39875-77. It violates these Plaintiffs' Christian faith to act as a conduit for these drugs and devices. CNS Ministries and HCC have always sought to avoid facilitating access to abortifacients through their health coverage plans, and the Mandate forces them to abandon this practice.

Defendants cannot avoid this conclusion by arguing that Plaintiffs really *should* be comfortable signing the self-certification form. The questions of moral complicity in this case are religious, not legal, and Defendants have no authority to dictate when and whether Plaintiffs' involvement in the scheme is "too attenuated" to implicate their religion. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1153-54 (10th Cir. June 27, 2013) (en banc). As *Hobby Lobby* instructed:

> [I]t is not for secular courts to rewrite the religious complaint of a faithful adherent, or to decide whether a religious teaching about complicity imposes "too much" moral disapproval on those only "indirectly" assisting wrongful conduct. Whether an act of complicity is or isn't "too attenuated" from the underlying wrong is sometimes itself a matter of faith we must respect.

Id.; *Gilardi v. U.S. Dept. of Health and Human Services*, 733 F.3d 1208, 1215 (D.C. Cir. 2013) ("[I]t is not for courts to decide [what] severs [a religious objector's] moral responsibility") (internal citation omitted); *Korte v. Sebelius*, 735 F.3d 654, 685 (7th Cir. Nov. 8, 2013) (rejecting

Defendants' "'attenuation' argument" because it asks whether "th[e] [Mandated] coverage impermissibly assist[s] the commission of a wrongful act in violation of the moral doctrines of the Catholic Church," a question which "[n]o civil authority can decide"); *Zubik* at *28 ("Completion of the self-certification form would be akin to cooperating with/facilitating 'an evil' and would place the Diocese 'in a position of providing scandal' because 'it makes it appear as though [the Diocese] is cooperating with an objectionable practice that goes against [Church] teaching.'").

2. The Mandate Imposes A Substantial Burden On These Plaintiffs' Religious Exercise Of Abstention.

Once the sincerity of the specific religious exercise at issue is determined, the Court must answer the question of whether the burden is substantial. A regulation substantially burdens religious exercise "if it prohibits a practice that is both sincerely held by and rooted in [the] religious belief[s] of the party asserting the claim." *United States v. Ali,* 682 F.3d 705, 709 (8th Cir. 2012) (citing *Weir v. Nix,* 114 F.3d 817, 820 (8th Cir. 1997)) (citation and internal quotation marks omitted). This is an objective test. It does not matter what the belief is that is being violated; what matters is the objectively-measured burden imposed by the government upon the plaintiff.[8]

In *Hobby Lobby*, the *en banc* Tenth Circuit confirmed that the existence of a substantial burden does not turn on whether the government coercion "somehow depends on the independent actions of third parties." *Hobby Lobby*, at 1137. In that case, the government argued that the burden on Hobby Lobby to comply with the same Mandate at issue here was too

[8] One way to think about the burden analysis is whether the burden would be considered "substantial" when imposed on *any* activity, religious or not. For example, if the government imposed the burdens here—massive fines—on for-profit corporations engaged in political speech, those burdens would easily be considered "substantial." *Cf. Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 336-37 (2010) (describing unconstitutional restrictions on speech such as "imposing a burden by impounding proceeds on receipts or royalties").

attenuated because it was the employees, not Hobby Lobby itself, that would have access to the problematic drugs and devices. The Tenth Circuit explained that the government's argument mistakenly transformed the objective substantial burden test into a subjective test. The government would have wrongly required a subjective review of the *Hobby Lobby* plaintiffs' belief that delved into "the theological merit of the belief in question." *Id.* Instead, the Tenth Circuit squarely held that the controlling consideration was the *intensity of the coercion* applied by the government to act contrary to those beliefs. *Id.*; *see also A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 264 (5th Cir. 2010) ("The focus of the inquiry is on the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression, as measured . . . from the person's perspective, not from the government's.") (quotations omitted).

To explain these Plaintiffs' quandary another way, if the accommodation were in furtherance of a crime rather than access to abortifacients, these Plaintiffs would be subject to liability for conspiracy and accomplice liability under, for example, 18 U.S.C. § 371 (conspirator liable for "any act to effect the object of the conspiracy"). These Plaintiffs' understanding of moral culpability should be given at least as much deference as that of culpability in federal criminal law. Of course the Court need not agree with these Plaintiffs that abortion constitutes taking innocent human life in order to defer to their understanding of moral culpability. But Defendants cannot—without hypocrisy—claim that these Plaintiffs' understanding of their own moral complicity is wrong when they frequently use a similar standard in conspiracy and accomplice liability prosecutions.

Just last month, the U.S. District Court for Western District of Pennsylvania addressed the legal issue involved in the case at bar. *Zubik, supra* (finding the accommodation to be in

violation of RFRA and issuing preliminary injunction against its enforcement). In *Zubik*, two non-profit organizations affiliated with the Catholic Church alleged that complying with the Mandate accommodation would substantially burden their religious exercise. *Id*. at *1-2. Specifically, the plaintiffs asserted "that by requiring self-certification and thereby facilitating or initiating the process of providing contraceptive products, services, and counseling, via a third party, the 'accommodation,' violates their rights under the RFRA." *Id*. at *23.

The court agreed with the plaintiffs, finding that they could not provide the self-certification documentation to the government, thus triggering the third-party provision of abortifacients to the plaintiffs' employees, without violating sincerely held religious beliefs. *Id*. at *25. The court found that the accommodation requires the plaintiffs "to shift the responsibility of purchasing insurance and providing contraceptive products, services, and counseling, onto a secular source," and the plaintiffs "have a sincerely-held belief that 'shifting responsibility' does not absolve or exonerate them from the moral turpitude created by the 'accommodation'; to the contrary, it still substantially burdens their sincerely-held religious beliefs." *Id*.

The *Zubik* court did not end its substantial burden analysis there. The court noted that the government "does not provide a direct answer" as to why the Catholic Church is given a complete exemption from the Mandate but "religious employers who provide the charitable and educational services of the Catholic Church [are] required to facilitate/initiate the provision of contraceptive products . . ." *Id*. at *26. "[E]qually problematic" is the fact that the leaders of both the Catholic Church and the non-exempt religious nonprofits, in that case—Catholic bishops, could freely exercise their religious beliefs when acting for the Church but "must personally take at least three affirmative actions (sign a self-certification form, compile a list of employees, and provide these to an insurer or TPA) in order to escape directly providing

contraceptive products, services, and counseling to the employees of the charitable and educational agencies, while knowingly facilitating/initiating the process for the provision of contraceptive services."[9] *Id*. The court concluded "that by dividing the Catholic Church in such a manner with the enactment of these two regulations, the Government has created a substantial burden on Plaintiffs' right to freely exercise their religious beliefs." *Id*. at *27.

The Mandate compels these Plaintiffs to participate in a scheme that they believe, as a matter of sincerely-held religious belief, is immoral. Self-certification is not the only action these Plaintiffs would engage in to trigger objectionable coverage—by paying for insurance, and just by hiring employees, the Mandate and the accommodation assures that objectionable coverage will be provided to those employees. This violates the sincere religious exercise of these Plaintiffs. Since these Plaintiffs can continue to exercise their faith only by dropping coverage—which employees value very much and which is therefore valuable to employers who want healthy and satisfied employees—or by incurring ruinous fines, the Mandate most certainly coerces them to act in a way that violates their religious beliefs. The imposition of fines for non-compliant insurance leaves Plaintiffs with a "Hobson's choice" between obeying their conscience and providing health insurance to their employees. *Hobby Lobby*, at 1141.

3. The Mandate Cannot Satisfy Strict Scrutiny.

The Mandate and the "accommodation" fail strict scrutiny for three separate reasons: (1) the government has neither identified an "interest of the highest order" nor has it acted as if its interests are compelling; (2) the Mandate or "accommodation" will not further the government's

[9] This analysis is applicable to plaintiff Charles N. Sharpe as well. When wearing his Heartland Community Church (exempt from the Mandate as a church) hat, he may exercise his religious beliefs freely. Even when wearing his Sharpe Holdings, Ozark National Life Insurance Company, and CNS Corporation (*for-profit* organizations that are judicially exempt) hats, he may freely exercise his religious beliefs. But when wearing his CNS Ministries hat, operating a "'good works' arm" of the Church, *Zubik*, at *27, absent relief from the Court, Mr. Sharpe must take the affirmative, religiously burdensome actions required by the accommodation.

purported interests; and (3) Defendants have multiple alternative means of pursuing their ends that are less restrictive of Plaintiffs' constitutional and civil rights than the Mandate or the "accommodation." Any one of these reasons suffices to cause Defendants to fail strict scrutiny.

As an initial matter, the Eighth Circuit's decisions in *Annex Med. v. Sebelius*, 2013 WL 1276025 (8th Cir. 2013) and *O'Brien v. U.S. Dep't of HHS*, Order, No. 12-3357 (8th Cir. Nov. 28, 2012), and this Court's decision, *Sharpe Holdings, Inc. v. U.S. Dept. of Health and Human Services*, 2:12-CV-92-DDN, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012), which all necessarily found that the Mandate did not pass strict scrutiny, control here.

a. The Government Has Identified No Compelling Interest.

Strict scrutiny 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." *O Centro*, 546 U.S. at 430-31).

i. Providing These Plaintiffs' Employees Access To The Objectionable Drugs And Devices Is Not An "Interest Of The Highest Order."

In other lawsuits, the government has identified its compelling interests in imposing the Mandate as "public health" and "gender equality." *Hobby Lobby*, at 1444. Although these are important interests in the abstract, they do not meet the *O Centro* test because they are "'broadly formulated interests justifying the general applicability of government mandates.'" *Id.* (quoting *O Centro*, 546 U.S. at 431); *see also Betenbaugh*, 611 F.3d at 268 ("invocation of general interests, standing alone, is not enough"). The government has thus far in the litigation failed to explain why it has a compelling interest in requiring CNS Ministries and HCC to trigger and facilitate insurance coverage of the mandated abortion-causing drugs and devices—Plan B, ella, and certain IUDs—to their employees, which the government must do to meet the "to the

person" standard articulated in *O Centro*. Since it is the government's burden to do so, the Mandate fails strict scrutiny as a threshold matter.

The court in *Zubik* found that while "[the public health and gender equality] interests are certainly important governmental interests . . . these two interests, as so broadly stated, are not 'of the highest order' such that 'those not otherwise served can overbalance legitimate claims to the free exercise of religion.'" *Zubik*, at *54-55 (citing *Yoder*, 406 U.S. at 215). Further, the court noted that if it were to find that the government's interests were sufficiently compelling to overcome the religious exercise of non-church religious nonprofits, that "would be to allow the Government to cleave the Catholic Church into two parts: worship, and service and 'good works,' thereby entangling the Government in deciding what comprises 'religion.'" *Id*. at *29. "If there is no compelling governmental interest to apply the contraceptive mandate to the religious employers who operate the 'houses of worship,' then there can be no compelling governmental interest to apply (even in an indirect fashion) the contraceptive mandate to the religious employers of the nonprofit, religious affiliated/related entities, like Plaintiffs in these cases." *Id*.

ii. Defendants' Purported Interests Are Not Compelling Because The Government Has Issued Numerous Exemptions And Because The Objectionable Drugs And Devices Are Already Widely Available.

A purported government interest also will not qualify as compelling unless the government has consistently demonstrated that it has a critical need to pursue the interest. "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546-47 (1993).

Here, the government's interests "cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, at 1143. "[T]his exempted population includes those working for private employers with grandfathered plans, [and] for employers with fewer than fifty employees." *Id.* In addition, some religious organizations are exempt from the Mandate altogether. *See* 45 C.F.R. § 147.131 (religious exemptions); 26 U.S.C. § 5000A (d)(2)(A) & (B) (exempting "health care sharing ministr[ies]"). These massive exemptions cover upwards of 130 million people.[10] That means that the Mandate fails strict scrutiny, because "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Hobby Lobby*, at 1143 (citations omitted).

b. The Mandate Will Not Further The Government's Purported Interests.

The Mandate also does not further Defendants' purported interest in expanding the availability of contraceptives (including abortifacient contraceptives) to citizens. For a strict scrutiny affirmative defense to be successful, there must be a causal link between the end in view and the means applied "to the person." *O Centro*, 546 U.S. at 430. In *O Centro*, for example, the Court recognized that in applying strict scrutiny courts "must searchingly examine the interests that the State seeks to promote ... and the impediment to those objectives that would *flow from* recognizing [the claimed exemption]." *Id.* at 431 (quoting *Yoder*, 406 U.S. at 221) (emphasis added). Moreover, the government had "to show with more particularity *how* its admittedly strong interest . . . would be adversely affected by granting an exemption *to the Amish*." *O Centro*, 546 U.S. at 431 (quoting *Yoder*, 406 U.S. at 236) (first emphasis added). Indeed, the

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[10] The government expected 98 million people to be on grandfathered plans in 2013. 75 Fed. Reg. 41726, 41732 (July 19, 2010). And "small employers," employing nearly 34 million people, need not offer health insurance at all and can therefore avoid the Mandate. WhiteHouse.Gov, *The Affordable Care Act Increases Choice and Saving Money for Small Business*, p. 3, *supra* at p. 10.

government "cannot rely on 'general platitudes,' but 'must show by specific evidence that [the adherent's] religious practices jeopardize its stated interests.'" *Betenbaugh*, 611 F.3d at 268 (quoting *Merced v. Kasson,* 577 F.3d 578, 592 (5th Cir.2009)); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 300 (2000) (in applying *intermediate* scrutiny, courts must not conflate "two distinct concepts . . . whether there is a substantial government interest and whether the regulation furthers that interest").

Forcing these Plaintiffs to terminate their employee health insurance coverage altogether will not advance the government's claimed purpose of expanding contraceptive insurance coverage. Indeed, by forcing these Plaintiffs to drop coverage for their employees, *fewer* people will have insurance coverage for contraceptives, not more. These Plaintiffs ask only for an exemption from being required to cover the so-called "contraceptives" that they believe to be abortifacients. Moreover, being driven out of existence by ruinous penalties would not increase its employees' access to contraceptives generally, and would actually decrease its employees' access to non-abortifacient contraceptives.

It is no answer for the government to speculate that employees might obtain insurance on the exchanges it has yet to get up and running. Aside from the fact that the eventual functioning of an exchange in Missouri is at this point at least an open question, there is little reason to think that *every* person covered under these Plaintiffs' plans would seek coverage on the exchange rather than paying the relatively small penalty under the individual mandate. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2595-96 (2012) ("for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more" so "[i]t may often be a reasonable financial decision to make the payment rather than purchase insurance"). Thus, the means (the Mandate) chosen by the government to advance its purported end

(expanding contraceptive coverage) does not just fail to advance that goal, but actually tends to defeat it.

c. Defendants Have Numerous Alternative Less Restrictive Means Of Furthering Their Purported Interests.

Even were one to assume that Defendants had identified a compelling interest and that the Mandate advanced that interest, the Mandate still fails strict scrutiny because there are other readily-available means of expanding contraception coverage that are far less restrictive of these Plaintiffs' constitutional and RFRA rights. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."). Moreover, the government must put forward "specific evidence" explaining why there is no less restrictive means of applying it "to the person"—that is, specifically to CNS Ministries and HCC. *O Centro*, 546 U.S. at 430.

In nationwide litigation over the Mandate, the government has failed to "advance[ ] an argument that the contraception mandate is the least restrictive means of furthering" its general interest in ensuring contraceptive access. *Korte v. Sebelius*, 528 Fed. Appx. 583, 588 (7th Cir. Dec. 28, 2012) (emphasis added); *accord Grote v. Sebelius*, 708 F.3d 850, 855 (7th Cir. 2013) (government "has not demonstrated that requiring religious objectors to provide cost-free contraception coverage is the least restrictive means of increasing access to contraception").

Indeed, Defendants have a host of readily available alternatives for expanding contraceptive access that would avoid any need to conscript religious objectors. Defendants could:

- Provide a tax credit to employees who purchase emergency contraceptives.
- Directly provide the drugs at issue, or directly provide insurance coverage for them through the state and federal health exchanges.

- Empower willing actors—for instance, physicians, pharmaceutical companies, or various interest groups—to deliver the drugs and sponsor education about them.
- Use their own resources to inform the public that these drugs are available in a wide array of publicly-funded venues.

This array of alternatives is real. Plan B is available over the counter to anyone, from a leading online pharmacy for $50, and even in many college vending machines.[11] Ella can be purchased online for $40, with no need for a physician's visit.[12] Moreover, HHS planned to spend over $300 million in 2012 to provide contraceptives directly through Title X funding.[13] And the federal government, in partnership with state governments, has constructed an extensive funding network designed to increase contraceptive access, education, and use, including:

- $2.37 billion for family planning in fiscal year 2010.
- $228 million in fiscal year 2010 for Title X program.
- $294 million in state spending for family planning in fiscal year 2010.[14]

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[11] Teva Women's Health, Find Plan B One-Step in the Aisle and Pick It Up Yourself, http://planbonestep.com/pharmacylocator.aspx (last visited Dec. 10, 2013) ("just take it off the shelf, and pay for it at the cashier"); Drugstore.com, Plan B One Step Emergency Contraceptive, http://www.drugstore.com/plan-b-one-step-emergency-contraceptive/qxp500496?catid=183040 (last visited Dec. 10, 2013) (advertising Plan B for $49.99 with free shipping); James Eng, *FDA OK with college's Plan B contraceptive vending machine*, MSN News, Jan. 29, 2013, *available at* http://news.msn.com/us/fda-ok-with-colleges-plan-b-contraceptive-vending-machine (last visited Dec. 10, 2013) (reporting that "Plan B is available widely in colleges and universities throughout . . . the nation," and that a Pennsylvania college that dispenses Plan B from a vending machine for $25 is "far from the first to do this").

[12] KwikMed, ella Prescribed Online Legally, http://ella-kwikmed.com/ (last visited Dec. 10, 2013) (physicians licensed to prescribe online offering free medical consultation and free next day shipping for ella); Watson Pharmacy, Understanding How Your Patients Can Get ella, http://www.ella-rx.com/wheredoigetella.asp (last visited Dec. 10, 2013) (noting "ella is also available at Planned Parenthood clinics").

[13] *See* HHS Grant Announcement, 2012 Family Planning Services FOA, *available at* https://www.grantsolutions.gov/gs/preaward/previewPublicAnnouncement.do?id=12878 (click on Grant Announcement – View PDF Version) (last visited Dec. 10, 2013) (announcing that "[t]he President's Budget for ... (FY) 2012 requests approximately $327 million for the Title X Family Planning Program").

[14] Guttmacher Inst., *Facts on Publicly Funded Contraceptive Services in the United States* (May 2012), http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited Dec. 10, 2013) (citations omitted).

The government can employ such pre-existing sources to increase contraceptive access. *See Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012) (noting existence of "analogous programs" and concluding that government has "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").

The court in *Zubik* also found that the Mandate did not meet the least restrictive means test:

> If the Government is correct that the entire fundamental statutory scheme set forth in the ACA will fail, without the participation in the contraceptive mandate by nonprofit, religious affiliated/related Plaintiffs and others like them (i.e., food pantries, homeless shelters, etc.), which operate under the authority of an already exempt religious body (i.e., Plaintiff Erie Diocese), then the foundation of the "statutory scheme" is certainly troubled.

Id. at *59.

B. These Plaintiffs Are Likely To Prevail On Their Free Exercise Clause Claim.

Laws which are not neutral or generally applicable face strict scrutiny under the Free Exercise Clause. *Lukumi*, 508 U.S. at 520. The Mandate is neither generally applicable nor neutral and cannot satisfy strict scrutiny.

1. The Mandate Is Not Generally Applicable.

A regulation fails general applicability when it "creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection." *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3rd Cir. 1999) (Alito, J.) ("*FOP*"). The animal slaughter ordinances in *Lukumi*, for example, ostensibly protected public health and prevented animal cruelty, but "fail[ed] to prohibit nonreligious conduct that endanger[ed] these interests." 508 U.S. at 543. Because the ordinances exempted many types of animal killing—

such as hunting, fishing, pest eradication, and euthanasia—the ordinances were not generally applicable. *Id.* at 543-44.

To be sure, not every exemption dooms a regulation. The problem arises when government allows secular exemptions that undermine a regulation's interests but disallows religious exemptions, thus making a "value judgment in favor of secular motivations, but not religious motivations." *FOP,* 170 F.3d at 366. In *FOP*, a regulation prohibiting police officers from growing beards allowed one exemption for undercover officers and another for medical reasons. *Id*. Two Muslim officers sued because the regulation forbade beards grown for religious reasons. The Third Circuit found that, whereas the undercover-officer exemption "d[id] not undermine the Department's interest in uniformity [of appearance]," the medical exemption did. *Id*. The court therefore found the policy failed general applicability.

Here, the Mandate's exemptions go far beyond the exemption scheme in *FOP*. The Mandate allows massive categorical exemptions for secular conduct that undermine the Mandate's purposes. Over 87 million Americans are covered under "grandfathered" plans that are indefinitely excused, not only from complying with the Mandate, but from covering *any* of the mandated preventive services. Additionally, 34 million more Americans are employed by small businesses that may avoid the Mandate. 26 U.S.C. § 4980H(c)(2). While these secular exemptions severely undermine the Mandate's interest in increasing insurance coverage for the whole range of women's preventive services, CNS Ministries and HCC get no exemption even from the narrow slice (abortifacients) of the Mandate to which they object for religious reasons. This is exactly the kind of "value judgment in favor of secular motivations, but not religious motivations" that fails general applicability and triggers strict scrutiny. *FOP*, 170 F.3d at 366.

2. The Mandate Is Not Neutral.

In addition to failing the requirement of general applicability, the Mandate also fails the separate requirement of neutrality for three reasons: (1) it produces differential treatment among religions; (2) it accomplishes a "religious gerrymander"; and (3) it favors secular over religious values.

a. The Mandate Produces Differential Treatment Among Religions.

One way to prove that a law is not neutral is to show that it produces "differential treatment of two religions." *Lukumi*, 508 U.S. at 536. In *Lukumi*, for example, the Court said that prohibiting killing animals for one religious purpose (sacrifice) while exempting other religious killings (kosher slaughter) created "differential treatment of two religions," which could constitute "an independent constitutional violation." *Id*. Similarly, in *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982), the Court struck down registration and reporting requirements that created differential treatment between "well-established churches" and "churches which are new and lacking in a constituency."[15] *Cf. O Centro*, 546 U.S. at 432-37 (requiring exemption under RFRA for one religion where exemption was granted for another).

Here, the Mandate establishes three tiers of religious objectors: favored "religious employers" (who are exempt), less-favored non-profit religious objectors (who are forced to facilitate access to abortion-causing drugs), and disfavored for-profit religious objectors (who are forced to facilitate and pay for access). *See* 78 Fed. Reg. at 39874-75; *Lukumi*, 508 U.S. at 533 ("[T]he minimum requirement of neutrality is that a law not discriminate on its face.").

The government cannot rank in different tiers the rights of people with identical religious

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[15] Although *Larson* was decided under the Establishment Clause, 456 U.S. at 230, it is significant for interpreting the neutrality requirement of both Religion Clauses. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008) ("[W]hile the Establishment Clause frames much of our [religious discrimination] inquiry, the requirements of the Free Exercise Clause . . . proceed along similar lines.").

objections. *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) ("[W]hen the state passes laws that facially regulate religious issues, it must treat individual religions and religious institutions without discrimination or preference.") (quotations omitted); *see also Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 167 (3d Cir. 2002) (law non-neutral where the government "granted exemptions from the ordinance's unyielding language for various secular and religious" groups, but rejected exemption for plaintiffs).

b. The Mandate Accomplishes A Religious Gerrymander.

Another way to prove that a law is not neutral is to show that "the effect of [the] law" is to accomplish a "religious gerrymander." *Lukumi*, 508 U.S. at 535. In *Lukumi*, the Court found that a "pattern of exemptions," *id*. at 537, was impermissibly used to narrow the law's prohibitions specifically "to target petitioners and their religious practices." *Id*. at 535. A similar pattern is manifest here.

Defendants have repeatedly recognized the sincerity of religious organizations' objections to facilitating access to abortion-causing drugs and devices. *See, e.g.*, January 20, 2012 Statement of Defendant Secretary Sebelius, *supra* (recognizing the "important concerns some have raised about religious liberty" and the need to "respect[ ] religious freedom"); *see also Hobby Lobby*, at 1125 (noting the government did not dispute religious sincerity of objections). Nevertheless, the "religious employers" exemption protects only institutional churches, their "integrated auxiliaries," "conventions or associations of churches," and "the exclusively religious activities of any religious order." *See* 78 Fed. Reg. at 39871. Yet other religious organizations—like CNS Ministries and HCC—are excluded from the exemption, even though they share the same religious objections.

c. The Mandate Favors Secular Reasons For Noncompliance Over Religious Reasons.

Finally, the Mandate also fails neutrality by honoring certain secular reasons for failure to comply, while rejecting these Plaintiffs' religious reasons. *See* Argument I.B.1, *supra* (cataloguing secular reasons that many employers may avoid Mandate). The net effect is that policies covering tens of millions of Americans are exempt for secular reasons, while CNS Ministries and HCC must drop their insurance or pay ruinous fines for their religious inability to comply with the Mandate. *See Lukumi*, 508 U.S. at 535 (noting "the effect of a law in its real operation is strong evidence of its object"); *Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) ("[T]he Supreme Court has made it clear that 'neutral' also means that there must be neutrality *between* religion and non-religion.").

***

Because the Mandate cannot qualify as a neutral or generally applicable law, Defendants must satisfy strict scrutiny. They cannot do so. *See supra* Argument I.A.3.

II. These Plaintiffs Satisfy The Other Preliminary Injunction Elements.

A. These Plaintiffs Face A Substantial Threat Of Irreparable Injury If The Injunction Is Not Issued.

It is settled law that a potential violation of these Plaintiffs' rights under the First Amendment and RFRA threatens irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). "By extension, the same is true of rights afforded under the RFRA, which covers the same types of rights as those protected under the Free Exercise Clause of the First Amendment." *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 129 (D.D.C. 2012), *appeal dismissed*, 2013 WL 2395168 (D.C. Cir. May 3, 2013) (citation omitted); *see also Newland*, 881 F. Supp. 2d at 1294-95 (irreparable harm established under RFRA claim against

Mandate); *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 997-98 (E.D. Mich. 2012) (same); *Zubik*, at *62 (same). Here, coercing CNS Ministries and HCC to facilitate access to abortion-causing drugs and devices in direct violation of their faith is the epitome of irreparable injury. Once they have been forced to violate their conscience by providing access to objectionable drugs and services, future remedies cannot change that violation.

Enforcement of the Mandate also threatens these Plaintiffs' hiring and human-resources planning. In addition, if these Plaintiffs choose to follow their religious conscience instead of complying with the Mandate, they will be subject to massive fines and penalties. Such jarring uncertainties adversely affect these Plaintiffs' ability to hire and retain employees, and constitute irreparable injury difficult to evaluate in terms of money damages.

B. The Threatened Injury To These Plaintiffs Far Outweighs Any Harm That Might Result.

There is no real dispute that, absent an injunction, CNS Ministries and HCC face grievous harm—namely, government compulsion to violate their religious beliefs, drop employee insurance altogether, or face crippling fines. No one has questioned the reality and severity of the cost to these Plaintiffs for exercising their sincerely held religious beliefs. In contrast, granting the requested temporary injunctive relief will merely prevent the government from enforcing one element of the mandate (the requirement to cover emergency contraceptives) against two employers during the pendency of this action.

The requested injunctive relief will merely preserve the status quo. The Government has never previously mandated contraceptive coverage, and there is no urgent need to enforce the Mandate immediately against these Plaintiffs before its legality can be more fully adjudicated. Both the ubiquity of contraception access and government subsidization thereof, and the fact that the government has exempted "over 190 million health plan participants and beneficiaries,"

Newland, 881 F. Supp. 2d at 1298, make it impossible for the Government to claim that it will be harmed by a temporary delay in enforcement against these Plaintiffs. *See also Zubik*, at *64 (finding that the millions of members of exempt plans create an "'underinclusiveness' which demonstrates that the Government will not be harmed in any significant way by the exclusion of these few Plaintiffs"). Moreover, while a "preliminary injunction would forestall the government's ability to extend all twenty approved contraceptives" to these Plaintiffs' employees, these Plaintiffs "will continue to provide sixteen of the twenty contraceptive methods, so the government's interest is largely realized while coexisting with" Plaintiffs' "religious objections." *Hobby Lobby*, at 1146.

Any claim of harm by the Government is further undermined by the fact that it consented to or did not oppose preliminary injunctive relief in numerous other cases challenging the Mandate. *See, e.g.*, Mot. to Stay, *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092 (E.D. Mo. Mar. 11, 2013) (Dkt. 41) (the case at bar); Order, *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-00036 (W.D. Mo. Feb. 28, 2013) (Dkt. 9); Order, *Hall v. Sebelius*, No. 13-cv-00295 (D. Minn. Apr. 2, 2013) (Dkt. 11). The Government "cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in several similar cases." *Geneva Coll. v. Sebelius*, 2013 WL 1703871, at *12 (W.D. Pa. Apr. 19, 2013). "If the government is willing to grant exemptions for no less than one third of all Americans, and it is willing to consent to injunctive relief in cases that do not fall within those exemptions, then it can suffer no appreciable harm" were an injunction entered here. *Beckwith Elec. Co., Inc. v. Sebelius*, 2013 WL 3297498, at *18 (M.D. Fla. June 25, 2013). In short, especially when balanced against the serious irreparable injury being inflicted on these Plaintiffs, any harm the Defendants might claim from a preliminary injunction is *de minimis*.

C. An Injunction Will Not Disserve The Public Interest.

Finally, issuing a preliminary injunction will not disserve the public interest. The public interest in enforcing long-standing First Amendment and religious freedom protections certainly outweighs the interest in immediate enforcement of a new law that creates a "substantial expansion of employer obligations" and raises "concerns and issues not previously confronted." *Hobby Lobby Stores, Inc. et al. v. Sebelius*, 870 F. Supp. 2d 1278, 1296 (W.D. Okla. 2012), *rev'd on other grounds*, 723 F.3d 1114 (10th Cir. 2013); *see also Newland*, 881 F. Supp. 2d at 1295 (finding "'there is a strong public interest in the free exercise of religion even where that interest may conflict with [another statutory scheme]'") (quoting *O Centro*, 389 F.3d at 1010).

Congress decided that RFRA trumps other statutes when it enacted RFRA; the statute reads: "[f]ederal statutory law adopted after November 16, 1993 is subject to [RFRA] unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb-3(b). "Congress thus obligated itself to *explicitly exempt* later-enacted statutes from RFRA, which is conclusive evidence that RFRA trumps later federal statutes when RFRA has been violated. That is why our case law analogizes RFRA to a constitutional right." *Hobby Lobby*, at 1146. Here, "Congress did not exempt the ACA from RFRA." *Id*. And of course the protection of these Plaintiffs' constitutional rights is also very much in the public interest.

Finally, as the *Zubik* court noted:

> The public interest also is best served if Plaintiffs (non-profit, affiliated/related organizations) can continue to provide needed educational and social services, without the threat of substantial fines for non-compliance with the contraceptive mandate as imposed upon them via the "accommodation."

Zubik, at *34.

In sum, all of the factors weigh heavily in favor of granting a temporary restraining order and preliminary injunction staying application of offending portions of the Mandate and avoiding

grave harm to these Plaintiffs' consciences and religious freedom.

CONCLUSION

These Plaintiffs, CNS International Ministries, Inc. and Heartland Christian College, respectfully request that the Court issue a temporary restraining order and preliminary injunction preserving the status quo and prohibiting Defendants, their agents, officers and employees from applying and enforcing against these Plaintiffs, their employee health plan(s), or their insurer(s) the statute and regulations that require these Plaintiffs or their insurer(s) and third party administrator(s) to provide employees insurance coverage for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," pursuant to 77 Fed. Reg. 8725, 78 Fed. Reg. 39870, or 45 C.F.R. § 147.131, as well as any penalties, fines, assessments, or enforcement actions for non-compliance, including but not limited to those found in 26 U.S.C. §§ 4980D and 4980H, and 29 U.S.C. § 1132, to the extent these regulations require coverage of services that these Plaintiffs believe to be abortifacients.

Respectfully submitted this 11th day of December, 2013.

OTTSEN, LEGGAT AND BELZ, L.C.

By: /s/ Timothy Belz______________

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Attorneys for Plaintiffs

Certificate of Service

I hereby certify that on December 11, 2013, the foregoing was filed electronically with the Clerk of the Court for the United States District Court for the Eastern District of Missouri to be served by operation of the Court's electronic filing system upon the following registered CM/ECF participants:

Jacek Pruski
U.S. Department of Justice—Civil Division
Federal Program Branch
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P.O. Box 883
Washington, DC 20530

Christina Bahr Moore
Office of U.S. Attorney
111 S. Tenth Street
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St. Louis, MO 63102

/s/ Timothy Belz

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

SHARPE HOLDINGS, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 2:12-cv-00092
	)	
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,	)	
	)	
Defendants.	)	

DECLARATION OF PLAINTIFF CHARLES N. SHARPE

I, Charles N. Sharpe, as president, founder, chairman of the board and chief executive officer of CNS International Ministries, Inc. ("CNS Ministries"), pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am an individual and a citizen of the State of Missouri and the United States. I make this Declaration in support of a Motion for a Temporary Restraining Order and Preliminary Injunction against the Defendants' regulations that require any employee health plans CNS Ministries may provide to include coverage for abortion causing drugs and devices and related counseling.
2. CNS Ministries is a Missouri non-profit corporation.
3. The CNS Ministries main office is at 6417 Shelby CR 150, Suite A in Bethel, Missouri.
4. I am the president, founder, chairman of the board and chief executive officer of CNS Ministries. I am responsible for leading all phases of CNS Ministries and heading all of its operations.

Exhibit 1

5. CNS Ministries provides full-time residential services to men, women and children who suffer from alcohol or drug dependencies or other behavioral problems. CNS Ministries operates a school, originally intended for children of individuals in the recovery program, although it is not restricted to those students.
6. I am an adherent of the Christian faith and a minister of the gospel. I believe I have a religious duty to strive to conduct myself and the operations of CNS Ministries in a manner consistent with the principles of my Christian faith.
7. CNS Ministries promotes and abides by the same Christian beliefs, practices, and aspirations that I have.
8. Christian belief and practice are integral to the identity of the CNS Ministries, and adherence to Christian tenets is a deeply and sincerely integral aspect of CNS Ministries. CNS Ministries seeks to defend and promote certain moral and ethical standards in their employees, including not just teaching them a life-sustaining work ethic but also promoting a belief in the sanctity and quality of life which precludes abortion on demand through abortifacient drugs and devices or otherwise.
9. CNS Ministries currently has more than 50 full-time employees. As part of its Christian mission, duties and beliefs, CNS Ministries promotes the well-being and health of its employees. In furtherance of these commitments, CNS Ministries ensures that its employees have comprehensive medical coverage through a self-insured plan. Employees pay a portion of the premiums required in order to maintain this coverage. These premiums partially fund medical services provided to other employees covered under the same plan.

10. Providing health insurance coverage to employees is vital for recruiting and retaining quality employees, and for maintaining a healthy, productive workforce.
11. CNS Ministries intends to continue to provide health coverage for its employees. CNS Ministries will do so in a way that is consistent with the values and beliefs that have always guided the organizations.
12. CNS Ministries, as a matter of its Christian commitment, wants to be able to provide the broadest, best coverage possible for our employees that excludes coverage for things it maintains are morally wrong.
13. In paying for employee health insurance, however, CNS Ministries has sought to ensure that the health plan—like the rest of CNS Ministries' benefits package—is harmonized with Christian teachings and beliefs. CNS Ministries maintains that actions intended to terminate an innocent human life by abortion are gravely sinful.
14. CNS Ministries maintains as a matter of Christian belief that human life begins at conception and that from that point on it is sacred and worthy of protection.
15. CNS Ministries opposes the collaboration in and facilitation, use, funding, provision or support of abortion on demand as a matter of sincerely held religious belief and practice.
16. CNS Ministries does not believe that abortion on demand constitutes medicine, health care, preventive health care, or a means of providing for the well-being of persons.
17. CNS Ministries maintains that abortion on demand involves gravely immoral practices and the intentional destruction of innocent human life.

18. CNS Ministries cannot pay for, provide, collaborate in, or facilitate coverage for abortion-causing drugs, such as Plan B and ella, and devices, such as copper IUDs, or related education and counseling without violating its sincerely held religious tenets and beliefs.
19. Since its creation, CNS Ministries has attempted to exclude abortion-causing drugs from employee health plans.
20. I understand that CNS Ministries does not qualify as a “religious employer” under the terms of the Mandate.
21. Given plan changes since March 23, 2010, the CNS Ministries health insurance plan does not qualify as a grandfathered health plan.
22. CNS Ministries’ plan renewal date is January 1, 2014.
23. I understand that the HHS Mandate will prevent CNS Ministries from providing employee health coverage similar to that which it has always provided, insurance that excludes coverage for abortion-causing drugs and devices and related counseling.
24. I understand that by issuing a self-certification pursuant to the government’s accommodation to religious nonprofit companies, CNS Ministries would have to identify its participating employees to the insurer or third-party administrator for the distinct purpose of enabling the government’s scheme to facilitate free access to abortifacient services. CNS Ministries cannot participate in, collaborate in or facilitate the government’s scheme in this manner without violating its sincerely held religious tenets.

25. I understand that one option available to employers under the Affordable Care Act is to drop health benefits altogether. It is my understanding that this is only an option for CNS Ministries until January 1, 2015, when enforcement of the employer mandate begins. Dropping all health coverage for our employees would have a severe impact on CNS Ministries' ability to compete with other organizations that do offer coverage, and would be against CNS Ministries' Christian mission, duties and beliefs.
26. Thus, the HHS Mandate prevents CNS Ministries from following and adhering to the tenets of its faith, and violates the religious-based principles and policies it has established.

VERIFICATION

Declaration of Charles N. Sharpe in Lieu of Affidavit pursuant to 28 U.S.C. § 1746:

I declare, under penalty of perjury under the laws of the United States that the foregoing statements are true and correct.

Executed December 11, 2013.

/s/ Charles N. Sharpe
Charles N. Sharpe

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

SHARPE HOLDINGS, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 2:12-cv-00092
	)	
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,	)	
	)	
Defendants.	)	

DECLARATION OF DAVID R. MELTON

I, David R. Melton, as president of the board of Heartland Christian College ("HCC"), pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am an individual and a citizen of the State of Missouri and the United States. I make this Declaration in support of a Motion for a Temporary Restraining Order and Preliminary Injunction against the Defendants' regulations that require any employee health plans HCC may provide to include coverage for abortion-causing drugs and devices and related counseling.
2. HCC is a Missouri non-profit corporation.
3. The HCC main office is at 500 New Creation Road, Newark, Missouri.
4. I am the president of the board of HCC.
5. HCC, a Bible college, is a Missouri non-profit corporation that provides post-secondary higher education to employees and residents of CNS International Ministries and their dependents, in addition to others. It is part of the same community in which CNS Ministries and Sharpe Holdings participate.

Exhibit 2

6. All members of the board and administration of HCC are adherents of the Christian faith and believe that they and HCC have a religious duty to strive to conduct themselves and the business of HCC in a manner consistent with the principles of the Christian faith.
7. Christian belief and practice are integral to the identity of HCC, and adherence to Christian tenets is a deep and integral aspect of HCC. HCC seeks to defend and promote certain moral and ethical standards in their employees, including not just teaching them a life-sustaining work ethic but also promoting a belief in the sanctity and quality of life which precludes abortion on demand through abortifacient drugs and devices or otherwise.
8. HCC currently has fewer than 50 full-time employees. As part of its Christian mission, duties and beliefs, HCC promotes the well-being and health of its employees. In furtherance of these commitments, HCC ensures that its employees have high-quality, comprehensive medical coverage through a self-insured plan. Employees pay a portion of the premiums required in order to maintain this coverage. These premiums partially fund medical services provided to other employees covered under the same plan.
9. Providing health insurance coverage to employees is vital for recruiting and retaining quality employees, and for maintaining a healthy, productive workforce. The provision of health insurance to employees is also something that reflects well on HCC when accreditation decisions are made.

10. HCC intends to continue to provide health coverage for its employees. HCC will do so because of and in a way that is consistent with the religious values and beliefs that have always guided the organization.
11. HCC has sought to ensure that the health plan—like the rest of HCC's benefits package—is harmonized with Christian teachings and Christian beliefs. I believe, and HCC maintains, that actions intended to terminate an innocent human life by abortion are gravely sinful.
12. It is the sincerely held religious position of HCC that human life begins at conception and that from that point on it is sacred and worthy of protection.
13. HCC opposes the collaboration in and facilitation, use, funding, provision or support of abortion on demand as a matter of sincerely held religious belief and practice.
14. HCC does not believe that abortion on demand constitutes medicine, health care, preventive health care, or a means of providing for the well-being of persons.
15. HCC takes the position that abortion on demand involves gravely immoral practices and the intentional destruction of innocent human life.
16. Accordingly, HCC cannot pay for, provide, collaborate in, or facilitate coverage for abortion-causing drugs, such as Plan B and ella, and devices, such as copper IUDs, or related education and counseling without violating its sincerely held religious tenets and beliefs.
17. Since its creation, HCC has attempted to exclude abortion-causing drugs from employee health plans.

18. I understand that HCC does not qualify as a "religious employer" under the terms of the Mandate.
19. Given plan changes since March 23, 2010, the HCC health insurance plan does not qualify as a grandfathered health plan.
20. HCC's plan renewal date is January 1, 2014.
21. I understand that the HHS Mandate will prevent HCC from providing employee health coverage similar to that which it has always provided--insurance that excludes coverage for abortion-causing drugs and devices and related counseling.
22. I understand that by issuing a self-certification pursuant to the government's so-called accommodation to religious nonprofit companies, HCC would have to identify its participating employees to the insurer or third-party administrator for the distinct purpose of enabling the government's scheme to facilitate free access to abortifacient services. HCC cannot participate in, collaborate in or facilitate the government's scheme in this manner without violating its religious tenets and convictions.
23. I understand that one option available to employers under the Affordable Care Act is to drop health benefits altogether. Dropping all health coverage for our employees would have a severe impact on HCC's ability to compete with other organizations that do offer coverage, and would be in opposition to HCC's Christian mission, duties and beliefs. It could also indirectly affect its accreditation status in a detrimental and adverse way.
24. Thus, the HHS Mandate prevents HCC from following its religious tenets.

VERIFICATION

Declaration of David R. Melton in Lieu of Affidavit pursuant to 28 U.S.C. § 1746:

I declare, under penalty of perjury under the laws of the United States that the foregoing statements are true and correct.

Executed December 11, 2013.

/s/ David R. Melton
David R. Melton