IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

JOSEPH B. HOLLAND, JR.; and
JOE HOLLAND CHEVROLET, INC.,
a West Virginia Corporation,

Plaintiffs,

v.

Civil Action No. 2:13-cv-15487

THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; **KATHLEEN SEBELIUS**, in her official capacity as Secretary of the United States Department of Health and Human Services; **THE UNITED STATES DEPARTMENT OF LABOR**; **SETH D. HARRIS**, in his official capacity as Acting Secretary of the United States Department of Labor; **THE UNITED STATES DEPARTMENT OF THE TREASURY**; and **JACOB J. LEW**, in his official capacity as Secretary of the United States Department of the Treasury,

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs Joseph B. Holland, Jr., ("Mr. Holland") and Joe Holland Chevrolet, Inc. ("Holland Chevrolet") (collectively, the "Plaintiffs"), seek a temporary restraining order ("TRO") and preliminary injunction enjoining the Defendants from applying the Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered titles of U.S. Code), the Health Care and Education Reconciliation Act, Pub. L. 111-52, 124 Stat. 1029 (2010) (codified as amended in

scattered titles of U.S. Code), and certain provisions of Title 45 of the Code of Federal Regulations (jointly the "ACA") to require the Plaintiffs to violate and abandon their sincere and deeply held religious beliefs regarding the sanctity of all human life and the immorality of abortion. Plaintiffs are seeking protection of their First Amendment rights to the free exercise of their religious beliefs, free speech, and freedom to assemble.

Mr. Holland is a believing and practicing born-again Christian. He is the President and Chairman of the Board of Directors of Holland Chevrolet, a closely held C-corporation primarily engaged in the sales and servicing of automobiles. Mr. Holland owns 91% of the Holland Chevrolet stock. The remaining stock is held in trust by the Joe B. Holland, Sr. Trust, of which Mr, Holland is the Trustee. (*See* EXHIBIT 1 to Verified Complaint (Affidavit of Joe B. Holland, Jr.).)

Holland Chevrolet has approximately 150 full-time employees, all of whom are provided, as partial compensation for their labor, group medical coverage. Mr. Holland operates Holland Chevrolet so as to glorify and honor God by being a faithful steward of all that is entrusted to him by God. *Id.*

The Plaintiffs believe that Holland Chevrolet should serve as a form of religious ministry of the truth of God's word to its employees, customers, and community. In furtherance of this ministry, Holland Chevrolet is closed on Sundays in observance of the commandment to "Remember the Sabbath day and keep it holy." Additionally, Holland Chevrolet has a chaplain in its employ; the Holland Chevrolet website emphasizes as part of the corporation's mission statement the duty "to glorify and honor God by being faithful stewards for all that is entrusted to us," *see* http://joeholland.com/mission.shtml (last visited June 21, 2013); Holland Chevrolet's signage and other business imagery

feature in their design the *ichthus* (the ancient symbol of the Christian faith); and Holland Chevrolet includes among the beneficiaries of its corporate giving various Christian causes such as the Fellowship of Christian Athletes. *Id.*

Mr. Holland believes that he must follow and adhere to the teachings of the Bible, and that part of his calling as a Christian is to ensure that his business follows and adheres to the teachings of the Bible. Central among the teachings of the Bible is the Sixth Commandment's injunction that one "shall not kill." Following and adhering to this Commandment, the Plaintiffs believe that all innocent human life is sacred to its Creator and that it is profoundly immoral to procure, facilitate, fund, or endorse any form of abortion. *Id.*

Pursuant to the Patient Protection and Affordable Care Act of 2010, the United States Department of Health and Human Services ("HHS") issued regulations that order certain employers to provide health insurance coverage for (i) FDA-approved contraceptives that destroy the human embryo after conception, such as the Plan B drug (the so-called "morning-after pill") and *ella* (the so-called "week-after pill") (sometimes referred to herein as "abortifacient drugs"), and (ii) counseling and education services regarding contraception methods including the availability of abortifacient drugs (collectively, the "Objectionable Coverage"). (The requirement to provide the Objectionable Coverage is sometimes referred to herein as the "Government Mandate."

Employers that refuse to provide the Objectionable Coverage in their group health plans are subject to severe penalties. *See* 42 U.S. Code § 300gg-22. Refusal to provide the Objectionable Coverage may also trigger a range of enforcement mechanisms under

ERISA, including civil actions by the Secretary of Labor or plan participants and beneficiaries, which could entail additional penalties. *See* 29 U.S. Code § 1132.

Plaintiffs are fundamentally opposed to abortion, its performance, procurement, facilitation, funding, and endorsement in any form. Therefore, Plaintiffs sincerely believe that the destruction of a human embryo after conception as the result of the use of abortifacient drugs is as objectionable under the Sixth Commandment as any other form of abortion. The Plaintiffs believe that funding or providing coverage for such destruction of human embryos after conception is no different from funding or providing coverage for any other form of abortion. Accordingly, the Plaintiffs believe that funding and providing the Objectionable Coverage violates the Sixth Commandment's condemnation of killing innocent life.

The ACA and its enabling regulations provide exemptions from the Objectionable Coverage for large corporations, labor unions and various entities with "grandfathered" employer group health plans, employers with less than 50 employees, and religious employers; and the Defendants have provided safe harbor from the Objectionable Coverage for certain non-profit entities. *See* 45 CFR §§ 147.130(a)(iv) & 147.140 and 26 U.S.C. § 4980H(c)(2). None of these exemptions are not available to the Plaintiffs.

Without a TRO and preliminary injunction enjoining enforcement of the ACA against Plaintiffs, they will be forced to choose between violating their deeply held and committed religious convictions or defying the ACA and subjecting themselves to severe penalties. This is a choice that the government, being bound by the Religious Freedom Restoration Act and the First Amendment to the United States Constitution, cannot rightly impose on the Plaintiffs.

The issues presented in this litigation are being litigated in federal courts throughout the United States.[1] Of particular note is the case of *Liberty University v. Lew*, Docket No.10-2347, which is pending before the 4th Circuit Court of Appeals on remand from the United States Supreme Court. This case presents many challenges to the ACA, including the challenges raised by the Plaintiffs in this civil action. Oral argument was heard in the *Liberty* case on May 16, 2013. Resolution of the issues in that case will likely have a substantial affect on the resolution of this civil action.

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[1] Plaintiffs are aware of at least two dozen cases where preliminary injunctions have been granted plaintiffs challenging the ACA's application on religious grounds. *See Annex Med., Inc. v. Sebelius*, No. 13-118 (8th Cir. 2013); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. 2012); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357 (8th Cir. 2012); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 1703871 (W.D. Pa. Apr. 19, 2013); *Sioux Chief Mfg. Co., Inc. v. Sebelius*, No. 13-0036-CV-W-ODS (W.D. Mo. Feb. 28, 2013); *Triune Health Grp., Inc. v. U.S. Dep't of Health & Human Servs.*, No. 1:12-cv-06756, (N.D. Ill. Jan. 3, 2013); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-CV-DDN, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012); *Monaghan v. Sebelius*, No. 12-15488, 2012 WL 6738476 (E.D. Mich. Dec. 30, 2012); *Am. Pulverizer Co. v. U.S. Dept. of Health & Human Servs.*, No. 12-3459-CV-S-RED, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012); *Tyndale House Publishers v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. Nov. 6, 2012); *Legatus v. Sebelius*, 901 F. Supp. 2d 980 (E.D. Mich. Oct. 31, 2012);*Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. July 27, 2012)..

Preliminary injunctions were granted unopposed in the following cases: *Johnson Welded Prods., Inc. v. Sebelius*, No. 1:13-cv-00609-ESH (D.D.C. May 24, 2013); *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069 (D.C. Cir. 2013)(granting injunction after court's *sua sponte* reconsideration of prior denial); *Hall v. Sebelius*, No. 13-0295 (D. Minn. Apr. 2, 2013); *Bick Holding, Inc. v. Sebelius*, No. 4:13-cv-00462-AGF (E.D. Mo. Apr. 1, 2013); *Tonn & Blank Construction, LLC, v. Sebelius*, No. 1:12-CV-325 (N.D. Ind. Apr. 1, 2013); *Lindsay v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-01210 (N.D. Ill. Mar. 20, 2013); *Hartenbower v. U.S. Dep't of Health & Human Servs.*, No. 1:13-DV-02253 (N.D. Ill. Apr. 18, 2012).

The Plaintiffs are only aware of seven such cases where a motion for temporary restraining order or preliminary injunction has been denied. *See Conestoga Wood Specialties Corp. v. U.S. Dept. of Health & Human Servs.*, No. 13-1144, 2013 WL 1277419 (3d Cir. 2013); *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. 2012)(granting motion to expedite appeal and denying motion for injunction pending appeal); *Hobby Lobby Stores Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302 (10th Cir. 2012); *Armstrong v. Sebelius*, No. 13-CV-00563 (D. Colo. May 10, 2013); *M.K. Chambers Co. v. U.S. Dept. of Health & Human Servs.*, No. 13-11379, 2013 WL 1340719 (E.D. Mich. Apr. 3, 2013)(denying motion for *ex parte* temporary restraining order); *Eden Foods Inc. v. Sebelius*, No. 13-11229, 2013 WL 1190001 (E.D. Mich. Mar. 22, 2013)(denying motion for temporary restraining order with motion for preliminary injunction pending); *Briscoe v. Sebelius*, No. 13-CV-00285-WYD-BNB, 2013 WL 755413 (D. Colo. Feb. 27, 2013).

A TRO and preliminary injunction should issue in this matter resolution of *Liberty University v. Lew*. Moreover, Plaintiffs submit that based on the statutory and factual basis of this case, they are entitled to a TRO and preliminary injunctive relief from the irreparable harm that would be inflicted against them by the enforcement of the Government Mandate. *See U.S. Dep't of Labor v. Wolf Run Mining Co.*, 452 F.3d 275, 281 n.1, 283 (4th Cir. 2006).

ARGUMENT

To obtain a TRO and preliminary injunction, the Plaintiffs must demonstrate by a clear showing: (1) that they are likely to succeed on the merits; (2) that they are likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that the injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 19-20 (2008); *Real Truth About Obama, Inc. v. Federal Election Com'n*, 575 F.3d 342, 346 (4th Cir. 2009), *vacated by* 130 S. Ct. 2371 (2010), *reinstated in relevant part by* 607 F.3d 355 (4th Cir. 2010). As demonstrated herein, the Plaintiffs satisfy each of these requirements and are therefore entitled to the requested TRO and preliminary injunctive relief.

I. The Plaintiffs Are Likely to Succeed on The Merits.

The Plaintiffs make a clear showing that they are likely to succeed on the merits. The Government Mandate violates, *inter alia*, their rights under RFRA, the Free Exercise Clause of the First Amendment; and the Free Speech Clause of the First Amendment.

A. The Government Mandate violates the Plaintiffs' rights under RFRA.

RFRA forbids the government from "substantially burden[ing] a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). The government can overcome this prohibition if

it can demonstrate that the burden "(1) is in furtherance of a compelling governmental interest[] and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb-1(b). Courts look to pre-*Smith* jurisprudence to examine free exercise claims made under RFRA. *See Goodall by Goodall v. Stafford County School Bd.*, 60 F.3d 168, 171 (4th Cir. 1995).

As the Plaintiffs demonstrate, the Government Mandate substantially burdens Plaintiffs' exercise of religion. The Government Mandate does not further a compelling governmental interest and does not adopt the least restrictive means of furthering any such interest. The Plaintiffs, therefore, are far more than likely to succeed on the merits of their RFRA claim.

1. The Government Mandate substantially burdens the Plaintiffs' religious exercise.

RFRA broadly defines religious exercise as "any exercise of religion, whether or not controlled by, or central to, a system of religious belief." 42 USCS § 2000bb-2 (citing 42 U.S.C. § 2000cc-5). The Supreme Court has required a similarly broad view of religious exercise and conviction, warning that "[c]ourts should not undertake to dissect religious beliefs." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981). As the Court explained, when someone "dr[aws] a line" respecting what does and does not violate the tenets of his religion "it is not for [courts] to say that the line he drew was an unreasonable one." *Id.* at 715.

The Plaintiffs assert sincerely held religious beliefs that all innocent human life is sacred, that it is profoundly immoral to procure, facilitate, endorse, or fund any form of abortion, and that providing the insurance coverage required by the Government Mandate thus would be a direct violation of a central tenet of their faith. The Plaintiffs' acting in

accordance with their beliefs by not providing the Objectionable Coverage, therefore, is clearly religious exercise protected by RFRA.

The Government has substantially burdened the Plaintiffs' exercise of religion. A "substantial burden" imposes "substantial pressure on an adherent to modify his behavior and to violate his beliefs," or coerces an individual into choosing "between following the precepts of her religion and forfeiting [governmental] benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 718; *Sherbert v. Verner*, 374 U.S. 398, 404 (1960); *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006); *see also*, *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (noting that it is a substantial burden for the government to compel someone "to perform acts undeniably at odds with fundamental tenets of their religious beliefs.").

Yoder, *Sherbert*, and *Thomas* are dispositive here. In *Yoder*, at issue was enforcement of a compulsory education law against the Old Order Amish that required school attendance to a certain age and imposed criminal fines. The Court found that enforcement of the law against the Amish was an unconstitutional burden on their free exercise rights. *Id.* at 234-35. *Sherbert* involved a worker who refused to work on Saturdays due to a religious conviction and was then denied unemployment benefits because of it. The Court held this was a "clear" burden on the worker's religious exercise that imposed "the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." 374 U.S. at 399-401, 403-404. In *Thomas*, a Jehovah's Witness quit his job because his religious beliefs prohibited him from producing war materials. Like the worker in *Sherbert*, he was subsequently denied unemployment benefits. The Court found the "coercive impact" of having to choose

"between fidelity to religious belief or cessation of work" was "indistinguishable from *Sherbert*" as a burden upon religious exercise. 450 U.S. at 709, 717-18.

The choice presented to Plaintiffs by the Government Mandate is the same as that presented to the injured parties in *Yoder*, *Sherbert*, and *Thomas*. As in *Yoder*, the Government Mandate requires Plaintiffs to violate their religious beliefs to comply with the law and avoid sanctions for noncompliance. Like *Sherbert*, the Government Mandate works like a fine that penalizes the Plaintiffs for their religious convictions and that causes the Plaintiffs to choose between their religious convictions and their livelihood. Like in *Thomas*, the Government Mandate coerces Plaintiffs to decide between faithfulness to their religious convictions or the continued well-being of their business. Without question, "[i]n the context of a small, closely-held corporation . . . these choices and the attendant consequences can have a significant impact on the health of [the] business[] and [its] owners." *Geneva Coll. v. Sebelius*, No. 2:12-CV-00207, 2013 WL 1703871, at *7 (W.D. Pa. Apr. 19, 2013).

The Government Mandate would penalize Plaintiffs for adhering to their religious convictions. *See Lovelace*, 472 F.3d at 184, 187 (holding that a prisoner's free exercise rights were substantially burdened, within the meaning of the term as applied by the Supreme Court, when he was prevented from fasting and participating in Nation of Islam congregational prayers and thereby from fulfilling his religious obligations). The Government Mandate coerces the Plaintiffs to violate their religious beliefs by requiring them to provide the Objectionable Coverage or face severe penalties. This is the quintessential example of Plaintiffs being "compel[led], under threat of [] sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."

Yoder, 406 U.S. at 218. Indeed, the Supreme Court has clarified that "onerous" financial expenses could qualify as a substantial burden on religious exercise. *See Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 392 (1990); *see also*, *Tyndale House Publishers v. Sebelius*, 904 F. Supp. 2d 106, 121 (D.D.C. Nov. 16, 2012) ("Government action can substantially burden a plaintiff's religious exercise even if the law only results in the plaintiff being forced to forego a government benefit."). *But see Goodall*, 60 F.3d at 171 (concluding that a county school board's not providing a cued speech transliterator to a student at a religious school did not constitute a substantial burden on religious exercise).

Here, the Mandate not only threatens Plaintiffs with severe financial penalties but it also seeks to compel them to provide health insurance coverage that violates their deeply held religious beliefs. Since the Government Mandate coerces the Plaintiffs to violate their religious beliefs by requiring them to provide the Objectionable Coverage, it is a substantial burden on their free exercise of religion.

2. The Government Mandate serves no compelling governmental interest.

The Government cannot show that coercing the Plaintiffs to comply with the Government Mandate by threat of substantial penalties furthers a compelling governmental interest. A compelling governmental interest is one that is "paramount," *Yoder*, 406 U.S. at 213, or "of the highest order." *Id.* at 215; *see also Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 546 (1993) (describing the Free Exercise Clause's requirement that a compelling governmental interest be "of the highest order"). At the preliminary injunction stage, no less than at trial, the government bears

the burden of demonstrating a compelling interest. *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 429-30 (2006).

In assessing RFRA claims, courts must "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." *Id.* at 541. That is, "RFRA requires the [g]overnment 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." *Id.* at 430.

The government cannot simply assert that excluding the Plaintiffs from the reach of the Government Mandate would undermine or harm its legislative scheme. It must instead "address the particular practice at issue" and show how granting the Plaintiffs an exemption would "seriously compromise [the government's] ability to administer the program." *Id.* at 435, 439. *See also Brown v. Entm't Merchs. Ass'n,* 131 S. Ct. 2729, 2738 (2011) ("The State must specifically identify an 'actual problem' in need of solving, and the curtailment of [the constitutionally protected right] must be actually necessary to the solution." (internal citations omitted)). "That is, the [government] must show that requiring the [P]laintiffs to provide the [Objectionable Coverage] will further the government's compelling interest." *Tyndale House*, 904 F. Supp. 2d at 125.

O Centro is precisely on point. It involved the application of RFRA to government enforcement of the Controlled Substances Act, 21 U.S.C. § 801 (2006), against a religious sect that used a sacramental tea containing a substance regulated by the Act. Under the Act, a criminal sentence was imposed for mere possession of the substance. 546 U.S. at 425-26. The Act, however, also granted a religious exemption for the use of another regulated drug – peyote – to hundreds of thousands of Native

Americans. *Id.* at 433. The Court found that this broad exemption undercut the government's attempt to show a compelling interest for denying an exemption to the religious group for its sacramental tea. *Id.*

As the *Tyndale House* court noted, the government has already voluntarily exempted millions of people from the Government Mandate through grandfathered plans alone[2] and many more people through other exemptions or exclusions.[3] Clearly, "[t]he very purpose of a law is undermined where it is so woefully underinclusive as to render belief in [its] purpose a challenge to the credulous." *Tyndale House*, 904 F. Supp. 2d at 128. Thus, any assertion of a compelling government interest for denying an exemption to the Plaintiffs and their approximately 150 employees is without merit.

The Government, therefore, cannot demonstrate a compelling interest for enforcing the Government Mandate against the Plaintiffs. As the Supreme Court has explained, "a law cannot be regarded as protecting an interest of the highest order when it [already] leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547.

3. The Government Mandate is not the least restrictive means of advancing government goals

Even if the Government could show a compelling governmental interest, enforcing the Government Mandate against the Plaintiffs is not the least restrictive means of advancing its interest. Since the government "has open to it [] less drastic way[s] of

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[2] *Tyndale House*, 904 F. Supp. 2d at 128; *Geneva Coll.*, 2013 WL 1703871 at *10; *Newland*, 881 F. Supp. 2d at 1298.

[3] *Geneva Coll.*, 2013 WL 1703871 at *10 (citing as exemptions, *inter alia*, 26 U.S.C. 5000A(d)(2)(A)("members of a recognized religious sect or division thereof" with religious objections to health insurance); 42 U.S.C. 300gg-13(a), 76 Fed. Reg. at 466-01 n.1 (employers with fewer than 50 employees)).

satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties." *Anderson v. Celebrezze,* 460 U.S. 780, 806 (1983).

Rather than coerce the Plaintiffs to violate their sincerely held religious beliefs or incur substantial penalties, the government could implement less drastic measures to achieve its goals. For example, the government could offer tax credits, deductions, or other similar tax incentives to encourage achievement of its goals. *Cf. Newland,* 881 F. Supp. 2d at 1298–99. Thus, even if the Government could demonstrate a compelling governmental interest, which it cannot, the Government Mandate is not the least restrictive means for advancing its goals. Since the Government Mandate substantially burdens the exercise of the Plaintiffs' religious beliefs and fails strict scrutiny, the Government Mandate clearly violates RFRA, and the Plaintiffs are likely to succeed on the merits of that claim.

B. The Government Mandate violates the Plaintiffs' rights under the Free Exercise Clause

The Plaintiffs are likely to succeed on the merits because the Government Mandate violates the Plaintiffs' rights under the Free Exercise Clause of the First Amendment. The Free Exercise Clause requires that any governmental action that burdens a particular religious practice be subject to strict scrutiny if the law is either not neutral towards religion or is not generally applicable. *Lukumi,* 508 U.S. at 531. The Government Mandate is not neutral toward religion and is not generally applicable.

In order for a law or regulation to be neutral, the law or regulation must "not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Id.* at 533. The

Government Mandate discriminates on its face and thus is not neutral because it grants religious exemptions to churches and houses of worship while denying the same religious exemption to other individuals and organizations that adhere to religious beliefs and practices no less than the churches to which exemptions are granted. 78 Fed. Reg. 8456, 8474. Drawing explicit distinction between types of organizations is equivalent to discrimination based on the "intensity" of the organization's religious beliefs and requires strict scrutiny. *See Spencer v. World Vision, Inc.,* 619 F.3d 1109, 1114 (9th Cir. 2010) (granting an exemption to churches but not other religious organizations "would also raise the specter of constitutionally impermissible discrimination between institutions on the basis of the 'pervasiveness or intensity' of their religious beliefs." (quoting *Colo. Christian Univ. v. Weaver,* 534 F.3d 1245, 1259 (10th Cir. 2008))); *Univ. of Great Falls v. NLRB,* 278 F.3d 1335, 1342 (2002) (the inquiry necessary to discriminate between different types of religious organizations is impermissible).

The Government Mandate is also subject to strict scrutiny because it is not generally applicable. A law or regulation is not generally applicable when it regulates religiously motivated conduct while leaving non-religiously motivated conduct unregulated. *See, e.g., Lukumi,* 508 U.S. at 544–45 (striking down an ordinance that permitting killing animals for secular purposes but not for religious purposes); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark,* 170 F.3d 359, 366 (3d Cir. 1999) (holding that a police department must permit a religious exemption to a no-facial-hair rule if it permits a medical exemption to the rule); *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth,* 556 F.3d 1021, 1035 (9th Cir. 2009) (Noonan, J., concurring) (campaign finance requirements are not generally applicable if they permit

secular exemptions for newspapers and media but do not permit religious exemptions for churches).

The Government Mandate subjects religious organizations like Holland Chevrolet to its requirements, but, because of the "grandfathering" exemption, exempts the health insurance plans of some 191 million persons from the same requirements. *Newland,* 881 F. Supp. 2d at 1291. Accordingly, the Government Mandate is not generally applicable.

Since it is neither neutral nor generally applicable, the Government Mandate is subject to strict scrutiny. As the Plaintiffs have clearly demonstrated in the context of RFRA, the government cannot state a compelling governmental interest or show that it has implemented the least restrictive means for furthering any such interest. Therefore, the Government Mandate clearly violates their rights under the Free Exercise Clause, and the Plaintiffs are clearly likely to succeed on the merits.

C. The Government Mandate violates the Plaintiffs' rights under the Free Speech Clause

The Plaintiffs are likely to succeed on the merits because the Government Mandate violates the Plaintiffs' rights under the Free Speech Clause of the First Amendment. The Government Mandate is subject to strict scrutiny because it violates Plaintiffs' right not to speak and because it discriminates against the Plaintiffs' speech based on the Plaintiffs' viewpoint and the content of their speech.

According to the Supreme Court, "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). "Viewpoint discrimination is an egregious form of content discrimination. The government must abstain from regulating speech

when the specific motivating ideology or the opinion or perspective of the speaker is the rationale of the speaker." *Rosenberger*, 515 U.S. at 829; *see also*, *Perry Ed. Assn. v. Perrry Local Educators' Assn.*, 460 U.S. 37, 46 (1983); *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."). *See Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("In the realm of private speech or expression, government regulation may not favor one speaker over another."); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 ("The government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression.").

The Government Mandate severely penalizes the Plaintiffs for refusing to participate in the expressive act of providing the Objectionable Coverage. The specific motivating ideology of the government in mandating the Objectionable Coverage is to circumvent and suppress Plaintiffs' rights to withhold such coverage conscientiously. The government's threat to punish Plaintiffs' expressive conduct with severe penalties constitutes viewpoint and content based discrimination. "The right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714. *West Va. Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *see also, Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995) ("a speaker has the autonomy to choose the content of his own message.").

The Government Mandate coerces the Plaintiffs into providing the Objectionable Coverage and effectively making a public assertion that the Objectionable Coverage is

morally permissible. Plaintiffs are being forced to communicate the government's message in a manner that can be readily observed and scrutinized by the public. The Plaintiffs here cannot simply disassociate themselves from the government's ideological position by publicly voicing their opposition outside of the context of their employee health plan. The Government substantially burdens and undermines the Plaintiffs' ability to express and advocate their contrary views and makes the Plaintiffs appear inconsistent, equivocal, or hypocritical. Since the Plaintiffs are being forced to adopt and communicate a message that they find morally repugnant through the required actions and activities imposed upon them by the Government Mandate they are likely to prevail on the merits of their Free Speech claim.

II. Enforcement of the Government Mandate against the Plaintiffs will Inflict Irreparable Harm on the Plaintiffs.

The Plaintiffs will suffer irreparable harm in the absence of a TRO and preliminary injunctive relief. "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) (plurality opinion); *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011) (quoting *Elrod*, 427 U.S. at 373). Courts treat the violation of rights protected by RFRA no differently. *Opulent Life Church v. City of Holly Springs Miss.,* 697 F.3d 279, 295 (5th Cir. 2012) ("Most basically, Opulent Life has satisfied the irreparable-harm requirement because it has alleged violations of its First Amendment and RLUIPA rights. … In the closely related RFRA context …, courts have recognized that this same principle applies." (internal cites and quotes omitted)).

The Government Mandate's violations of the Plaintiffs' rights under the First Amendment and RFRA show that the Plaintiffs will suffer irreparable harm unless the court issues a TRO and preliminary injunction.

III. The Balance of Harms Favors the Issuance of A Temporary Restraining Order and Preliminary Injunctive Relief.

The balance of equities clearly tips in the Plaintiffs' favor. The Government Mandate will violate the Plaintiffs' core constitutional and statutory rights and subject them to substantial penalties. The Plaintiffs would be forced to provide the Objectionable Coverage in violation of their fundamental religious beliefs.

By contrast, a preliminary injunction and TRO would not cause any inequitable harm for the government. Any administrative inconvenience of revising regulations and exemptions under the Mandate to secure the Plaintiffs' RFRA and constitutional rights does not constitute a significant burden. *Cf. Doe v. Wood County Bd. of Educ.*, 888 F. Supp. 2d 771 (S.D.W.Va. Aug. 29, 2012). Indeed, the Government has already exempted the employers of approximately 191 million persons from the Government Mandate. Clearly, granting an additional exemption for a single employer and its approximately 150 employees hardly imposes an administrative burden. *See Newland,* 881 F. Supp. 2d at 1298. An order requiring the Defendants to refrain from applying the Government Mandate to the Plaintiffs while this case is pending would not inflict any further harm on the Defendants.

In addition, "[t]he harm in delaying the implementation of a statute that may later be deemed constitutional must yield to the risk presented here of substantially infringing the sincere exercise of religious beliefs." *Legatus,* 2012 U.S. Dist. LEXIS 156144 at *44; *see also Opulent Life Church,* 697 F.3d at 297 ("We have just concluded that Opulent

Life's harm is irreparable; hence, Holly Springs would need to present powerful evidence of harm to its interests to prevent Opulent Life from meeting this requirement.").

IV. Public Interest Favors Granting The Temporary Restraining Order and Preliminary Injunctive Relief.

The public interest clearly favors granting a TRO and preliminary injunctive relief. "[I]njunctions protecting First Amendment freedoms are always in the public interest." *Opulent Life Church,* 697 F.3d at 298 (quoting *Christian Legal Soc'y v. Walker,* 453 F.3d 853, 859 (7th Cir. 2006)); *cf. Elrod,* 427 U.S. 347; *see also Connection Distrib. Co. v. Reno,* 154 F.3d 281, 288 (6th Cir. 1998) ("[I]t is always in the public interest to protect constitutional rights."); *Phelps-Roper v. Nixon,* 545 F.3d 685, 690 (8th Cir. 2008) (same). The protection of the Plaintiffs' constitutional and statutory rights inures to the benefit of all citizens, guaranteeing their rights to free exercise of religion, speech, and assembly. The public consequences of denying a TRO and preliminary injunction would chill free speech and free exercise of religion. The general public has an interest in access to speech and the continual growth and development of a robust marketplace of ideas, including the communication of religious speech. Withholding a TRO and preliminary injunction would contravene the overwhelming weight of Supreme Court jurisprudence which stands for the vigorous protection of Americans' First Amendment rights.

Additionally, a TRO and preliminary injunction cannot possibly harm the public interest for the Plaintiffs do not seek to enjoin preliminarily the Government Mandate as to all employers, but only as to itself. Any claim by the government that a TRO and preliminary injunction should not issue because of some broad public interest is fatally

undermined by the fact that the government has already made over 190 million exemptions and allowances. Marginal exemptions and allowances are of no detriment.

CONCLUSION

Application of the ACA and the Government Mandate to the Plaintiffs violates their rights under the First Amendment to the United States Constitution and under the Religious Freedom Restoration Act. Since the Plaintiffs have clearly shown that they are likely to succeed on the merits, that they are about to suffer irreparable harm, and that no harm to the public interest would result from the issuance of a preliminary injunction and TRO, this Court should grant Plaintiffs' Motion for Preliminary Injunction and TRO.

Respectfully submitted this 24th day of June, 2013.

Joseph B. Holland, Jr. and Joseph B. Holland Chevrolet, Inc.
By counsel,

/s/ Allen R. Prunty
Kent J. George (WV Bar No. 4842)
William C. Porth (WV Bar No. 2943)
Allen R. Prunty (WV Bar No. 2989)
Brian E. Calabrese (WV Bar No. 12028)
ROBINSON & MCELWEE, PLLC
700 Virginia Street, East - Suite 400
Charleston, West Virginia 25301
(304) 344-5800 Telephone

and

Jeffrey C. Mateer
(Texas State Bar No. 13185320)
Hiram S. Sasser, III
(Texas State Bar No. 24039157)
LIBERTY INSTITUTE
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075
(972) 941–4444

Jeremiah G. Dys (WV Bar #9998)
The Family Policy Council of WV
P.O. Box 566
Charleston, WV 25322
(304)-881-5196