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

WILLIAM C. LINDSAY and LINDSAY,
RAPPAPORT & POSTEL, LLC,
Plaintiffs,

vs. Case No. 1:13-cv-01210

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

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF
A PRELIMINARY INJUNCTION**

INTRODUCTION

This is a challenge to regulations ("the Mandate") promulgated by the Defendants requiring employers to include in any employee health benefit plan coverage for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." Plaintiff, William Lindsay, owns the controlling interest in and is managing partner of Plaintiff, Lindsay, Rappaport & Postel, LLC (hereafter, "LR&P"). Lindsay's religious beliefs have led him to provide a health care plan for his employees as an integral component of his firm's mission and values. Those same religious beliefs, however, dictate that paying for all FDA approved contraceptives and sterilization as part of his firm's health plan is sinful. For the government to require him to do so — under pain of crippling fines should he fail to comply — burdens his ability to exercise his religion by imposing direct pressure on him to violate his conscience. This the government may not do under the Religious Freedom Restoration Act (RFRA) without demonstrating a compelling interest pursued by the least restrictive means. The government cannot make such a showing in this case.

Twice now, the Seventh Circuit Court of Appeals has granted injunctive relief against the Mandate to plaintiffs in nearly identical circumstances as those presented here. A district court in this district has done likewise. In addition, the Eighth Circuit and six district courts have also granted injunctive relief on substantially similar facts.

For the reasons argued herein, this Court should grant Plaintiffs Lindsay and LR&P preliminary injunctive relief against the challenged Mandate.

FACTUAL BACKGROUND

Plaintiff, William Lindsay, is an Illinois lawyer. He owns the controlling interest in and is managing partner of Plaintiff, Lindsay, Rappaport & Postel, LLC. The firm has offices in Chicago and Waukegan, and has seventeen full-time employees. Lindsay Declaration, ¶ 2 – 3, 11 (Attached hereto as Exhibit A).

Lindsay is a Catholic. Along with his wife, he is active in his parish and volunteers with or otherwise supports a wide variety of church-related charities such as Food for the Poor, Catholic Charities, Catholic Relief Services, Women's Center for Greater Chicagoland, Lake County Right to Life and many others. Lindsay wishes to conduct his firm's business in a manner that does not conflict with the values of his Catholic faith. Lindsay Dec. ¶ 4 – 5.

One of those values is the belief that he has a moral and religious duty to look out for the physical needs of his employees. One of the ways he exercises that belief is by providing a group health plan. At the same time, however, Lindsay has concluded that his Catholic faith forbids him to pay for contraceptives, sterilization, abortion-inducing drugs or related education and counseling as required by the Mandate. Lindsay Dec., ¶ 4, 7. He makes a moral distinction between whatever acts his employees themselves may choose to do with the wages he pays them, and his act of paying for, purchasing, and directly subsidizing through health benefits acts that he has concluded are immoral. Lindsay believes that the former do not implicate his religiously informed conscience, but the latter do. Lindsay Dec. ¶ 8.

Lindsay became aware of the Mandate some time in August of 2012. At that time, he asked his insurance agent whether or not his firm's current policy covered those drugs and services encompassed by the Mandate. Lindsay was told — inaccurately as it turns out — that his plan did *not* cover those things. In January, 2013, however, Lindsay's agent advised him that

his plan did, in fact, cover the objected-to drugs and services. Since learning of this mistake, Lindsay has been exploring what options he and his firm have available to them to obtain a health policy that excludes the objectionable coverage. Lindsay Dec. ¶ 13.

LR&P's health coverage plan renewal date is April 1, 2013. Lindsay Dec. ¶ 12. Solely because of the Mandate, Plaintiffs would be required to include in any new plan the objectionable coverage. Lindsay Dec. ¶ 16. In the absence of the Mandate, Lindsay would be able to provide a plan without the objectionable coverage under Illinois law.[1]

The Mandate thus puts Lindsay to the choice of either no longer providing a health care plan for the firm's employees or violating his beliefs (and his firm's ethical guidelines). Lindsay Dec., ¶ 15. Lindsay considers this a form of pressure or coercion since it requires him to abandon a sincerely held religious belief in order to avoid forsaking an integral component of his firm's values, or paying the fines that would follow non-compliance with the Mandate.

Plaintiffs' current plan is not considered "grandfathered" under the Mandate, and, as a for-profit employer, LR&P does not qualify for the "religious employer" exemption of the Mandate.[2] Lindsay Dec. ¶ 17, 19.

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[1] The State of Illinois requires coverage for outpatient contraceptive services and drugs in individual and group health insurance policies. 215 Ill. Comp. Stat. § 5/356z.4. Yet, the Illinois Health Care Right of Conscience Act provides "health care payers," 745 Ill. Comp. Stat. § 70/3(f), such as Plaintiffs, with an exemption from having to pay for, or having to arrange for the payment of, any health care services, including "family planning, counseling, referrals, or any other advice in connection with the use or procurement of contraceptives and sterilization or abortion procedures; medication; or surgery or other care or treatment," 745 Ill. Comp. Stat. § 70/3(a), that violates the health care payer's conscience as documented in its ethical guidelines or the like, 745 Ill. Comp. Stat. §§ 70/2, 70/3(e), 70/11.2.

[2] Neither the original version of the Mandate nor the proposed revisions announced on February 1, 2013 provide any exemption for for-profit businesses. *See* http://cciio.cms.gov/resources/factsheets/womens-preven-02012013.html, last visited February 27, 2013.

THE REGULATIONS BEING CHALLENGED

On March 23, 2010, the Affordable Care Act (hereafter "ACA") became law.[3] The ACA requires group health plans to provide no-cost coverage for the preventative care and screening of women in accordance with guidelines created by the Health Resources and Services Administration (hereafter "HRSA"). 42 U.S.C. § 300gg-13(a)(4). The HRSA guidelines include, among other things, "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Women's Preventive Services: Required Health Plan Coverage Guidelines, Health Res. & Servs. Admin.*, http://www.hrsa.gov/womensguidelines/ (last visited Feb. 28, 2013).

On August 1, 2011, Defendants promulgated an interim final rule ("the Mandate"), requiring all "group health plan[s] and . . . health insurance issuer[s] offering group or individual health insurance coverage" to provide coverage for all FDA-approved contraceptive methods and sterilization procedures as well as patient education and counseling about those services. 76 Fed. Reg. 46621, 46622 (Aug. 3, 2011); 45 C.F.R. § 147.130 (2011). This interim rule, along with the religious employer exemption described below, was adopted as final, "without change," on or about February 15, 2012. 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012).

Not all employers are required to comply with the Mandate. "Grandfathered" health plans, that is, plans in existence on March 23, 2010, and that have not undergone any of a

[3] In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), the Court upheld the so-called "individual mandate" of the ACA under the Constitution's taxing power. In so doing, the Court did *not* rule on the constitutionality of the Mandate challenged herein. In fact, as Justice Ginsburg observed, "A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause." *Id*. at 2624 (Ginsburg, J., concurring in part, dissenting in part).

defined set of changes,[4] are exempt from compliance with the Mandate. *See* 75 Fed. Reg. 41726, 41731 (July 19, 2010).[5] Defendant HHS estimates that "98 million individuals will be enrolled in grandfathered group health plans in 2013." *Id.* at 41732. Also exempt from the Mandate are non-profit "religious employers," as defined at 45 C.F.R. § 147.130(a)(1)(iv)(B). 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011); 77 Fed. Reg. 8725 (Feb. 15, 2012). In addition, employers with fewer than fifty full-time employees have no obligation to provide health insurance for their employees under the ACA and do not have to comply with the Mandate. 26 U.S.C. § 4980H(c)(2)(A). Finally, under the ACA, individuals are exempt from the requirement to obtain health insurance if they are members of a "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds or are members of a "health care sharing ministry." 26 U.S.C. §§ 5000A(d)(2)(A)(i), (ii), (B)(ii).

Non-exempt employers who fail to provide an employee health insurance plan will be exposed to annual fines of roughly $2,000 per full-time employee, minus the first thirty employees. *See* 26 U.S.C. §§ 4980H(a), (c)(1). Additionally, even employers of fewer than 50 employees who — like Lindsay and LR&P — do provide a health plan, are required to comply with the Mandate or be subject to an assessment of $100 a day per employee. *See* 26 U.S.C. § 4980D(b)(1); *see also* Staman & Shimabukuro, Cong. Research Serv., RL 7-5700, *Enforcement of the Preventative Health Care Services Requirements of the Patient Protection and Affordable Care Act (2012)* (assessment applies to employers violating the ACA's "preventive care" provision).

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[4] *See* 26 C.F.R. § 54.9815-1251T (2010); 29 C.F.R. § 2590.715-1251 (2010); 45 C.F.R. § 147.140 (2010).

[5] *See* 42 U.S.C. § 18011 (2010); 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011).

ARGUMENT

I. PLAINTIFFS SATISFY THE STANDARD FOR INJUNCTIVE RELIEF.

In exercising its discretion to decide whether to grant Plaintiffs injunctive relief, this Court considers (1) whether Plaintiffs are likely to succeed on the merits of their claims; (2) whether Plaintiffs are likely to suffer irreparable harm absent injunctive relief; (3) whether the harm Plaintiffs would suffer without an injunction outweighs the harm Defendants would suffer if the injunction were granted; and (4) whether an injunction is in the public's interest. *State of Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 769 (7th Cir. 2011). In balancing the harms, "the court weighs these factors against one another in a sliding scale analysis . . . which permits district courts to weigh the competing considerations and mode appropriate relief." *Stuller, Inc. v. Steak N Shake Enters.*, 695 F.3d 676, 678 (7th Cir. 2012) (quotation marks and citations omitted).

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR RFRA CLAIM.

For purposes of this Motion for a Preliminary Injunction, Plaintiffs rely on Count I (RFRA) of their Complaint. Plaintiffs preserve the other claims and issues in their Complaint.

Within the past two months, the Seventh Circuit Court of Appeals has twice granted preliminary injunctive relief in cases that, in all material respects, are indistinguishable from this case. *Korte v. Sebelius*, No. 12-3841, 2012 U.S. App. LEXIS 26734 (7th Cir. Dec. 28, 2012); *Grote Indus. LLC v. Sebelius*, No. 13-1077, 2013 U.S. App. LEXIS 2112 (7th Cir. Jan. 30, 2013). Within the same time frame, a district court in this district has done likewise. *Triune Health Group, Inc. v. U.S. Dep't of Health and Human Servs.*, No. 1:12-cv-06756 (N.D. Ill. Jan. 3, 2013) (finding that *Korte* was "binding precedent" entitling Plaintiffs to injunctive relief under identical circumstances to those present here) (attached hereto as Exhibit B). In addition, since

July of 2012, eight other federal courts — including the Eighth Circuit Court of Appeals — have granted preliminary relief in cases that, like this one, have been brought by for-profit businesses challenging this same Mandate.[6]

The basic rationale underlying those decisions finding that for-profit business owners are entitled to injunctions in these circumstances is, perhaps, best summarized by the Seventh Circuit in the *Korte* case. This rationale (the same one the court used a month later in *Grote*) is as follows. The business owners assert that paying for those services and drugs required by the Mandate violates their religion. *Korte*, 2012 U.S. App. LEXIS 26734, at *3. It is the *coerced coverage* of the services that constitutes the substantial burden on religious exercise — *not* their later use by employees. *Id.*, at *10. Neither the for-profit corporate status of the plaintiff, nor the fact that plaintiff may have previously inadvertently provided the objected to services is dispositive. *Id.*, at *8-9, *11-12. The government cannot satisfy the strict scrutiny imposed by RFRA because, *inter alia*, the government's own massive exemptions to the Mandate undermine any argument that it advances a compelling interest, and — even if the interest were compelling — the government has available to it a number of less restrictive means of advancing that

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[6] *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12‐3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-CV-92, 2012 U.S. Dist. LEXIS 182942 (E.D. Mo. Dec. 31, 2012); *Monaghan v. Sebelius*, No. 12-15488, 2012 U.S. Dist. LEXIS 182857 (E.D. Mich. Dec. 30, 2012); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-cv-3459, 2012 U.S. Dist. LEXIS 182307 (W.D. Mo. Dec. 20, 2012); *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, 2012 U.S. Dist. LEXIS 163965 (D.D.C. Nov. 16, 2012); *Legatus v. Sebelius*, No. 12-12061, 2012 U.S. Dist. LEXIS 156144 (E.D. Mich. Oct. 31, 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012).

But, *cf. Conestoga Wood Specialties Corp. v. Sebelius*, No. 12-6744, 2013 U.S. Dist. LEXIS 4449, at *10–14 (E.D. Pa. Jan. 11, 2013), *appeal docketed*, No. 13-1144, 2013 U.S. App. LEXIS 2706, at *6 (3d Cir. Jan. 29, 2012) (denying injunction pending appeal); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012*), appeal docketed*, No. 12-6294, 2012 U.S. App. LEXIS 26741 (10th Cir. Dec 20, 2012) (denying injunction pending appeal), *and* 133 S. Ct. 641 (2012) (Sotomayor, J., in chambers) (same).

interest, none of which would involve coercing the consciences of religious objectors. *Id.*, at *8. Accordingly, plaintiff business owners can show that they satisfy the requirements for preliminary injunctive relief. *Id.*, at *12-14.

There are no meaningful distinctions between the facts of the present case and the facts in *Korte* and *Grote*. Like the Kortes and the Grotes and their respective businesses, Lindsay has a religious objection to covering contraceptives, sterilization, and the rest in his firm's health plan. Like the Kortes and the Grotes, Lindsay wishes to continue to provide health coverage for his employees, but, because of the Mandate, will be unable to do so in a manner consistent with his religious beliefs. Like the Kortes and the Grotes, Lindsay faces an impending deadline for renewing his health plan. He is, at this moment, being directly pressured by the government to violate his beliefs as part of the cost of staying in business. By presenting Lindsay with this coercive choice, the government is placing a substantial burden on his right to freely exercise his religion — the very thing Congress intended to prohibit by enacting the Religious Freedom Restoration Act.

As in *Korte*, *Grote*, and all the other cases, the government can only hope to justify this burden by demonstrating that the Mandate is necessary to advance a compelling interest — "an interest of the highest order" — by the least restrictive means. Yet, as the Seventh Circuit and other courts have repeatedly found, this is a losing proposition for the Defendants. *Korte*, *supra*, at *12-13; *Grote*, 2013 U.S. App. LEXIS 2112, at *11. Following the Supreme Court's teaching that "[I]t is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that interest unprohibited," *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993), courts have noted the "massive exemptions" to the Mandate's coverage — some 191 million

individuals according to two courts — as well as millions more via other categorical exemptions, and have concluded that this completely undermines the government's claim to be advancing anything approaching a *compelling* interest. *See Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, 2012 U.S. Dist. LEXIS 163965, *49-61 (D.D.C. Nov. 16, 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, *20-24 (D. Colo. 2012).

And, as if these gigantic loopholes of unprohibited damage to the government's remarkably *non*-compelling compelling interest were not enough, there is at least one other virtual concession of non-compellingness that undercuts the whole idea. Even grandfathered plans are required to comply with *some* provisions of the Affordable Care Act — the prohibition on excessive waiting periods, and the extension of dependent coverage, for example.[7] But the Mandate's preventive services coverage is *not* applicable to grandfathered plans, thus rendering hollow any government protestation that the Mandate is needed to advance a truly compelling interest.

As for the contention that the Mandate is the "*least* restrictive means" for advancing the interest, the argument is practically self-refuting. The government has a goal of universal access to free contraception. Is the *least* restrictive way to go about doing that to enact a rule saying that *some* (a fraction as it turns out) of employers must include it in their employee health plans, even if some of that fraction think it's a sin to do so? Hardly. Leaving aside such alternatives as tax deductions or credits for the purchase of contraceptives, government reimbursement programs, or incentives to drug companies to provide contraceptives free of charge, the single *least* restrictive means of accomplishing the asserted goal is also the simplest, least complicated,

[7] For a summary of which Affordable Care Act provisions apply to grandfathered health plans, see *Application of the New Health Reform Provisions of Part A of Title XXVII of the PHS Act to Grandfathered Plans*, http://www.dol.gov/ebsa/pdf/grandfatherregtable.pdf (last visited Feb. 28, 2013).

and tried and true means imaginable: the government could give the objected-to drugs away for free. In fact, through one program or another, the government already does that to the tune of $2.37 billion a year.[8] The government need only eliminate the current income eligibility scales attached to its existing programs to accomplish its goal. No new programs, no new agencies, no bureaucratic expansion. Just change the rules for who is eligible.

Since it is well-established that, if the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental liberties," *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983), it cannot be seriously contended that the *least* restrictive means in this context is the swiss-cheese-like Mandate that applies to some (but not most) for-profit employers, some (but not most) non-profit employers, some (but not most) of the time.

Because the Mandate imposes a substantial burden on Plaintiffs' religious exercise, and because the Mandate fails the strict scrutiny test, Plaintiffs are likely to succeed on the merits of their RFRA claim.

III. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION.

Plaintiffs' right to the free exercise of religion, as protected by RFRA, are being violated by the Mandate as shown above. The deprivation of First Amendment freedoms constitutes irreparable harm, *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976), and "a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001); *see also Jolly v. Coughlin*, 76 F.3d 468, 482 (2nd Cir. 1996) ("[c]ourts

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[8] In 2010, public expenditures for family planning services totaled $2.37 billion, and Title X of the Public Health Service Act, the only federal program devoted specifically to supporting family planning services, contributed $228 million during this same year. Guttmacher Institute, *Facts on Publicly Funded Contraceptive Services*, May 2012, http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited Feb. 28, 2013).

have persuasively found that irreparable harm accompanies a substantial burden on an individual's rights to the free exercise of religion under RFRA"). Lindsay and LR&P need to secure new health coverage by April 1, 2013. Solely due to the Mandate, Plaintiffs cannot do so in a manner that does not violate their principles without first obtaining relief from this Court.

IV. AN INJUNCTION WOULD CAUSE NO HARM TO DEFENDANTS.

An order requiring Defendants to not apply the Mandate to Plaintiffs while this case is pending will not harm Defendants' interests, especially when Defendants already have exempted thousands of employers from the Mandate. Moreover, there is no legitimate governmental interest to be furthered by Defendants' infringement of Plaintiffs' constitutional and statutory rights. *See Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004).

V. THE PUBLIC INTEREST FAVORS A PRELIMINARY INJUNCTION.

The public has no interest in having Defendants violate Plaintiffs' constitutional and statutory rights, as discussed *supra*, so an injunction will not harm the public interest. *See id.*

VI. THIS COURT SHOULD NOT IMPOSE A BOND ON PLAINTIFFS.

Enjoining the enforcement of the Mandate as to Plaintiffs will impose no monetary requirements on Defendants, and Plaintiffs request that no bond be required. *See, e.g.,* Fed. R. Civ. P. 65(c); *Planned Parenthood v. Comm'r*, 794 F. Supp. 2d 892, 921 (S.D. Ind. 2011) (imposing no bond where preliminary injunction would not cause monetary injury). Moreover, a bond requirement would harm Plaintiffs' constitutional and statutory rights by causing them to have to pay to assert and defend those rights.

CONCLUSION

The Seventh Circuit has twice enjoined the enforcement of the challenged Mandate against businesses in circumstances virtually identical to those presented by Plaintiffs Lindsay and LR&P. For the resons stated herein, this Court should do likewise.

Respectfully submitted this 28th day of February, 2013.

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CERTIFICATE OF SERVICE

I, Francis J. Manion, counsel for Plaintiffs, hereby certifies that on February 28th, 2013, a true and correct copy of the foregoing and attachments were caused to be filed electronically with this Court through the CM/ECF filing system. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's CM/ECF system. Parties may access this filing through the Court's CM/ECF system. I also certify that a true and correct copy of the foregoing and attachments were caused to be sent on February 28th, 2013, to each of the following defendants and the U. S. Attorney for the Northern District of Illinois by U.S. Mail:

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