UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

M.K. CHAMBERS COMPANY, a Michigan corporation; GERALD D. CHAMBERS, an individual; and ROBERT W. CHAMBERS, an individual,

Plaintiffs,

v.

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

Defendants.

Judge Denise Page Hood

Magistrate Judge Michael J. Hluchaniuk

Case No. 2:13-cv-11379

_____/

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PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

_____/

Plaintiffs, M.K. Chambers Company ("MKC"), Gerald D. Chambers ("GDC"), and Robert W. Chambers ("RWC"), (collectively MKC, GDC, and RWC referred to as "Plaintiffs"), by their attorneys, The Troy Law Firm, hereby move this Honorable Court to enter an order for preliminary injunction, pursuant to Fed. R. Civ. P. 65(a) and L.R. 65.1, in order to prevent continued and immediate irreparable injury to Plaintiffs' fundamental rights and interests.

In support of their emergency motion, Plaintiffs rely upon the pleadings and papers of record, as well as their brief filed with this motion, and the declarations and exhibits attached hereto. For the reasons set forth more fully below, Plaintiffs hereby request that this Honorable Court enjoin the enforcement of Defendants' Health and Human Services Mandate of the Affordable Care Act ("HHS Mandate") which violates Plaintiffs' rights guaranteed by the First Amendment to the United States Constitution and the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb *et seq*.

Prior to the filing of this Emergency Motion for Preliminary Injunction, the attorneys for the parties, Kimberly A. Cochrane and Bradley P. Humphreys, held a telephone conference on April 23, 2013, discussing the nature of the relief sought and its legal basis. Plaintiffs' Counsel requested but did not obtain concurrence in the relief sought. Such has been the case with plaintiffs across the country who have filed similar lawsuits in objection to the HHS Mandate.

Across the country, the federal district courts are disagreeing as to how these cases should be decided, and some cases in this district have made their way up to the Sixth Circuit Court. Before deciding the merits of these cases, guidance from the appellate courts and/or the Supreme Court may be beneficial. In the meantime, as discussed more fully in their brief, Plaintiffs contend that there would be no harm to any party if a preliminary injunction were

issued in this case now, as such injunction would merely maintain the status quo that has existed in this country for the past 237 years.

WHEREFORE, for all the above reasons, and the reasons stated in Plaintiffs' attached brief, Plaintiffs hereby request that this Honorable Court issue an order for preliminary injunction, and any other relief it deems appropriate.

Dated: April 26, 2013

Respectfully submitted,

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PLAINTIFFS' BRIEF IN SUPPORT OF EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

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Grand Canyon Air Tour Coalition v.*F.A.A., 154 F.3d 455 (D.C. Cir. 1998)* 45

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75 Fed. Reg. 34540 25

75 Fed. Reg. 34558 25

75 Fed. Reg. 34562 25

75 Fed. Reg. 34566 25

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76 Fed. Reg. 46621 4

76 Fed. Reg. 46621–26 45

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76 Fed. Reg. 46624 45

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77 Fed. Reg. 8725 ..... 4, 5, 29, 46

77 Fed. Reg. 8726 29

77 Fed. Reg. 16501 ..... 19, 35, 40, 46

77 Fed. Reg. 16503 19

Other Authorities

Cooper, Helene & Laurie Goodstein, "Rule Shift on Birth Control Is Concession to Obama Allies" (Feb. 10, 2012), *available at* http://www.nytimes.com/2012/02/11/ health/ policy/ obama-to-offer-accommodation-on-birth-control-rule-officials-say.html? pagewanted = all&_r=0 28

Ctrs. For Disease Control and Prevention, Morbidity and Mortality Weekly Report, *Prepregnancy Contraceptive Use Among Teens with Unintended Pregnancies Resulting in Live Births — Pregnancy Risk Assessment Monitoring System (PRAMS)*, 2004–2008," 61(02); 25-29 (Jan. 20, 2012), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/ mm6102a1.htm?s_cid=mm6102a1_e 31

Duenas, J.L., et al., "Trends in the Use of Contraceptive Methods and Voluntary Interruption of Pregnancy in the Spanish Population During 1997–2007," *Contraception*, January 2011, at 82-87 33

Edgardh, K., et al., "Adolescent Sexual Health in Sweden," 78 *Sexual Transmitted Infections* 352-56 (2002) *available at* http://sti.bmjjournals.com/cgi/content/full/78/5/352 33

Finer, L. B., and S. K. Henshaw, "Disparities in rates of unintended pregnancy in the United States, 1994 and 2001," 38(2) *Perspectives on Sexual & Reprod. Health* 90–96 (2006) *available at* http://www.guttmacher.org/pubs/journals/3809006.html 33

Girma, Sourafel, David Paton, "The Impact of Emergency Birth Control on Teen Pregnancy and STIs," *Journal of Health Economic*, March 2011, at 373-380 33

Glasier, A., "Emergency Contraception," British Medical Journal (Sept 2006): 560-561..... 33

Guttmacher Institute, *Facts on Contraceptive Use in the United States* (June 2010), *available at* http://www.guttmacher.org/pubs/fb_contr_use.html 31

Guttmacher Institute, *Facts on Publicly Funded Contraceptive Services in the United States* (May 2012), *available at* http://www.guttmacher.org/pubs/fb_contraceptive_serv.html 35

HealthCare.Gov, "Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans," (June 14, 2010), *available at* http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html 25, 29

HHS, News Release (January 20, 2012), *available at* http://www.hhs.gov/news/ press/2012pres/01/20120120a.html..... 19

HRSA, "Women's Preventive Services," *available at* http://www.hrsa.gov/womensguidelines..... 4, 5

Institute of Medicine, *The Best Intentions* (1995) *available at* http://books.nap.edu/openbook.

php?record_id=4903&page=64 32

Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* (2011), *available at* http://books.nap.edu/openbook.php?record_id=13181..... 30

Jones, R., J. Darroch and S.K. Henshaw "Contraceptive Use Among U.S. Women Having Abortions," 34 *Perspectives on Sexual and Reproductive Health* 294–303 (2002)..... 31

Laycock, Douglas & Oliver S. Thomas, "Interpreting the Religious Freedom Restoration Act," 73 *Tex. L. Rev.* 209, 224 (1994)..... 30, 36

Mosher WD & Jones J, Use of contraception in the United States: 1982–2008, Vital and Health Statistics, 2010, Series 23, No. 29, at 14 and Table E, *available at* http://www.cdc.gov/NCHS/data/series/sr_23/sr23_029.pdf..... 31

WhiteHouse.gove, "Remarks by the President on Preventive Care" (Feb. 10, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care 19

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Exhibit 1 Affidavit of Gerald D. Chambers

Exhibit 2 Affidavit of Robert W. Chambers

INTRODUCTION

This action arises because Defendants' Health and Human Services Mandate of the Affordable Care Act ("HHS Mandate") violates rights guaranteed to Plaintiffs' by the First Amendment to the United States Constitution and the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb *et seq*. Defendants are mandating that MKC and its owners, GDC and RWC, allow coverage in their workforce health insurance policy for contraception, abortion, and drugs commonly referred to as "life style drugs," in violation of their Catholic faith and other Christian beliefs, which forbid Plaintiffs from participating in, paying for, training others to engage in, or otherwise supporting contraception or the killing of people by abortion.

Defendants' HHS Mandate subjects Plaintiffs to having to defend lawsuits brought against them by the Secretary of Labor, as well as fines and penalties accruing in the amount of more than $240,000.00 per year. Forcing Plaintiffs to choose between their faith and such penalties is a blatant violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ("RFRA"), the First Amendment to the United States Constitution, and the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* Defendants cannot satisfy the strict scrutiny required under the RFRA and these laws.

Plaintiffs are currently faced with imminent harm under Defendants' HHS Mandate. Despite the current availability of contraceptives, abortion, and "life style drugs" through other means, without forcing Plaintiffs to provide them, the Government refuses to consent to this motion and instead fully threatens its penalties. Defendants have already been the subject of a preliminary injunction against the HHS Mandate. *See Legatus, et al*. v. *Sebelius, et al*., No. 12-12061 (E.D. Mich. Oct. 31, 2012); *Domino's Farms Corporation, et al*. v. *Sebelius, et al*., No.

12-15488 (E.D. Mich. Dec. 30, 2012); *American Pulverizer Co., et al*. v. *Dep't of Health & Human Servs, et al*., No. 12-3459 (W.D. Mo. Dec. 20, 2012); *Newland, et al*. v. *Sebelius, et al*., No. 12-1123 (D. Colo. Jul. 27, 2012); and *Tyndale House Publishers, Inc*. v. *Sebelius, et al*., No. 12-1635 (D.D.C. Nov. 16, 2012).

While great legal minds may differ, Plaintiffs contend that immediate injunctive relief is necessary to protect their religious freedom and preserve the status quo that has existed in this country for the last 237 years before the HHS Mandate.

STATEMENT OF FACTS

Plaintiff, M.K. Chambers Company ("MKC"), is a Michigan corporation with a registered office in North Branch, Michigan.[1] Plaintiff, Gerald D. Chambers ("GDC"), is the President of MKC and a 50% shareholder, and Plaintiff, Robert W. Chambers ("RWC"), is the Vice President of MKC and the other 50% shareholder.[2] MKC is family owned and operated and was created 56 years ago by GDC's and RWC's father.[3] GDC and RWC follow the teachings, mission, and values of the Catholic faith, and operate their business in a manner that does not conflict with their Catholic faith and other Christian beliefs.[4]

For decades, GDC and RWC formulated MKC's health insurance policy with Blue Cross/Blue Shield of Michigan, to specifically exclude contraception, abortion, drugs commonly referred to as "life style drugs," and otherwise exempted MKC from paying, contributing, or supporting contraception and abortion for others, or for "life style drugs."[5] GDC and RWC do not believe that contraception or abortion properly constitute health care, and involve immoral

[1] See paragraph 3 of Affidavits of Gerald D. Chambers and Robert W. Chambers, attached as Exhibits 1 and 2, respectively.
[2] See Exs. 1 and 2, ¶¶ 4-5.
[3] See Exs. 1 and 2, ¶ 6.
[4] See Exs. 1 and 2, ¶ 7.
[5] See Exs. 1 and 2, ¶ 8.

practices and the destruction of innocent human life.[6] GDC and RWC formulated their workforce insurance policy with these exclusions in an effort to adhere to the Catholic Church's teachings regarding the immorality of artificial means of contraception and sterilization, and their belief that actions intended to terminate an innocent human life by abortion are gravely sinful.[7] Further, their religious beliefs forbid them from participating in, paying for, training others to engage in, or otherwise supporting contraception or the killing of people by abortion.[8]

GDC and RWC have always managed and operated MKC in a way that reflects the teachings, mission, and values of their Christian faith. For example, the MKC facilities remain closed and do not service any of their customers on Sundays. Additionally, through MKC, GDC and RWC strongly support, financially and otherwise, Catholic fundraisers and other events, and have refused to provide support, financially or otherwise, to events or entities that do not reflect the teachings, mission, and values of the Catholic faith, such as Planned Parenthood.[9]

Sadly, on January 1, 2013 and pursuant to the HHS Mandate, Plaintiffs lost the right to make health care insurance decisions in line with their Catholic views. The Affordable Care Act[10] calls for health insurance plans to provide coverage and "not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines" and directed the Secretary of the United States Department of Health and Human Services, Defendant Sebelius, to determine what would constitute "preventative care." 42 U.S.C. § 300gg-13(a)(4). Defendants United States Health and

[6] See Exs. 1 and 2, ¶ 9.
[7] See Exs. 1 and 2, ¶ 10.
[8] See Exs. 1 and 2, ¶ 11.
[9] See Exs. 1 and 2, ¶ 12.
[10] The Patient Protection and Affordable Care Act, Public Law 111-148, was enacted on March 23, 2010; the Health Care and Education Reconciliation Act of 2010, Public Law 111-152, was enacted on March 30, 2010 (collectively, the Affordable Care Act).

Human Services, United States Department of Treasury, and United States Department of Labor, published an interim final rule under the Affordable Care Act, requiring providers of group health insurance to cover "preventive care" for women as provided in guidelines to be published on a later date.[11] Prior to adopting those guidelines, Defendants accepted public comments. Upon information and belief, a large number of groups filed comments, warning of the potential conscience implications of requiring religious individuals and groups to pay for contraception, abortion, and abortifacients.

On February 15, 2012, Defendant United States Department of Health and Human Services ("HHS") promulgated the Mandate that group health plans include coverage for all Food and Drug Administration-approved contraceptive methods and procedures, patient education, and counseling for all women with reproductive capacity in plan years beginning on or after August 1, 2012 (the "HHS Mandate"). See 45 C.F.R. § 147.130 (a)(1)(iv), as confirmed at 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration (HRSA) Guidelines, (http://www.hrsa.gov/womensguidelines). All FDA-approved contraceptives included contraception, abortion, and abortifacients such as birth-control pills; prescription contraceptive devices, including IUDs; Plan B, also known as the

[11] Defendants directed the Institute of Medicine ("IOM") to compile recommended guidelines describing which drugs, procedures, and services should be covered as preventative care for women. (http://www.hrsa.gov/womensguidelines). IOM invited select groups to make presentations on the preventive care that should be mandated by all health plans. (http://www.nap.edu/openbook.php?record_id=13181&PAGE=217). No religious groups or groups opposing Government-mandated coverage of contraception, abortion, and related education and counseling were invited to present. Defendants adopted the IOM recommendations in full. 76 Fed. Reg. 46621 (Aug. 3, 2011); 45 C.F.R. § 147.130.

"morning-after pill"; and ulipristal, also known as "ella" or the "week-after pill"; and other drugs, devices, and procedures. (http://www.hrsa.gov/womensguidelines).

The Affordable Care Act and the HHS Mandate include a number of exemptions. The allowable factors for receiving exemptions under the Affordable Care Act include: the age of the plan, 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140 (exempting plans that qualify for "grandfathered" status by meeting criteria such as abstaining from plan changes since the date of March 23, 2010); a non-profit company which qualifies as a "religious employer," 45 C.F.R. § 147.130 (a)(iv)(A) and (B) (exempting non-profit companies which adopt certain hiring practices and exist to further the organization's religious doctrine); and individuals of certain religions which disapprove of insurance in its entirety such as the Muslim or Amish religion, 26 U.S.C. § 5000A(d)(2)(A)(i)-(ii) (exempting members of "recognized religious sect or division" that conscientiously object to acceptance of public or private insurance funds). Because Plaintiffs do not fall under any of the above-described exemptions, they are currently forced to pay for, fund, contribute, provide, or support artificial contraception, sterilization, abortion, abortifacients or related education and counseling, in violation of their Constitutional rights and deeply held religious beliefs. See 45 C.F.R. § 147.130 (a)(1)(iv), as confirmed at 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration (HRSA) Guidelines, (http://www.hrsa.gov/womensguidelines).

Because of the HHS Mandate, MKC's workforce insurance carrier has refused to continue writing a policy for MKC, as it has for decades, excluding contraception, abortion, and drugs commonly referred to as "life style drugs." Thus, on January 1, 2013, when MKC's current plan year began, MKC was forced to choose between one of two evils: (1) exercising its

rights under the RFRA and the First Amendment and not offering workforce insurance coverage that includes contraception, abortion, and "life style drugs," or (2) violating its rights and religious beliefs and offering workforce insurance coverage that includes contraception, abortion, and "life style drugs." MKC unwillingly chose to sacrifice its religious beliefs, as opposed to not offering its workforce any insurance coverage at all.

If Plaintiffs choose not to provide insurance to its workforce, Plaintiffs will incur, at minimum, a $2,000 annual fine per employee, of which they have approximately 120 employees. 26 U.S.C. § 4980H.[12] The fines are even more insurmountable if Plaintiffs decide to offer insurance that does not comply with the HHS Mandate. Moreover, if Plaintiffs discontinue providing health insurance, they will face disadvantages in employee recruitment and retention, and their workforce will be forced to seek expensive insurance on the private market.

Plaintiffs wish to simply continue providing health insurance in compliance with their sincere and deeply held religious beliefs, as they have done for decades.[13] Plaintiffs bring this motion for injunctive relief to enjoin the unconstitutional and illegal directives of the HHS Mandate, and to preserve the status quo that has existed in this country for the last 237 years before the HHS Mandate. Currently, Defendants are forcing businesses and organizations which hold sincerely held religious beliefs to violate those beliefs by supplying contraceptive and abortifacient coverage through their workforce insurance plans. Such action blatantly disregards religious freedom and the right of conscience, and is nothing short of irreconcilable with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. ("RFRA"), and the First Amendment.

[12] See Exs. 1 and 2, ¶ 3.
[13] See Exs. 1 and 2, ¶ 8.

ARGUMENT

The standard for issuing a preliminary injunction in this Circuit is well established. In *Connection Distributing Co*. v. *Reno*, 154 F.3d 281, 288 (6th Cir. 1998), the court stated:

> In determining whether or not to grant a preliminary injunction, a district court considers four factors: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

*S*ee also *Hamilton's Bogarts, Inc*. v. *Michigan*, 501 F.3d 644, 649 (6th Cir. 2007). Typically, the reviewing court will balance these factors, and no single factor will necessarily be determinative of whether or not to grant the injunction. *Connection Distributing Co*., 154 F.3d at 288. However, because this case deals with a violation of Plaintiffs' First Amendment rights, the crucial and often dispositive factor is whether Plaintiffs are likely to prevail on the merits. *Id*.

I. PLAINTIFFS' ARE LIKELY TO SUCCEED ON THE MERITS.

It is not surprising that, in our country, founded by individuals who sought refuge from religious persecution, the Supreme Court has succinctly avowed,

> If there is any fixed star in our constitutional constellation, it is that *no official, high or petty*, can prescribe what shall be orthodox in politics, nationalism, *religion*, or other matters of opinion *or force citizens to confess by word or act their faith* therein.

W. Va. State Bd. of Educ. v. *Barnette*, 319 U.S. 624, 642 (1943) (emphasis added). The statement written by Justice Jackson in his majority opinion is considered one of the Court's greatest statements about our fundamental freedoms established by the Bill of Rights. It is upon this backdrop, and resting upon this body of jurisprudence built upon deference to the inalienable freedom of religion, that the constitutionality of the HHS Mandate must be decided.

A. The HHS Mandate violates the Religious Freedom Restoration Act.

Congress enacted the RFRA in response to *Employment Division* v. *Smith*, 494 U.S. 872 (1990), where, in upholding a generally applicable law that burdened the sacramental use of peyote, the Supreme Court held that the First Amendment's Free Exercise Clause did not require the court to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws. *Id*. at 883-90. Congress, by enacting the RFRA three years after the decision in *Smith*, purposefully adopted a statutory rule comparable to the constitutional rule rejected in *Smith*.

The RFRA strictly prohibits the Federal Government from substantially burdening a person's exercise of religion, "even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb-1(a), except when the Government can "demonstrate[] that application of the burden to the person--(1) [furthers] a compelling government interest; and (2) is the least restrictive means of furthering that . . . interest." 42 U.S.C. § 2000bb-1(b). *See also Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (holding that the RFRA applies to the federal government); *Newland, et al*. v. *Sebelius, et al*., 2012 WL 3069154 (D. Colo. Jul. 27, 2012) (granting preliminary injunction from HHS Mandate due to violation of the RFRA).

In its formulation of the RFRA, Congress expressly adopted the compelling interest test of *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). In both cases, the Court "looked beyond broadly formulated interests justifying the general applicability of government mandates, scrutinized the asserted harms, and granted specific exemptions to particular religious claimants." *Gonzales*, 546 U.S. at 431; *see also Yoder*, 406 U.S. at 213, 221, 236; and *Sherbert*, 374 U.S. at 410. In *Sherbert*, the Court held that the State's

denial of unemployment benefits to an employee who refused to work on Saturdays because of her religious beliefs was an impermissible burden on her free exercise of religion because it "force[d] her to choose between following the precepts of her religion and forfeiting 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 404. In *Sherbert*, the court held that the Government could not impose the same kind of burden upon the free exercise of religion as it would impose a fine against noncompliant parties of the law. *Id*. at 402 ("Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit the dissemination of particular religious views.") (internal citations omitted).

In *Yoder*, Amish and Mennonite parents of teenaged children held religious beliefs that prohibited them from sending their children to high school as required by Wisconsin law. *Yoder*, 406 U.S. at 207. Each parent was fined $5 per child for failing to comply with state law for not sending their children to school beyond the eighth grade in accordance with their sincerely held religious belief that "higher learning tends to develop values they reject as influences that alienate man from God." *Id*. at 208-13. The Court held that the impact of Wisconsin law, while recognizing the "paramount" interest in education that the law sought to promote, impermissibly compelled the parents to perform acts undeniably at odds with the fundamental tenets of their religious beliefs. *Id*. at 218, 213, 221; *see also Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961). The Court found that this compulsion "carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Yoder*, 406 U.S. at 218. The same constitutionally forbidden compulsion is before the court in this case.

In accordance with the Supreme Court rulings in *Sherbert* and *Yoder*, and with the plain language of the RFRA expressly enacted by Congress to protect religious freedom, the HHS Mandate substantially burdens Plaintiffs' sincere exercise of religion; it requires Plaintiffs to choose between complying with federal law and violating their deeply held religious beliefs, or disobeying federal law and suffering the consequences. Furthermore, the Government cannot "demonstrate[] 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).

1. Plaintiffs' abstention from providing abortion-inducing drugs in their workforce health insurance plans qualifies as "religious exercise" under the RFRA.

Plaintiffs' formulation of their workforce health insurance plans according to their religious beliefs is the "exercise of religion" under the RFRA. The RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). To refrain from morally objectionable activity is part of the exercise of religion; the Supreme Court has recognized that the "exercise of religion" encompasses a belief that one must avoid participation in certain acts. *See, e.g., Employment Division* v. *Smith*, 494 U.S. 872, 877 (1990) (explaining under the Free Exercise Clause that "the 'exercise of religion' often involves not only belief and profession but the performance of (*or abstention from*) physical acts"). Thus, a person exercises religion by *avoiding* work on certain days (*see Sherbert*, 374 U.S. at 399), or by *refraining* from sending children over a certain age to school (*see Yoder*, 406 U.S. at 208). *See* 42 U.S.C. § 2000bb(b)(1) (incorporating *Sherbert* and *Yoder* into the RFRA). Similarly, a person's religious convictions may compel him to *refrain* from facilitating prohibited conduct by others. *See, e.g. Thomas* v. *Review Bd.*, 450 U.S. 707, 714-16

(1981) (recognizing religious exercise in refusing to "produc[e] or directly aid[] in the manufacture of items used in warfare").

Pursuant to the teachings of the Catholic Church, Plaintiffs' sincerely held religious beliefs require them to abstain from providing or purchasing health insurance coverage for contraception, abortion, abortifacients, or related education and counseling. Plaintiffs' abstention from providing contraceptives and abortion-inducing drugs in their workforce health insurance plans qualifies as "religious exercise" under the RFRA. The HHS Mandate creates Government-imposed coercive pressure on Plaintiffs to promote and otherwise support contraception and the killing of people by abortion, and to purchase health insurance that provides contraception, abortion, and abortifacients—or, in other words, to change or violate their beliefs. By failing to provide an exemption for Plaintiffs' religious beliefs, the HHS Mandate not only forces Plaintiffs to engage in repugnant activity and speech, but exposes Plaintiffs to substantial per employee fines for their religious exercise—roughly $2,000 annually per each of their 120 employees, a fine significantly more severe than the $5 per student fine struck down by the Court in *Yoder*—but also exposes Plaintiffs to substantial competitive disadvantages if they are no longer permitted to offer or purchase health insurance due to their religious beliefs. 26 U.S.C. §§ 4980D & 4980H; *Legatus, et al*. v. *Sebelius, et al*., No. 12-12061 (E.D. Mich. Oct. 31, 2012) (holding Plaintiffs likely to show HHS Mandate substantially burdens religious exercise); see also *Sherbert* at 374 U.S. at 403-04 (finding "a fine imposed against appellant" to be a quintessential burden). The HHS Mandate imposes a substantial burden on Plaintiffs' religious exercise by forcing Plaintiffs to violate their deeply held religious beliefs and the teachings of the Catholic Church.

a. MKC exercises religious beliefs.

In several lawsuits against the HHS Mandate, the Government has argued that a for-profit entity is categorically incapable of exercising religion. This position is flawed on a number of levels. First, MKC is undeniably and thoroughly religious and thus can exercise religious beliefs. It is and has always been managed and operated in a manner that does not conflict with the Catholic faith and other Christian beliefs.[14] For example, the MKC facilities remain closed and do not service any of their customers on Sundays, and, for each of the 56 years of its existence, MKC's health insurance policy has always excluded contraception, abortion, and drugs commonly referred to as "life style drugs." Additionally, MKC strongly supports, financially and otherwise, Catholic fundraisers and other events, and has refused to provide support, financially or otherwise, to events or entities that do not reflect the teachings, mission, and values of the Catholic faith, such as Planned Parenthood.[15]

Second, the "free exercise of religion" in the RFRA, and in the First Amendement that the RFRA explicitly seeks to enhance, has always been recognized as including the exercise of religion in all areas of life, including in business and "profitable" enterprise. There is simply no "business exception" to the RFRA to the First Amendment. The RFRA protects "any" exercise of religion. 42 U.S.C. § 2000bb-2(4); 42 U.S.C. § 2000cc-5(7)(A); *see also United States* v. *Philadelphia Yearly Meeting of the Religious Soc'y of Friends*, 322 F. Supp. 2d 603 (E.D. Pa. 2004) (Quaker Church's refusal to levy its employee's wages was an exercise of religion under the RFRA). The Government's proposal that a business corporation has no capability to exercise religion is "conclusory" and "unsupported." *McClure* v. *Sports and Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985). Both *Stormans, Inc.* v. *Selecky*, 586 F.3d 1109, 1119-20 & n.9

[14] See Exs. 1 and 2, ¶ 7.
[15] See Exs. 1 and 2, ¶ 12.

(9th Cir. 2009), and *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988), recognized that a for-profit and even "secular" corporation could assert free exercise claims.

In several lawsuits against the HHS Mandate, the Government's premise seems to be that one cannot exercise religion while engaging in business. But, judicially, the context of free exercise has usually involved the pursuit of financial gain. In *Sherbert*, 374 U.S. at 399, an employee's religious beliefs were burdened by not receiving unemployment benefits; likewise in *Thomas*, 450 U.S. at 709. In *United States* v. *Lee*, 455 U.S. 252, 257 (1982), the Court held an employer's religious beliefs were sufficiently burdened by paying taxes for workers and required the Government to justify its burden. Many other cases have recognized that business corporations can exercise religion. *See, e.g.*, *Jasniowski* v. *Rushing*, 678 N.E.2d 743, 749 (Ill. App. Dist. 1, 1997) (for profit corporation may assert free exercise claim), *vacated*, 685 N.E.2d 622 (Ill. 1997). *Morr-Fitz, Inc. et al.* v. *Blagojevich*, No. 2005-CH-000495, slip op. at 6–7, 2011 WL 1338081 (Ill. Cir. Ct. 7th, Apr. 5, 2011) (ruling in favor of the free exercise rights of three pharmacy corporations and their owners); *Roberts* v. *Bradfield*, 12 App. D.C. 453, 464 (D.C. Cir. 1898) (recognizing that the right of "free exercise of religion" inheres in "an ordinary private corporation"). *See also Commack Self-Service Kosher Meats, Inc.* v. *Hooker*, 800 F. Supp. 2d 405 (E.D.N.Y. 2011) (analyzing free exercise claims without regard to profit motive); *Maruani* v. *AER Services, Inc.*, 2006 WL 2666302 (D. Minn. 2006) (analyzing religious First Amendment claims by a for-profit business). A court analyzing a free exercise claim does not ask whether the claimant is the right category of person; it asks "whether [the challenged statute] abridges [rights] that the First Amendment was meant to protect." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776 (1978).

Congress has rejected the Government's restrictive view in many ways. The Affordable Care Act itself lets employees and "facilit[ies]" assert religious beliefs for or against "provid[ing] coverage for" abortions generally, without requiring them to be non-profits. 42 U.S.C. § 18023. Congress has repeatedly authorized similar objections, including to contraceptive insurance coverage.[16] These protections cannot be reconciled with the Government's view that anything connected with commerce excludes religion.

Third, the Government has tended to confuse the protection of "any" "exercise of religion" under the RFRA, with narrower categories such as "religious employer" in Title VII employment discrimination. *See* 42 U.S.C. § 2000e–1(a). This argument cannot help the Government in this case. The text Congress used in the RFRA does not limit its protections to a "religious corporation, association, or society" as stated in Title VII. In the RFRA, Congress instead protects the "exercise of religion," period, by anyone. To read a "religious employer" limit into the RFRA would violate the text of the statute. In any event, the RFRA protects "free exercise of religion," which does not turn on whether the plaintiff is a "religious corporation."

Fourth, to the extent that the Government might argue the RFRA only protects religious exercise by "persons," and that persons do not include corporations, this argument contradicts clear Supreme Court precedent. "First Amendment protection extends to corporations," and a First Amendment right "does not lose First Amendment protection simply because its source is a corporation." *See Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310 (2010). In *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the lead

[16] *See, e.g.*, Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, Title VII, Div. C, § 727; *Id.* at Title VIII, Div. C, § 808; *see also* 42 U.S.C. § 300a-7; 42 U.S.C. § 2996f(b)(8); 20 U.S.C. § 1688; 42 U.S.C. § 238n; 42 U.S.C. § 1396u-2(b)(3)(B); 42 U.S.C. § 1395w-22(j)(3)(B); and Pub. L. 112-74, Title V, § 507(d). See also 48 C.F.R. § 1609.7001(c)(7).

plaintiff was an entity rather than a natural person, and the Supreme Court vindicated free exercise rights on behalf of *Church of Lukumi Babalu Aye, **Inc.** v. City of Hialeah*, 508 U.S. 520 (1993) (emphasis added). "[I]t is well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell* v. *Dept. of Social Services*, 436 U.S. 658, 687 (1978). "That corporations are in law, for civil purposes, deemed persons is unquestionable." *United States* v. *Amedy*, 24 U.S. 392, 11 Wheat. 392 (1826). "[C]orporations possess Fourteenth Amendment rights . . . through the doctrine of incorporation, [of] the free exercise of religion." *Primera Iglesia Bautista Hispana of Boca Raton, Inc.* v. *Broward County*, 450 F.3d 1295 (11th Cir. 2006). It must be presumed that when Congress passed the RFRA to build on the First Amendment's protection of free exercise of religion, it was aware of the centuries-old judicial interpretation that corporations are "persons" with constitutional rights. *See Lindahl* v. *Office of Personnel Management*, 470 U.S. 768 (1985) ("Congress is presumed to be aware of an administrative or judicial interpretation . . . ." (quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n. 8 (1975)). If for-profit corporations can have no First Amendment "purpose," this would overturn the Supreme Court's vindication of First Amendment rights for for-profit companies such as the New York Times. *See New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

b. <u>MKC's religious owners can exercise religion under the RFRA</u>.

MKC can and has brought free exercise of religion claims on behalf of not only itself, but its religious owners. Plaintiff, Gerald D. Chambers ("GDC"), is the President of MKC and a 50% shareholder, and Plaintiff, Robert W. Chambers ("RWC"), is the Vice President of MKC and the other 50% shareholder.[17] GDC and RWC follow the teachings, mission, and values of

[17] See Exs. 1 and 2, ¶¶ 4-5.

the Catholic faith, and operate their business in a manner that does not conflict with their Catholic faith and other Christian beliefs.[18] MKC's owners, GDC and RWC, share MKC's religious beliefs against allowing a contraception or abortifacient provision in MKC's health insurance policy. As such, for decades, GDC and RWC formulated MKC's health insurance policy to specifically exclude contraception, abortion, drugs commonly referred to as "life style drugs," and otherwise exempted MKC from paying, contributing, or supporting contraception and abortion for others, or for "life style drugs."[19] GDC and RWC do not believe that contraception or abortion properly constitute health care, and involve immoral practices and the destruction of innocent human life.[20] GDC and RWC formulated their workforce insurance policy with these exclusions in an effort to adhere to the Catholic Church's teachings regarding the immorality of artificial means of contraception and sterilization, and their belief that actions intended to terminate an innocent human life by abortion are gravely sinful.[21] Further, their religious beliefs forbid them from participating in, paying for, training others to engage in, or otherwise supporting contraception or the killing of people by abortion.[22]

Several cases recognize that a corporation can assert religious beliefs on behalf of its owners when the Government requires the corporation to do things in violation of the owners' religious beliefs. This is because a business is an extension of the moral activities of its owners and operators. Both *Stormans*, 586 F.3d at 1119–20 & n.9, and *Townley*, 859 F.2d at 620 n.15, affirm that the owners of a for-profit and even "secular" corporation had their religious beliefs burdened by regulation of that corporation, and that the corporation could sue on behalf of its owners to protect those beliefs. *See also McClure*, 370 N.W.2d at 850. To the extent the

[18] See Exs. 1 and 2, ¶ 7.
[19] See Exs. 1 and 2, ¶ 8.
[20] See Exs. 1 and 2, ¶ 9.
[21] See Exs. 1 and 2, ¶ 10.
[22] See Exs. 1 and 2, ¶ 11.

Government argues that MKC's owners are "free" to abandon their specialty fastener manufacturing enterprise and sell it to a secular company that will comply with the HHS Mandate, such expulsion from a 56 year family business would be an extreme form of Government burden.

2. The HHS Mandate substantially burdens MKC's and its owners' religious exercise.

Not only does the HHS Mandate burden MKC's and its owners' exercise of religious beliefs, but the burden is substantial. The Government "substantially burdens" religious exercise when it puts "'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Thomas*, 450 U.S. at 718.

The HHS Mandate directly orders MKC to provide its workforce with insurance coverage that MKC and its owners consider repulsive. If MKC offers insurance lacking the mandated coverage, it faces a penalty of $100 per day per employee, as well as the prospect of lawsuits by the Defendant Secretary of Labor and by its own plan participants. 26 U.S.C. § 4980D(a), (b) (financial penalties); 29 U.S.C. § 1132(a) (providing for civil enforcement actions by the Secretary of Labor, as well as by plan participants). Alternatively, if MKC ceased offering workforce health insurance altogether, this would not only harm its 120 employees, but MKC would be subjected to an annual assessment of $2,000 per employee. 26 U.S.C. § 4980H. If MKC provides the workforce insurance coverage that the HHS Mandate directly orders MKC to provide, as it has been doing since January 1, 2013, it violates its beliefs and religious integrity.

To call these burdens "substantial" is an understatement. The Supreme Court has struck down religious burdens far less dramatic. For instance, *Sherbert* involved a plaintiff who was not required to work on the Sabbath, but was merely denied unemployment benefits for refusing such work, and the Court deemed this an "unmistakable" substantial pressure on the plaintiff to

abandon that observance. *Sherbert*, 374 U.S. at 404 (reasoning that the law "force[d] [plaintiff] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand," and that "the pressure on her to forego that practice is unmistakable"); *see also Thomas*, 450 U.S. at 717–18 (finding burden on religious exercise "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith. . . thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs"). *Sherbert* and *Thomas* therefore declared even "indirect" pressure to be a substantial burden. *See Thomas*, 450 U.S. at 718 (explaining "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial").

With "direct" pressure, the Supreme Court has been even more exacting. For instance, *Yoder* struck down a *five dollar fine* on Amish parents for not sending their children to high school. *Yoder*, 406 U.S. at 208. The Court reasoned that "[t]he [law's] impact" on religious practice was "not only severe, but inescapable, for the. . . law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218. This exactly describes the HHS Mandate on its face; it "affirmatively compels" MKC, under threat of severe consequences—lawsuits by the Defendants, fines, regulatory penalties, a prohibition on providing employee health benefits, competitive disadvantage—"to perform acts undeniably at odds with the fundamental tenets of their religious beliefs." *Yoder*, 406 U.S. at 218. MKC could avoid this steep price, of course, by abandoning its religious convictions about participating in activities it believes destructive of human life, but, it is black letter law that "[a] substantial burden exists when government action

puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs[.]'" *Thomas*, 450 U.S. at 718; *see also Lee*, 455 U.S. at 254 ($27,000 penalty).

Defendants themselves have acted as if they understand this kind of burden. The HHS Mandate contains an exemption for certain churches and religious orders, in order to "take[] into account the effect on the religious beliefs of certain religious employers." 76 Fed. Reg. 46623. And both Defendant Sebelius and President Obama have publicly recognized that the Mandate burdens religious believers. In her January 20, 2012 announcement previewing the one-year safe harbor, Secretary Sebelius stated that the extension "strikes the appropriate balance between respecting religious freedom and increasing access to important preventative services."[23] Likewise, in his February 10, 2012 press conference President Obama acknowledged that religious liberty is "at stake here" because some institutions "have a religious objection to directly providing insurance that covers contraceptive services."[24] The President explained that this religious liberty interest is why "we originally exempted all churches from this requirement." Finally, the basic premise of the Defendants' most recent rule-making on the Mandate is to explore alternate insurance arrangements that would avoid burdening religious organizations' consciences. *See* 77 Fed. Reg. 16501, 16503. These statements candidly acknowledge that coercing religious objectors substantially burdens their religious exercise.[25]

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[23] The Secretary's statement regarding the one-year extension can be found at: http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited April 24, 2013).

[24] A transcript of the President's remarks is available at http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care (last visited April 24, 2013).

[25] Congress has elsewhere recognized the need to accommodate the same burden. *See, e.g.*, Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, Title VII, Div. C, § 727 (protecting religious health plans in the federal employees' health benefits

The United States District Court for the District of Colorado ruled that the HHS Mandate threatens a substantial burden on the religious beliefs of a for-profit company run by religious believers, such that a preliminary injunction is warranted. *Newland, et al*. v. *Sebelius, et al*., No. 12-1123 (D. Colo. Jul. 27, 2012). A court in Missouri disagreed, however, and accepted the Government's argument that health insurance provision of abortion-inducing pills, contraception or sterilization is not a substantial burden. *O'Brien* v. *U.S. Dep't of Health & Human Srvs.*, 2012 WL 4481208 (E.D. Mo. 2012). The *O'Brien* decision, however, is both incorrect and inapplicable to MKC.

In *O'Brien*, the court said that payment into a health insurance plan that covers objectionable practices is merely "indirect financial support of a practice," in contrast to "directly and inevitably prevent[ing] plaintiffs from acting in accordance with their religious beliefs." *Id.* at *6. This is not factually true regarding MKC, because, while MKC may be paying an insurance company and not directly paying for objectionable items itself, the coverage of contraceptive and abortifacients itself— not merely use—is a violation of Plaintiffs' religious beliefs.[26] More fundamentally, *O'Brien* is an impermissible judicial decision of moral theology; a determination that promotion of contraceptives and abortifacients is morally acceptable if it is not too proximate. The Supreme Court rejected the same attempt in *Thomas*, where the Government deemed the armament manufacturing activity to which plaintiff objected "sufficiently insulated" from his objection to war. 450 U.S. at 715. "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs . . . ." *Id.*

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program from being forced to provide contraceptive coverage); *id.* at Title VIII, Div. C, § 808 (affirming that the District of Columbia must respect the religious and moral beliefs of those who object to providing contraceptive coverage in health plans).

[26] See Exs. 1 and 2, ¶ 11.

O'Brien likewise contradicts *Lee*, which explicitly held that the for-profit religious plaintiff had met its showing to establish a sufficient burden for a free exercise of religion claim. 455 U.S. at 257. In doing so, the Court rejected the Government's attempt to insist that despite the plaintiff's sincerity of beliefs, there was no substantial burden on "the integrity of the Amish religious belief or observance." *Id.* Instead the Supreme Court found the burden sufficiently "interferes with the free exercise rights of the Amish." *Id.* In *Lee*, the Court said that determining if a burden sufficiently violates a faith, in order to satisfy a free exercise claim, is an interpretation of faith that is "not within 'the judicial function and judicial competence'" *Id.* (quoting *Thomas*, 450 U. S. at 716). The *O'Brien* court's attempt to judge between different levels of moral culpability is incompatible with the Supreme Court's definition of substantial burden, by which it is not a measure of religious beliefs, but is a measure of the "pressure" the Government applies against beliefs. *Thomas*, 450 U.S. at 718. As explained above, the HHS Mandate here explicitly orders a violation of beliefs and imposes intense penalties as pressure to do so.

The HHS Mandate here is even more proximate than the substantial burden found in *Lee*, because the Plaintiffs here must provide objectionable coverage directly to other private citizens, whereas in *Lee* they sent the money to a multi-trillion dollar budget in Washington. *O'Brien* constrains free exercise to "ritual," the "Sabbath," and child-rearing, but allows the Government to coerce believers to help other people engage in objectionable activities. *O'Brien*, 2012 WL 4481208 at *6. This idea severely constricts the First Amendment and the RFRA (which protects "any" free exercise of religion, not merely freedom of worship). Instead, *Lee* requires that the Court recognize a sufficient burden and apply the applicable scrutiny level, which is strict scrutiny under the RFRA and *O Centro*.

The Government is also foreclosed from arguing that merely because a corporation shields its owners from liability, there is no religious burden on the owners. That conclusion does not follow. Protecting an owner from liability is merely one characteristic of a business corporation, and it is not the morally relevant one here. MKC's religious owners have adopted beliefs that make it immoral for them to implement the HHS Mandate's commands through the entity they own. This is why *Stormans* and several other cases concluded, matter-of-factly, that a Government burden on a business corporation is a burden on its close holding family owners and directors. 586 F.3d at 1119–20; *McClure*, 370 N.W.2d at 850; *Jasniowski*, 678 N.E.2d at 749; *Morr-Fitz, Inc.*, No. 2005-CH-000495, slip op. at 6–7. Liability protection is not a talisman by which the Government may trample on the religious beliefs of business owners.

3. The HHS Mandate cannot satisfy strict scrutiny.

It is Defendants, not Plaintiffs, who must demonstrate both a compelling interest and their use of the least restrictive means before this Court, even at the preliminary injunction stage. *Gonzales*, 546 U.S. at 428-30. *See also Newland, et al*. v. *Sebelius, et al*., No. 12-1123 (D. Colo. Jul. 27, 2012) ("The initial burden is borne by the party challenging the law. Once that party establishes that the challenged law substantially burdens her free exercise of religion, the burden shifts to the government to justify that burden. The nature of this preliminary injunction proceeding does not alter these burdens."). Defendants cannot establish that their coercion of MKC is "in furtherance of a compelling governmental interest." The RFRA, with "the strict scrutiny test it adopted," *O Centro Espirita*, 546 U.S. at 430, imposes "the most demanding test known to constitutional law." *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997). A compelling interest is an interest of "the highest order," *Lukumi*, 508 U.S. at 546, and is implicated only by

"the gravest abuses, endangering paramount interests," *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Defendants cannot propose such a generalized interest "in the abstract," but must show a compelling interest "in the circumstances of this case" by looking at the particular "aspect" of the interest as "addressed by the law at issue." *Cal. Democratic Party* v. *Jones*, 530 U.S. 567, 584 (2000); *O Centro Espirita*, 546 U.S. at 430–32 (RFRA's test can only be satisfied "through application of the challenged law 'to the person'—the particular claimant"); *see also Lukumi*, 508 U.S. at 546 (rejecting the assertion that protecting public health was a compelling interest "in the context of these ordinances"). The Government must "specifically identify an 'actual problem' in need of solving" and show that coercing MKC is "actually necessary to the solution." *Brown* v. *Entm't Merchs. Ass'n*, 564 U.S. ___; 131 S. Ct. 2729, 2738 (June 27, 2011). If Defendants' "evidence is not compelling," they fail their burden. *Id.* at 2739. To be compelling, Defendant's evidence must show not merely a correlation but a "caus[al]" nexus between their HHS Mandate and the grave interest it supposedly serves. *Id.* The Government "bears the risk of uncertainty . . . ambiguous proof will not suffice." *Id.*

Defendants' interest in coercing MKC to provide coverage of abortifacients is not compelling. In other cases the Government has attempted to identify two interests—women's health and equality, by reducing unintended pregnancy—to justify the HHS Mandate under the RFRA. But these interests are generic and abstract. In *O Centro Espirita*, the Court held that evidence, showing that Schedule I controlled substances were "extremely dangerous," was insufficient, and that "categorical" support could not meet the Government's burden under the RFRA. 546 U.S. at 432.

The simple fact is that, even if contraceptives and abortifacient drugs are assumed to provide health and equality to women, Defendants have not shown a compelling interest to deliver those benefits by means of coercing MKC itself. As discussed below, the Government already delivers and subsidizes contraceptives and abortifacients to women and could do so here as well, without forcing MKC to do it.

a. Defendants cannot identify a compelling interest.

The most striking obstacle to Defendants' assertion of a compelling interest is that the Government itself has voluntarily omitted 191 million people from the Mandate. *Newland, et al.* v. *Sebelius, et al.*, No. 12-1123 (D. Colo. Jul. 27, 2012). This amounts to nearly two-thirds of the nation, and is being offered by the Government for secular reasons. But Defendants still refuse to exempt MKC.

The HHS Mandate does not apply to thousands of plans that are "grandfathered" under the Affordable Care Act. See 76 Fed. Reg. 46623 & n.4. Also, the HHS Mandate does not apply to members of a "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds. 26 U.S.C. §§ 5000A(d)(2)(a)(i) and (ii). And, the HHS Mandate exempts from its requirements "religious employers," defined as churches or religious orders that primarily hire and serve their own adherents and that have the purpose of inculcating their values. 76 Fed. Reg. 46626. The Government has decided that employers in any of these categories simply do not have to comply with the HHS Mandate.

These are massive exemptions that cannot coexist with a compelling interest against MKC. "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 520. Defendants cannot claim a "grave" or "paramount" interest to impose the HHS Mandate on

MKC or other religious objectors, while allowing the identical "appreciable damage" to 191 million people. No compelling interest exists when the Government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Id*. at 546–47. The exemptions to the HHS Mandate "fatally undermine[] the Government's broader contention that [its law] will be 'necessarily . . . undercut'" if MKC is exempted too. *O Centro Espirita*, 546 U.S. at 434.

Defendants' immense grandfathering exemption has nothing to do with a determination that those 191 million people do not need contraceptive coverage, whereas MKC's employees somehow do. The exemption was instead a purely political maneuver to garner votes for the Affordable Care Act, by letting "President Obama ma[k]e clear to Americans that 'if you like your health plan, you can keep it.'"[27] The grandfathering rule is in no way temporary. There is no sunset on grandfathering status in the Affordable Care Act or its regulations. Instead, a plan can keep grandfathered status in perpetuity, even if it raises fixed-cost employee contributions and, for several items, even if the increases exceed medical inflation plus 15% every year. *Id.* The Government repeatedly calls it a "right" for a plan to maintain grandfathered status. See 75 Fed. Reg. 34538, at 34540, 34558, 34562, & 34566.

Notably, grandfathered plans *are* subject to a variety of mandates under the Affordable Care Act: no lifetime limits on coverage; extension of dependent coverage to age 26; no exclusions for children with pre-existing conditions; and others.[28] But Congress deemed the HHS Mandate in this case *not important enough* to impose it on grandfathered plans.

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[27] HHS, HealthCare.Gov, "Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans," *available at* http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (last visited April 24, 2013).

[28] HealthCare.Gov, *supra*.

Defendants therefore contradict the text of the Affordable Care Act when they take a litigation position, contrary to Congress, that the HHS Mandate of contraceptive and abortifacient coverage is an interest "of the highest order."

The flaw of Defendants' supposed compelling interest is even more fatal here because MKC is a large employer of 120 employees, and, according to Defendants, "[m]ost of the 133 million Americans with employer-sponsored health insurance through large employers will maintain the coverage they have today." *Id.* In other words, Defendants have voluntarily excluded most Americans situated alongside the employees of MKC. They cannot demonstrate they have a paramount interest to force it to comply in violation of its beliefs. Defendants are completely content to leave 2/3 of the nation's women without "health and equality" flowing from this HHS Mandate. Yet they would insist those same interests can pass the most demanding test known to constitutional law. They cannot. If the Government can toss aside such a massive group of employees for political expediency, their "interest" in mandating cost-free birth control coverage cannot possibly be "paramount" or "grave" enough to justify coercing MKC to violate its and its owners' religious beliefs. *See O Centro Espirita*, 546 U.S. at 434 ("Nothing about the unique political status of the [exempted peoples] makes their members immune from the health risks the Government asserts").

In *O Centro Espirita*, the Supreme Court held that no compelling interest exists behind a law that has a much more urgent goal—regulating extremely dangerous controlled substances—and far fewer exemptions than the broad swath of omissions in the HHS Mandate. In *O Centro Espirita*, the Court dealt with the Controlled Substances Act's prohibition on "all use," with "no exception," of a hallucinogenic ingredient in a tea along with other Schedule I substances. 546 U.S. at 423, 425. But because elsewhere in the statute there was a narrow religious exemption for

Native American use of a different substance, peyote, the Court held that the Government could not meet its compelling interest burden even in its generalized interest to regulate Schedule I substances as applied to the plaintiffs in that case. *Id.* at 433. Even more so here, the Government cannot satisfy its burden by pointing to general health benefits of contraception. Halting the use of extremely dangerous drugs is far more urgent than forcing religious objectors to provide contraception coverage. Defendants' grant of secular and religious exemptions for millions of other employees betrays any alleged compelling interest they may have in forcing MKC to comply with the HHS Mandate against their religious beliefs.

The Government cannot satisfactorily explain why employees of MKC must be subject to the HHS Mandate, while the Government itself voluntarily omits 191 million people. The Government has no data showing the number of religious employers objecting to the HHS Mandate, but that total number of employees could only constitute a fraction of a percent of the tens of millions of employees the Government is voluntarily omitting. This is a quintessential illustration of *Brown v. Entm't Merchs.*'s insistence that the "government does not have a compelling interest in each marginal percentage point by which its goals are advanced." 131 S.Ct. at 2741. As in *O Centro*, where Government exclusions apply to "hundreds of thousands" (here, millions), the RFRA requires "a similar exception for the 130 or so" and even less affected here. 546 U.S. at 433.

The HHS Mandate on its face is also inconsistent with a compelling interest rationale. Defendants have used their discretion to write a "religious employer" exemption into the HHS Mandate for certain churches. 76 Fed. Reg. 46626. But there is no nexus between the HHS Mandate exemption's criteria and Defendants' alleged interest, such that a compelling interest exists for non-exempt religious entities like MKC but is absent for exempt ones like churches.

On the contrary, Defendants have simply engaged in political line-drawing based on what the President's political base will accept, weighed against how much election-year resistance he may encounter.[29] Under the RFRA, MKC cannot be denied a religious exemption on the premise that Defendants can pick and choose between religious objectors. *See O Centro Espirita*, 546 U.S. at 434 (since the law does "not preclude exceptions altogether; RFRA makes clear that it is the obligation of the courts to consider" other exemptions).

b. <u>There is no "business exception" to the RFRA's compelling interest test</u>.

In other cases, the Government, referencing *United States* v. *Lee*, 455 U.S. 252, 257 (1982), has attempted to characterize the RFRA's scrutiny as not being very strict in commercial contexts. But *O Centro Espirita* does not allow the Court to apply a "strict scrutiny lite" for a business RFRA claim, or indeed for any RFRA claim. "[T]he compelling interest test" of "RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test," such as in speech cases. 546 U.S. at 430. *O Centro* explicitly confined *Lee* to its context of a tax that was nearly universal, and the court did not allow the Government to claim "that a general interest in uniformity justified a substantial burden on religious exercise." *Id.* at 435.

Lee does discuss "statutory schemes which are binding on others in that activity." 455 U.S. at 261. But the HHS Mandate here is emphatically not "binding on others in th[e] activity"

[29] The New York Times describes in great detail the politically-driven deliberation that led to the Mandate. Helene Cooper & Laurie Goodstein, "Rule Shift on Birth Control Is Concession to Obama Allies" (Feb. 10, 2012), *available at* http://www.nytimes.com/2012/02/11/health/policy/obama-to-offer-accommodation-on-birth-control-rule-officials-say.html?pagewanted=all&_r=0 (last visited April 24, 2013).

of large employers providing insurance. Whereas *Lee*'s tax contained only a tiny exemption for some Amish, the HHS Mandate here excludes:

- 191 million Americans in "grandfathered" plans, that are not subject to the HHS Mandate, including "most" large employers, of which MKC is one. "Keeping the Health Plan You Have," *supra* note 27.

- Members of certain objecting religious groups need not carry insurance at all. *See, e.g.*, 26 U.S.C. § 5000A(d)(2)(a) ("recognized religious sect or division"); § 5000A(d)(2)(b)(ii) ("health care sharing ministries").

- Small employers (*i.e.*, those with fewer than 50 employees) can drop employee insurance with no Government penalty. 26 U.S.C. § 4980H(c)(2).

- Churches, church auxiliaries, and religious orders enjoy a blanket exemption from the HHS Mandate. 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012).

The HHS Mandate is many things, but "uniform" is not one of them. *O Centro* was impatient with the Government's uniformity argument:

> The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rule[s] of general applicability."

546 U.S. at 436. *Lee*'s universal tax is not comparable to the Mandate and its exceptions.

The law upheld in *Lee* was a tax to raise Government funding. Governments cannot function without taxes. *Lee* ruled that if exemptions were allowed "[t]he tax system could not function." 455 U.S. at 260. But the United States has functioned for 237 years without a federal mandate compelling MKC or anyone else to cover contraceptives and abortifacients in insurance. The HHS Mandate is not a "government program," as discussed in *Lee*. It requires MKC to give contraceptives and specific abortifacient services to private citizens, not to pay money to the Government for use in the Government's own activities. The HHS Mandate is private, not governmental. In fact, the Government has decided *not* to pursue its goals with a Government

program offering contraception—of which many exist—but instead to conscript religiously objecting citizens.

Lee does not apply the scrutiny test applicable under the RFRA. *Lee* was a precursor to *Smith*, which expanded on *Lee* to adopt the standard that the RFRA affirmatively rejected. The RFRA specifies that it is codifying its test "as set forth in *Sherbert*, 374 U.S. 398 and Wisconsin v. *Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb. The RFRA omits *Lee* from this list. *Lee* itself never says it is requiring a "compelling interest" or "least restrictive means." But *Sherbert* and *Yoder did* apply the RFRA's test. *Sherbert* involved a plaintiff's bid for financial gain, despite the Government's generally applicable law. As scholars note:

> The standard thus incorporated [by RFRA] is a highly protective one. . . . The cases incorporated by Congress explain "compelling" with superlatives: "paramount," "gravest," and "highest." Even these interests are sufficient only if they are "not otherwise served," if "no alternative forms of regulation would combat such abuses". . . .

Douglas Laycock and Oliver S. Thomas, "Interpreting the Religious Freedom Restoration Act," 73 *Tex. L. Rev.* 209, 224 (1994).

c. <u>The Government cannot meet its evidentiary burden</u>.

The Government also fails the compelling interest test because its "evidence is not compelling." *Brown* v. *Entm't Merchs.*, 131 S. Ct. at 2739. It points only to generic interests, marginal benefits, correlation but not causation, and uncertain methodology. The Institute of Medicine Report on which the Mandate is based ("2011 IOM"),[30] does not demonstrate the Government's conclusions. At best, its studies argue for a generic health benefit from contraception. But the HHS Mandate's evidence must be tailored to the effect of exempting

[30] Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* (2011), *available at* http://books.nap.edu/openbook.php?record_id=13181 (last visited April 25, 2013).

MKC, not to generic health interests. *O Centro*, 546 U.S. at 430–31. Likewise the Government cites no pandemic of unwanted births at MKC or similar entities, which cause catastrophic consequences for health and employees. It could be that employees of such entities experience zero negative health consequences absent the HHS Mandate, for any number of reasons. At best, Defendants do not know. But Defendants "bear the risk of uncertainty," *Brown*, 131 S. Ct. at 2739. Speculation and generalizations will not suffice.

Nowhere does the IOM cite evidence showing that the HHS Mandate would even increase contraception use. Instead, the IOM's sources show: 89% of women avoiding pregnancy are already practicing contraception;[31] among the other 11%, lack of access is not a statistically significant reason why they do not contracept;[32] even among the most at-risk populations, cost is not the reason those women do not contracept.[33] The studies cited at 2011

[31] The Guttmacher Institute, "Facts on Contraceptive Use in the United States (June 2010)," *available at* http://www.guttmacher.org/pubs/fb_contr_use.html (last visited April 25, 2013).

[32] Mosher WD and Jones J, "Use of contraception in the United States: 1982–2008," Vital and Health Statistics, 2010, Series 23, No. 29, at 14 and Table E, *available at* http://www.cdc.gov/NCHS/data/series/sr_23/sr23_029.pdf (last visited April 25, 2013).

[33] R. Jones, J. Darroch and S.K. Henshaw "Contraceptive Use Among U.S. Women Having Abortions," *Perspectives on Sexual and Reproductive Health* 34 (Nov/Dec 2002): 294–303 (*Perspectives* is a publication of the Guttmacher Institute). The Centers for Disease Control released a study this year showing that even among those most a risk for unintended pregnancy, only 13% cite cost as a reason for not using contraception. CDC, "Prepregnancy Contraceptive Use Among Teens with Unintended Pregnancies Resulting in Live Births — Pregnancy Risk Assessment Monitoring System (PRAMS), 2004–2008," Morbidity and Mortality Weekly Report 61(02);25-29 (Jan. 20, 2012), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6102a1.htm?s_cid=mm6102a1_e (last visited April 25, 2013).

IOM pp. 109 do not show that cost leads to non-use generally, but relate only to women switching from one contraception method to another.

The Government's evidence also does not apply universally. Women who suffer "unintended pregnancy" are primarily young, unmarried, and low income. 2011 IOM at 102. MKC's workforce has jobs and health insurance. The Government asserts that women incur more preventive care costs generally, citing 2011 IOM at 19–20. But the IOM does not say if those studies specifically include contraception as part of "preventive care." Nor, if they do, does the IOM say what percentage of the preventive care gap contraception accounts for.

The Government cannot show that the HHS Mandate would prevent negative health consequences. "Nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology." *Brown* v. *Entm't Merchs.*, 131 S. Ct. at 2739 (quotation marks omitted). The IOM admits that "research is limited" regarding negative outcomes from unintended pregnancy. 2011 IOM at 103. The IOM therefore cites its own 1995 report, which similarly emphasizes the fundamental flaws in determining which pregnancies are "unintended," and "whether the effect is caused by or merely associated with unwanted pregnancy."[34] The 1995 IOM admits that no causal link exists for most of its alleged factors. This makes sense, since the intendedness or unintendedness of a pregnancy cannot itself physiologically change its health effect. Thus, a delay in seeking prenatal care upon unintended pregnancy is "no longer statistically significant" for women not

[34] Institute of Medicine, *The Best Intentions* (1995) ("1995 IOM"), available at http://books.nap.edu/openbook.php?record_id=4903&page=64 (last visited April 25, 2013).

already disposed to delay or who have a "support network."[35] The IOM's recital of possible health consequences shows that the evidence is not compelling:

- The alleged increase in smoking and drinking drops significantly where studies control for other causes; while data on domestic violence and depression "provide little systematic assessment" and merely "suggest" association (not causation).[36]

- The alleged reduction in low birth weight and prematurity overlooks the fact that, like other cited factors, these are merely "associated" with, not caused by, unintended pregnancy (1995 IOM at 70; 2011 IOM at 103). Several studies show no connection between it and pregnancy-spacing in the U.S.[37] And several studies show that low birth weight is associated not with contraception but with shorter pregnancy *intervals*, further distancing itself from a contraception connection. 2011 IOM at 103.

- Evidence is not compelling that the HHS Mandate against MKC would certainly cause pregnancy-prevention. In 48% of all unintended pregnancies, contraception was used.[38] Multiple peer-reviewed studies demonstrate that there is no scholarly consensus that increased contraception use reduces either abortion (which occurs upon pregnancy) or sexually transmitted diseases.[39]

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[35] *Id.* at 68.
[36] *Id.* at 69, 73, 75.
[37] *Id.* at 70-71.
[38] Finer, L. B., and S. K. Henshaw, "Disparities in rates of unintended pregnancy in the United States, 1994 and 2001," 38(2) *Perspectives on Sexual & Reprod. Health* 90-96 (2006) *available at* http://www.guttmacher.org/pubs/journals/3809006.html (last visited April 25, 2013).
[39] K. Edgardh, et al., "Adolescent Sexual Health in Sweden," Sexual Transmitted Infections 78 (2002): 352-6 (http://sti.bmjjournals.com/cgi/content/full/78/5/352); Sourafel Girma, David Paton, "The Impact of Emergency Birth Control on Teen Pregnancy and STIs," Journal of Health Economic, (March 2011): 373-380; A. Glasier, "Emergency Contraception," British Medical Journal (Sept 2006): 560-561; 37 J.L. Duenas, et al., "Trends in the Use of Contraceptive Methods and Voluntary Interruption of Pregnancy in the Spanish Population During 1997-2007," Contraception (January 2011): 82-87.

Notably, no evidence shows that the HHS Mandate is the only method to provide the items in question. MKC suggests that such evidence would not be possible, since Government-provided contraceptives and abortifacients are just as free and effective as any other kind.

d. Defendants cannot show that the HHS Mandate is the least restrictive means of furthering their interests.

Even if a compelling interest exists, the Government cannot possibly show that the HHS Mandate against MKC is "the least restrictive means of furthering" it under 42 U.S.C. 2000bb-1. In weighing whether the Government applies the least restrictive means in the HHS Mandate, a court in this District has already found that, "The cost to Plaintiffs appears provably substantial. The cost to the Government appears provably small." *Legatus, et al.* v. *Sebelius, et al.*, No. 12-12061 (E.D. Mich. Oct. 31, 2012). The fact that the Government could subsidize contraception itself to give it to employees at exempt entities, and that it already does so on a wide scale, shows that the Government fails the RFRA's least restrictive means requirement. Defendants bear the burden to show both of these elements—compelling interest and least restrictive means—including at the preliminary injunction stage. *O Centro Espirita*, 546 U.S. at 428–30.

"[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, [the Government] may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Johnson* v. *City of Cincinnati*, 310 F.3d 484, 503 (6th Cir. 2002) (quoting *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1971)). Strict scrutiny requires a "serious, good faith consideration of workable . . . alternatives that will achieve" the alleged interests. *Grutter* v. *Bollinger*, 539 U.S. 306, 339 (2003). "[W]ithout some affirmative evidence that there is no less severe alternative," the HHS Mandate cannot survive the RFRA's requirements. *Johnson*, 310 F.3d at 505.

Defendants fail the least restrictive means test because the Government could, if the political will existed, achieve its desire for free coverage of birth control *by providing that benefit itself*. Rather than coerce MKC to provide contraceptive and abortifacient coverage in their workforce insurance plan, the Government could possibly create its own "contraceptive and abortifacient insurance" plan covering the items to which MKC objects, and then allow free enrollment in that plan for whomever the Government seeks to cover. Or the Government could directly compensate providers of contraceptives and abortifacients. Or the Government could offer tax credits or deductions for contraceptives and abortifacient purchases. Or the Government might impose a mandate on the contraceptive and abortifacient manufacturing industry to give its items away for free.[40] These and other options could fully achieve Defendants' goal while being less restrictive of MKC's beliefs. There is no essential need to coerce MKC to provide the objectionable coverage itself.

Defendants cannot deny that the Government could pursue its goal more directly. This conclusion is not only dictated by common sense, but is also proven because the federal Government and many states already directly subsidize birth control coverage for many citizens through Title XIX (Medicaid) and Title X (Family Planning Services) funding, among others.[41] Thus the Court's RFRA inquiry could end here: the HHS Mandate is not the least restrictive

[40] And by virtue of Defendants' recent attempts to quell political backlash by claiming they may create an "accommodation" for some additional religious entities (but still not for Plaintiffs), Defendants are necessarily admitting that the HHS Mandate is not the least restrictive means to achieve their goals. See 77 Fed. Reg. 16501–08 (Mar. 21, 2012).

[41] See *Facts on Publicly Funded Contraceptive Services in the United States* (Guttmacher Inst. May 2012) (citations omitted), *available at* http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited April 25, 2013).

means of furthering Defendants' interest. Other options may be more difficult to pass as a political matter (which further illustrates the public's disbelief that the HHS Mandate's interest is "compelling"). Indeed the Affordable Care Act itself does not require the HHS Mandate. 42 U.S.C. § 300gg-13(a)(4). But political difficulty does not exonerate the HHS Mandate's burdens on Plaintiffs' religious beliefs, nor does it allow the HHS Mandate to pass RFRA's strict scrutiny. The availability of many alternative methods fatally undermines Defendants' burden under the RFRA and the HHS Mandate from applying to MKC.

The Government cannot propose a watered-down least restrictive means test. The RFRA requires the HHS Mandate to be "the least restrictive means," not the least restrictive means among only what the Government wants to select. In *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), the Supreme Court required alternative means instead of fundamental rights violations. There, North Carolina sought to curb fraud by requiring professional fundraisers to disclose during solicitations how much of the donation would go to them. 487 U.S. at 786. Applying strict scrutiny, the Supreme Court declared that the state's interest could be achieved by publishing the same disclosures itself online, and by prosecuting fraud. *Id.* at 799–800. Although these alternatives would be costly, less directly effective, and a restructuring of the governmental scheme, strict scrutiny demanded they be prioritized. *Id.* Here, the RFRA similarly requires full consideration of other ways the Government can and does provide women free contraceptives and abortifacients. "The lesson" of the RFRA's pedigree of caselaw "is that the Government must show something more compelling than saving money." Laycock at 224.

In *Newland*, the Government attempted to argue that it has an alleged need to impose the HHS Mandate within the employer-based insurance market. But this fails the compelling

interest/least restrictive means test because it *redefines the Government's interest* from securing health and equality to accomplishing those goals in a specific way. The Government has zero evidence, much less compelling evidence, that it has a "paramount" and "grave" need to achieve its alleged health and equality interests *by coercion of* MKC, instead of by providing contraceptives and abortifacients itself. The Government does not even have a hint of evidence that its interests would *not* be served if the Government itself provided the contraceptives and abortifacients it desires. In *Newland,* the court stated, "Defendants have failed to adduce facts establishing that government provision of contraception services will necessarily entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventative health care coverage to women." *Newland, et al*. v. *Sebelius, et al*., 2012 WL 3069154 (D. Colo. Jul. 27, 2012).

Furthermore, the Government cannot possibly show that even if all the women in MKC's plan received the Mandated items free from the Government, that they would *still* suffer adverse health consequences and an inability to be free from work-interrupting pregnancy, solely because the Mandated items have not been delivered *by* their religiously objecting employers, but by the Government's coverage. "[T]he Government has not offered evidence demonstrating" compelling harm from an alternative that is available and less restrictive of religion. *O Centro,* 546 U.S. at 435–37.

The HHS Mandate substantially burdens the religious exercise of MKC and its owners, and Defendants fail strict scrutiny. MKC has a likelihood of success under its RFRA claim.

B. The HHS Mandate violates the First Amendment to the United States Constitution, Free Exercise Clause.

In addition to violating the RFRA, the HHS Mandate violates the Free Exercise Clause because it is not "neutral and generally applicable." *Lukumi*, 508 U.S. 520 at 545 (citing *Smith,*

494 U.S. at 880). When a law burdens religious exercise because it is not actually neutral or generally applicable it must be "justified by a compelling governmental interest" and be "narrowly tailored to advance that interest." *Id*. at 531-32 (citing *Employment Div., Dep't of Human Res. of Ore*. v. *Smith*, 494 U.S. 872 (1990)). As discussed above, the Government cannot meet strict scrutiny.

The HHS Mandate is not neutral on its face because it explicitly discriminates among religious organizations on a religious basis. It thus fails the most basic requirement of facial neutrality. *See, e.g., Lukumi*, 508 U.S. at 533 (explaining that "the minimum requirement of neutrality is that a law not discriminate on its face"). Indeed, the HHS Mandate is a more patent violation of neutrality than the ordinances unanimously struck down in *Lukumi*, which involved ostensibly neutral animal cruelty laws structured to target religiously-motivated practices only. By contrast, on its face, the religious employer exemption to the HHS Mandate divides religious objectors into favored and disfavored classes, forgetting *Lukumi*'s warning that "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Lukumi*, 508 U.S. at 533.

The religious employer exemption protects the consciences only of *certain* religious bodies, which it defines with reference to their internal *religious* characteristics. Namely, it exempts only those organizations whose "purpose" is to inculcate religious values; who "primarily" employ and serve co-religionists; and who qualify as churches or religious orders under the tax code. *See* 45 C.F.R. § 147.130(a)(iv)(B)(1)–(4). These criteria openly do what *Lukumi* says a neutral law cannot do – refer to religious qualities without any discernible secular reason. *Lukumi*, 508 U.S. at 533. There is no conceivable secular purpose, for instance, in limiting conscience protection to religious groups that "primarily serve" co-religionists while

denying it to those who serve persons regardless of their faith. These criteria practice religious "discriminat[ion] on [their] face" and therefore trigger strict scrutiny. *Lukumi*, 508 U.S. at 533; *cf. Univ. of Great Falls* v. *NLRB*, 278 F.3d 1335, 1337 (D.C. Cir. 2001) (rejecting "substantial religious character" test for NLRB jurisdiction as contrary to both the Free Exercise and Establishment Clauses because it would effectively exempt only "religious institutions with hard-nosed proselytizing, … that limit their enrollment to members of their religion") (relying on *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979)).

In addition to not being neutral on its face, the HHS Mandate is not generally applicable. A law is not generally applicable if it regulates religiously-motivated conduct, yet leaves unregulated similar secular conduct. *See, e.g., Lukumi*, 508 U.S. at 544–45. As explained above, the HHS Mandate here exempts 191 million Americans on a variety of grounds, but refuses to exempt MKC based on its religious objections. In *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359 (3d Cir. 1999), the court held that a police department's no-beard policy was not generally applicable because it allowed a medical exemption but refused religious exemptions. "[T]he medical exemption raises concern because it indicates that the [police department] has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." 170 F.3d at 366 (Alito, J.). *See also Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 210–11, 214 (3d Cir. 2004) (Alito, J.) (rule against religious bear-keeping violated Free Exercise Clause due to categorical exemptions for zoos and circuses); *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 were not generally applicable where they included categorical exemptions for newspapers and media, but not for churches); *Mitchell Cnty.* v. *Zimmerman*, 810

N.W.2d 1, 16 (Iowa 2012) (categorical exemptions for secular conduct allowed Mennonite farmers to use steel-wheeled tractors on county roads).

The religious exemption from the HHS Mandate in particular is not generally applicable because the Affordable Care Act itself awards Defendants unlimited discretion to shape its scope. Defendants "*may* establish exemptions," 45 C.F.R. § 147.130 (emphasis added), and pursuant to 42 U.S.C. § 300gg-13, Defendants' discretion to craft its exemptions is unlimited. 76 Fed. Reg. 46623 (asserting that § 300gg-13 grants HHS/HRSA "authority to develop comprehensive guidelines" under which Defendants believe "it is appropriate that HRSA, in issuing these Guidelines, takes into account the effect on the religious beliefs of certain religious employers"). Using their unfettered assessments, Defendants continue to change their exemptions and accommodations, as evidenced by two different versions of a "safe harbor" they issued, *in addition to* the religious exemption itself, and the fact that in recent rulemaking, yet another category of nonprofit religious entities subject to different treatment than the HHS Mandate will be created. 77 Fed. Reg. 16501. This built-in discretion means that Defendants have broad discretion to create exemptions based on an "individualized … assessment of the reasons for the relevant conduct," a feature that deprives the HHS Mandate of general applicability and subjects it to strict scrutiny. *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884).

C. The HHS Mandate violates the First Amendment to the Constitution, Establishment Clause.

The HHS Mandate also violates the Establishment Clause of the First Amendment. The HHS Mandate's "religious employer" exemption, as discussed above, sets forth Defendants' notion of what "counts" as religion and what doesn't for the purposes of who will be exempt under the HHS Mandate. But the Government may not adopt a caste system of different

religious organizations and belief-levels when it imposes a burden. Instead it "must treat individual religions and religious institutions 'without discrimination or preference.'" *Colo. Christian U.* v. *Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008); *Larson v. Valente*, 456 U.S. 228 (1982); *see also Wilson* v. *NLRB*, 920 F.2d 1282 (6th Cir. 1990) (holding that section 19 of the National Labor Relations Act, which exempts from mandatory union membership any employee who "is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations," is unconstitutional because it discriminates among religions and would involve an impermissible Government inquiry into religious tenets), *cert. denied*, 505 U.S. 1218 (1992).

In this case, as an example, the HHS Mandate's four-pronged religious exemption deems religious organizations insufficiently "religious" if they do not focus on co-religionists in hiring and service, which would involve the Government's probing of what exactly count as the organization's religious "tenets."

D. The HHS Mandate violates the First Amendment to the Constitution, Free Speech and Expressive Association.

The HHS Mandate additionally violates the First Amendment by coercing MKC to provide for speech that is contrary to its and its owners' religious beliefs. The "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977) (quoting *W.V. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 637 (1943)). Accordingly, the First Amendment protects the right to "decide what not to say." *Hurley* v. *Irish-Am. Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (internal quotation marks omitted).

Additionally, "[a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy* v. *James*, 408 U.S. 169, 181 (1972) (citations omitted). The Sixth Circuit echoed this fundamental understanding of the right to association by stating, "Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of freedom of speech." *Connection Distributing Co*. v. *Reno*, 154 F.3d 281, 295 (6th Cir. 1998) (citing *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958).

Indeed, "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984). The Government traditionally has not been allowed to force a person—who objects to an activity or conduct on moral grounds—to subsidize, and thereby endorse, conduct that he believes, teaches, or otherwise states is wrong. *See, e.g., Keller* v. *State Bar of California*, 496 U.S. 1 (1990) (holding that the Government cannot compel state bar members to finance political and ideological activities of which they disagree); *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977) (holding that the Government cannot require state employees to provide financial support for ideological union activities they oppose which are unrelated to collective bargaining); *Wooley* v. *Maynard*, 430 U.S. 705 (1977) (enjoining a state law which required that plaintiff affix the motto "Live Free or Die" on his license plate when the plaintiff, who was a Jehovah's Witness, found the motto morally repugnant).

Despite the Government not being allowed to force an objector to subsidize, and thereby endorse, conduct that he believes, teaches, or otherwise states is wrong, in this case, the

Government is wrongfully forcing MKC to participate in, pay for, train others to engage in, or otherwise support contraception or the killing of people by abortion. Moreover, for the reasons stated below, this Court should not consider any argument by the Government that the HHS Mandate affects what MKC must do, and not what it says. Conduct communicates a message; MKC's conduct for the last 56 years has been to exclude contraception, abortion, and "life style drugs" from its workforce health insurance plans. The message that MKC has been sending to its workforce for the last 56 years is the same – that its health insurance plan excludes contraception, abortion, and "life style drugs."

Based on the speech at issue here (expressing one's faith), Plaintiffs are also protected by "the First Amendment's expressive associational right." *See Boy Scouts of America* v. *Dale*, 530 U.S. 640, 648-650 (2000) (finding that the Boy Scouts are protected by the First Amendment and stating, "It seems indisputable that an association that seeks to transmit . . . a system of values engages in expressive activity"). In *Boy Scouts of America*, the Supreme Court held that "freedom of expressive association" under the Free Speech Clause prohibited the enforcement of a public accommodation law when it required the Boy Scouts be led by a homosexual scoutmaster. *Id*. at 648. The Supreme Court held that compelling the enforcement of the public accommodation law would "force the organization to send a message, both to the youth members and the world, that the [organization] accepts homosexual conduct as a legitimate form of behavior." *Id*. at 653. Correspondingly, in *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), the Supreme Court held that the First Amendment gave the plaintiffs, organizers of a private St. Patrick's Day parade, the right to exclude a homosexual group from the parade, when plaintiffs believed that the group's presence would communicate a message about homosexual conduct to which plaintiffs objected. The First Amendment

protected plaintiffs' right "not to propound a particular point of view," and the Supreme Court protected the "principle of speaker's autonomy." *Id*. at 575, 580.

The HHS Mandate compels expressive speech. At the least, it requires MKC's workforce insurance plan to cover "education and counseling" in favor of contraceptives and abortifacients. Education and counseling are, by definition, speech. The Supreme Court has explained that its compelled speech jurisprudence is triggered when the Government forces a speaker to fund objectionable speech. *See, e.g, Abood* v. *Detroit Bd. of Ed.*, 431 U.S. 209, 234–35 (1977) (forced contributions for union political speech); *United States* v. *United Foods*, 533 U.S. 405, 411 (2001) (forced contributions for advertising). The Supreme Court recently reaffirmed that "compulsory subsidies for private speech" violate the First Amendment unless they involve a "mandated association" that meets the compelling interest / least restrictive means test. *Knox* v. *Service Employees Intern. Union*, 567 U.S. ___; 132 S. Ct. 2277, 2289 (June 21, 2012). Here there is no "mandated association" because the Government omits many employers from the HHS Mandate, and the HHS Mandate violates the compelling interest test. These factors, and because the HHS Mandate is not a condition on Government funding, distinguish it from *Rumsfeld* v. *Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47 (2006). *Rumsfeld* does not negate *Knox*, *Abood*, and *United Foods*.

Since the First Amendment, through its free speech and expressive association provisions, protects nonreligious organizations based upon moral objections to exclude individuals whose mere presence was thought to send an objectionable message, then, reasonably, the Court should protect the free speech and association of Plaintiffs who object to subsidizing and supporting certain messages and conduct based upon their deeply held religious beliefs. The compelled subsidization and support of contraceptives, abortion, and abortifacients

in the instant case strikes at the heart of one's ability to communicate unambiguous moral teachings and religious beliefs, and one's ability to form associations that maintain adherence to those teachings.

E. The HHS Mandate violates the Administrative Procedure Act.

The HHS Mandate was finalized while transparently, even admittedly, refusing to satisfy Defendants' statutory duty to actually "consider" objections issued during the comment period. Section 706 of the APA provides that courts "shall hold unlawful and set aside agency action, findings, and conclusions found to be without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Defendants must follow the procedure found in § 553, which requires administrative agencies to: (1) publish notice of proposed rulemaking in the Federal Register; (2) "give interested parties an opportunity to participate in the rule making through submission of written data, views, or arguments"; and (3) consider all relevant matter presented before adopting a final rule that includes a statement of its basis and purpose. 5 U.S.C. § 553(b) & (c).

"An agency is required to provide a meaningful opportunity for comments, which means that the agency's mind must be open to considering them." *Grand Canyon Air Tour Coalition* v. *F.A.A.*, 154 F.3d 455, 468 (D.C. Cir. 1998) (citing *McLouth Steel Products Corporation* v. *Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988)). The Court need not engage in any subjective judgment about whether Defendants provided due consideration to objections to the HHS Mandate. In this case, Defendants essentially admit that they did not do so:

(1) The Affordable Care Act prohibits the HHS Mandate from going into effect until one year after it is in final, unchanged form. 75 Fed. Reg. 41726; 76 Fed. Reg. 46624.

(2) Defendants themselves insisted, in August 2011, prior to the comment period, that they believed the HHS Mandate must exist in final form, unchanged from as it was written on August 1, 2011, in order to deliver Mandated items to college women by August 2012. 76 Fed. Reg. 46621–26.

(3) Defendants delivered on their promise to ignore comments by finalizing their rule "without change" in February 2012. 77 Fed. Reg. 8725–30.

(4) Due to public outcry, Defendants then admitted in a new regulatory process in March 2012, 77 Fed. Reg. 16501, that the same objections offered in the 2011 comment period actually did require alterations that they had refused to consider in 2011 but would now pursue.

(5) Yet Defendants continue to impose their HHS Mandate on MKC and others as if their rule had actually been finalized in August 2011, *in a process that meaningfully considered suggested changes prior to finalization*.

Defendants' mockery of the notice and comment process has led to palpable injury to MKC. The HHS Mandate's adoption of HRSA's preventive services guidelines against religious objectors should be vacated and remanded to the Defendant agencies until they actually finalize a Mandate after meaningful consideration, and *then* wait an additional year to impose it.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITHOUT INJUNCTIVE RELIEF.

Granting preliminary injunctive relief is necessary to prevent MKC from suffering continued irreparable harm. "The basis of injunctive relief in the federal courts has always been irreparable harm." *Sampson* v. *Murray*, 415 U.S. 61, 88 (1974).

Application of the HHS Mandate to MKC violates its rights under the First Amendment and the RFRA. It is settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976); *Legatus, et al.* v. *Sebelius, et al.*, No. 12-12061 (E.D. Mich. Oct. 31, 2012) (holding that the HHS Mandate causes irreparable harm to First Amendment rights, "The potential for harm to Plaintiffs exists, and with the showing Plaintiffs have made thus far of being able to convincingly prove their case at trial, it is properly characterized as irreparable."). Deprivation

of rights secured by the RFRA—which affords even greater protection to religious freedom than the Free Exercise Clause—also constitutes irreparable harm. *See, e.g., Kikumura* v. *Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (noting that "courts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA"); *Jolly* v. *Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (explaining under RFRA that "although the plaintiff's free exercise claim is statutory rather than constitutional, the denial of the plaintiff's right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily"); *W. Presbyterian Church* v. *Bd. of Zoning Adjustment of Dist. of Columbia*, 849 F. Supp. 77, 79 (D.D.C. 1994) (granting a preliminary injunction against a zoning ordinance prohibiting a church's feeding of the homeless based on likely violations of the First Amendment and RFRA). The District Court in Colorado reached the same conclusion in the *Newland* case. *See Newland*, 2012 WL 3069154 at *4 (noting "it is well-established that the potential violation of Plaintiffs' constitutional and RFRA rights threatens irreparable harm") (citation omitted).

MKC is currently suffering irreparable harm by not being able to operate their business in a manner that reflects their Catholic faith and other Christian beliefs. MKC does not qualify for any of Defendants' exemptions for non-enforcement and has been subject to the HHS Mandate since January 1, 2013. Because of the HHS Mandate, MKC's workforce insurance carrier has refused to continue writing a policy for MKC, as it has for decades, excluding contraception, abortion, and drugs commonly referred to as "life style drugs." Thus, on January 1, 2013, MKC was forced to choose between exercising its rights under the First Amendment and RFRA and not offering workforce insurance coverage that includes contraception, abortion, and "life style drugs," or violating their religious beliefs and offering workforce insurance coverage that includes contraception, abortion, and "life style drugs." MKC unwillingly chose to sacrifice its

religious beliefs, as opposed to not offering its workforce any insurance coverage at all. Further, even assuming arguendo that MKC could obtain third party group insurance coverage that specifically excludes contraception, abortion, and "life style drugs," the payment of penalties which would be imposed upon MKC for not providing this coverage would be the ringing of a bell announcing its Death Knell – further irreparable harm.

The deprivation of Plaintiffs' First Amendment freedoms, even for minimal periods, constitutes irreparable injury. By virtue of the fact that the law applies to MKC now, and Defendants have expressed opposition to this motion, MKC's harm will continue absent injunctive relief.

III. THE BALANCE OF EQUITIES TIPS IN PLAINTIFFS' FAVOR.

Here, the balance of equities overwhelmingly favors MKC. Granting preliminary injunctive relief will merely prevent Defendants from enforcing the HHS Mandate against one religious entity and will simply preserve the *status quo* between the parties. If the HHS Mandate is not enforced against Plaintiffs, Defendants will suffer no harm, because the exercise of constitutionally protected expression can never harm Defendants' or others' legitimate interests. See *Connection Distributing Co.* v. *Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *see also Legatus, et al.* v. *Sebelius, et al.*, No. 12-12061 (E.D. Mich. Oct. 31, 2012) (holding that the HHS Mandate should be enjoined, "The Government will suffer some, but comparatively minimal harm if the injunction is granted. . . . The balance of harms tips strongly in Plaintiffs' favor.").

Defendants have already exempted a number of churches and church-related entities from the HHS Mandate. Even more notably, Defendants have granted what nearly amounts to its own voluntary "injunction" by granting delayed enforcement of the HHS Mandate against a broad

array of religious organizations until their first plan years start after August 2013. Omission of MKC from the "safe harbor" is arbitrary and unwarranted in the first place. Defendants cannot possible show that applying the HHS Mandate to *one* other religious entity would "substantially injure" others' interests.

Balanced against this *de minimis* injury to Defendants is the real and immediate threat to MKC's and its owners' integrity of religious belief. In sum, any minimal harm in not applying the HHS Mandate against one additional entity, in light of Defendants' willingness to not enforce it against thousands of others, "pales in comparison to the possible infringement upon Plaintiffs' constitutional and statutory rights." *Newland*, 2012 WL 3069154 at *4.

Moreover, arguing that equity does not weigh in Plaintiffs' favor because it took them twelve weeks after the HHS Mandate became effective to file this suit is unjust. The Government did not send business owners advanced notice of the HHS Mandate, and Plaintiffs only became aware of it at the end of 2012 through Catholic publications and their health insurance carrier who was attempting to renew their policy. Initially believing that they did not have a right or a chance to fight the Government over implementation of the HHS Mandate, Plaintiffs did not initially seek legal advice. Once they realized, again through Catholic publications, that the HHS Mandate could be challenged, Plaintiffs hired counsel, who prepared and filed the instant lawsuit as quickly as possible to eliminate or minimize Plaintiffs' harm.

IV. AN INJUNCTION IS IN THE PUBLIC INTEREST.

The impact of the preliminary injunction on the public interest turns in large part on whether Plaintiffs' Constitutional rights are violated by the enforcement of Defendants' HHS Mandate. As the Sixth Circuit noted, "[I]t is always in the public interest to prevent the violation

of a party's Constitutional rights." *G & V Lounge, Inc.* v. *Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Dayton Area Visually Impaired Persons, Inc.* v. *Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties"). Aforementioned, the enforcement of Defendants' HHS Mandate is a direct violation of Plaintiffs' fundamental rights protected by the RFRA and the First Amendment. Therefore, the public interest is best served by preventing Defendants from compelling individuals to violate their religious beliefs and rights of conscience, protected by the RFRA and the First Amendment.

A preliminary injunction will serve the public interest by protecting MKC's First Amendment and RFRA rights. "There is a strong public interest in the free exercise of religion even where that interest may conflict with [another statutory scheme]." *O Centro Espirita Beneficiente Uniao do Vegetal* v. *Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), aff'd and remanded, *O Centro*, 546 U.S. 418. Furthermore, any interest of Defendants in uniform application of the mandate "is … undermined by the creation of exemptions for certain religious organizations and employers with grandfathered health insurance plans and a temporary enforcement safe harbor for non-profit organizations." *Newland*, 2012 WL 3069154 at *4.

CONCLUSION

Plaintiffs hereby request that this Honorable Court issue an order for preliminary injunction, and any other relief it deems appropriate. The HHS Mandate violates both the RFRA and the First Amendment. Unless this Honorable Court issues an order for preliminary injunction, Plaintiffs will continue to suffer irreparable harm. Defendants, conversely, would

face no harm if an injunction is issued, as the HHS Mandate already exempts millions of other companies and organizations.

Dated: April 26, 2013

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CERTIFICATE OF SERVICE

I certify, that on April 26, 2013, I electronically filed a document entitled "Plaintiffs' Emergency Motion For Preliminary Injunction" with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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