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' EX PARTE NOTICE OF MOTION AND EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND BRIEF IN SUPPORT

_______________________________________/

PLEASE TAKE NOTICE that, at the earliest possible time for this Honorable Court to hear this motion, 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 for an ex parte Temporary Restraining Order ("TRO") pursuant to Fed. R. Civ. P. 65(b)(1) and LR 65.1 in order to prevent continued and immediate irreparable injury to Plaintiffs' fundamental rights and interests.

In support of their 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 (hereinafter "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.

1. The purpose for a TRO in this case is to permit Plaintiffs to continue to provide insurance to their employees that does not violate Plaintiffs' constitutionally and statutorily granted rights to free exercise of religion, free speech, and free association, as they did prior to January 1, 2013.
2. Without relief from this Honorable Court, Plaintiffs will continue to be irreparably harmed as their constitutional rights will continue to be violated.
3. This request for TRO requires immediate attention because the HHS Mandate became effective as to Plaintiffs on January 1, 2013, and Plaintiffs have been subjected to irreparable harm since January 1, 2013.

4. Defendants have already been provided with notice of Plaintiffs' concerns, not through this lawsuit, which was just filed on March 29, 2013, but through at least five previously filed lawsuits addressing the same issues, including two cases in the Eastern District of Michigan, wherein the court enjoined the HHS Mandate for for-profit companies indistinguishably situated and structured to the Plaintiffs. See *Legatus, et al*. v. *Sebelius, et al*., No. 12-12061 (E.D. Mich. October 31, 2012) (see Opinion attached as Exhibit 3); and *Domino's Farms Corporation, et al*. v. *Sebelius, et al*., No. 12-15488 (E.D. Mich. December 30, 2012) (see Opinion attached as Exhibit 4).

WHEREFORE, for all the above reasons, and the reasons stated in Plaintiffs' attached Brief, Plaintiffs hereby request that this Honorable Court issue an ex parte temporary restraining order, and any other relief its deems appropriate.

Dated: April 2, 2013

Respectfully submitted,

/s/ Kimberly A. Cochrane
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PLAINTIFFS' BRIEF IN SUPPORT OF EX PARTE MOTION AND EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

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Exhibit 2	Affidavit of Robert W. Chambers
Exhibit 3	Opinion; *Legatus, et al*. v. *Sebelius, et al*., No. 12-12061 (E.D. Mich. Oct. 31, 2012)
Exhibit 4	Opinion; *Domino's Farms Corporation, et al*. v. *Sebelius, et al*., No. 12-15488 (E.D. Mich. Dec. 30, 2012)
Exhibit 5	Opinion; *American Pulverizer Co., et al*. v. *Dep't of Health & Human Servs, et al*., No. 12-3459 (W.D. Mo. Dec. 20, 2012)
Exhibit 6	Opinion; *Newland, et al*. v. *Sebelius, et al*., No. 12-1123 (D. Colo. Jul. 27, 2012)
Exhibit 7	Opinion; *Tyndale House Publishers, Inc*. v. *Sebelius, et al*., No. 12-1635 (D.D.C. Nov. 16, 2012)

ISSUE PRESENTED

I. Whether a government mandate, which forces Plaintiffs to provide health insurance that violates their sincerely held religious beliefs, right to free speech, and right to freedom of association, causes irreparable harm sufficient to warrant injunctive relief?

CONTROLLING AUTHORITY

American Pulverizer Co., et al. v. *Dep't of Health & Human Servs, et al.*, No. 12-3459 (W.D. Mo., Dec. 20, 2012)

Church of Lukumi Babalu Aye, Inc. v. *City of Hialeah*, 508 U.S. 520 (1993)

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Wisconsin v. *Yoder*, 406 U.S. 205 (1972)

STATEMENT OF FACTS

Plaintiff, M.K. Chambers Company ("MKC"), is a Michigan corporation with a registered office in North Branch, Michigan (see paragraph 3 of Affidavits of Gerald D. Chambers and Robert W. Chambers, attached as Exhibits 1 and 2, respectively). 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 (see paragraphs 4-5 of Exs. 1 and 2). MKC is family owned and operated and was created 56 years ago by GDC's and RWC's father (see paragraph 6 of Exs. 1 and 2). 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 (see paragraph 7 of Exs. 1 and 2).

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" (see paragraph 8 of Exs. 1 and 2). 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 (see paragraph 9 of Exs. 1 and 2). 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 (see paragraph 10 of Exs. 1 and 2). 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 (see paragraph 11 of Exs. 1 and 2).

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, through MKC, GDC and RWC strongly support, financially and otherwise, Catholic fundraisers and other events, and have refused providing support, financially or otherwise, for events or entities that do not reflect the teachings, mission, and values of the Catholic faith, such as requiring that the MKC facilities remain closed and do not service any of their customers on Sundays, eliminate any organization from a supplier list that knowingly supports, endorses, or contributes to organizations that actively participate in killing people, such as Planned Parenthood (see paragraph 12 of Exs. 1 and 2).

However on January 1, 2013, pursuant to the Health and Human Services Mandate of the Affordable Care Act ("HHS Mandate"), Plaintiffs lost the right to make health care insurance decisions in line with their Catholic views. The HHS Mandate forces Plaintiffs to pay, 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 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration (HRSA) Guidelines, (http://www.hrsa.gov/womensguidelines).

The Affordable Care Act 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 Human Services, United States Department of Treasury, and United States Department of Labor, published an interim final rule under the Affordable Care Act. 75 Fed. Reg. 41726 (2010), requiring providers of group health insurance to cover "preventive care" for women as provided in guidelines to be published on a later date. *Id.*[1] 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 (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

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[1] 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.

known as the "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 HHS Mandate applies to almost all group health plans and health insurance issuers, 42 U.S.C. § 300gg-13(a)(1),(4), and forces Plaintiffs to provide "preventative care" by making available and subsidizing contraception, abortion, and abortifacients such as the "morning-after pill," "Plan B," and "ella." The HHS Mandate also requires group health care plans and insurance issuers to provide education and counseling for all women beneficiaries with reproductive capacity—even if paying for or providing such "services" violates one's consciences and deeply held religious beliefs.

The Affordable Health Care Act and the HHS Mandate include a number of exemptions. Plaintiffs, however, do not fall under any of these exemptions. The allowable factors for receiving exemptions under the Affordable Health 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).

Plaintiffs' plan year began on January 1, 2013, requiring Plaintiffs to choose between complying with the HHS Mandate and violating their deeply held religious beliefs, or disobeying

federal law and incurring the consequences. Either choice subjects Plaintiffs to severe burdens. 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; see paragraph 3 of Exs. 1 and 2. The fines are even more insurmountable if Plaintiffs were to decide to offer insurance that did 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.

All Plaintiffs wish to do is simply continue providing health insurance in compliance with their sincere and deeply held religious beliefs, as they have done for decades (see paragraph 8 of Exs. 1 and 2). Plaintiffs bring this motion for an ex parte temporary restraining order to enjoin the unconstitutional and illegal directives of 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.

At least five courts thus far, including the Eastern District of Michigan, have enjoined the HHS Mandate for for-profit companies indistinguishably situated and structured to the Plaintiffs. See *Legatus, et al*. v. *Sebelius, et al*., No. 12-12061 (E.D. Mich. Oct. 31, 2012) (see Opinion attached as Exhibit 3); *Domino's Farms Corporation, et al*. v. *Sebelius, et al*., No. 12-15488 (E.D. Mich. Dec. 30, 2012) (see Opinion attached as Exhibit 4); *American Pulverizer Co., et al*. v. *Dep't of Health & Human Servs, et al*., No. 12-3459 (W.D. Mo. Dec. 20, 2012) (see Opinion

attached as Exhibit 5); *Newland, et al*. v. *Sebelius, et al*., No. 12-1123 (D. Colo. Jul. 27, 2012) (see Opinion attached as Exhibit 6); *Tyndale House Publishers, Inc*. v. *Sebelius, et al*., No. 12-1635 (D.D.C. Nov. 16, 2012) (see Opinion attached as Exhibit 7).

ARGUMENT

The factors to be weighed before issuing a TRO are the same as those considered for issuing a preliminary injunction. See, e.g., *Workman* v. *Bredesen*, 486 F.3d 896, 904-05 (6th Cir. 2007); *Southerland* v. *Fritz*, 955 F. Supp. 760, 761 (E.D. Mich. 1996). 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*.

A. PLAINTIFFS' LIKELIHOOD OF SUCCESS 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.

***i. The HHS Mandate violates the Religious Freedom Restoration Act*.**

Congress enacted the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb et seq. (hereinafter "RFRA"), in response to *Employment Div., Dept. of Human Res. of Ore.* 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*., No. 12-1123 (D. Colo. Jul. 27, 2012) (granting preliminary injunction from HHS Mandate due to violation of the RFRA) (see pp 17-18, Ex. 6).

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* at 431, *see also Yoder* at 213, 221, 236; *Sherbert* 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* 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* 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 incurring the consequences. Furthermore, the federal 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. The HHS Mandate substantially burdens Plaintiffs' free exercise of religion.

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). This includes not merely worship but actions in accordance with one's faith.

Pursuant to the teachings of the Catholic Church, Plaintiffs' sincerely held religious beliefs prohibit them from providing or purchasing health insurance coverage for contraception, abortion, abortifacients, or related education and counseling. Plaintiffs' compliance with these beliefs is a religious exercise. The HHS Mandate creates government-imposed coercive pressure on Plaintiffs to purchase insurance and provide 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 exposes Plaintiffs to substantial per employee fines for their religious exercise—roughly $2,000 annually per employee, 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 p 13, Ex. 3); 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.

2. The HHS Mandate fails to use the least restrictive means and fails to justify a compelling interest.

The HHS Mandate furthers no compelling governmental interest and is not narrowly tailored to any compelling governmental interest, as contraceptives are currently readily available through other means without forcing Plaintiffs to provide them.

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.") (quoting *Gonzales*, 546 U.S. at 429) (see p 11, Ex. 6). In order to prove that Defendants' substantial burden on Plaintiffs' religious liberties is justified,

Defendants need to pass strict scrutiny—"the most demanding test known to constitutional law." *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997). Defendants are charged to "specifically identify an 'actual problem' in need of solving," and show that substantially burdening Plaintiffs' free exercise of religion is "actually necessary to the solution." *Brown* v. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (June 27, 2011). The government bears the burden of proof and "ambiguous proof will not suffice." *Id*. at 2739. Indeed, one district court has already ruled that the government failed to meet this burden of proof under the HHS Mandate. *Newland*, *et al*. v. *Sebelius, et al*., No. 12-1123 (D. Colo. Jul. 27, 2012) ("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.") (see p 17, Ex. 6); *see also Legatus*, *et al.* v. *Sebelius, et al.,* No. 12-12061 (E.D. Mich. Oct. 31, 2012) (in weighing whether the Government applies the least restrictive means in the HHS Mandate, "The cost to Plaintiffs appears provably substantial. The cost to the Government appears provably small.") (see p 22, Ex. 3).

There is "no actual problem in need of solving," and forcing Plaintiffs to violate their religious beliefs fails to offer any sort of "actually necessary solution." Forcing Plaintiffs to provide and fund health insurance which makes contraceptives and abortifacients available to their workforce serves only an ambiguous, non-compelling interest, and at best would serve the interest of marginally increasing access to contraceptives and abortifacients. Defendant Kathleen Sebelius herself has admitted that contraceptive services are already readily available "at sites such as community health centers, public clinics, and hospitals with income-based support." Physicians and pharmacies have traditionally also provided contraceptive and abortifacient services. There is no compelling reason for the HHS Mandate to take the matter one step further

by forcing employers, such as MKC, objecting upon sincere religious grounds, to subsidize these services through the insurance plans they sponsor. If Defendants were truly concerned with the lack of access to contraceptives and abortifacients in this country, Defendants could provide those "preventative services" without burdening Plaintiffs' religious beliefs. Defendants could provide the "preventative services" directly, Defendants could arrange—although they admit this system is already in place—for the "preventative services" to be made available at community health centers, public clinics, and hospitals, or Defendants could even offer tax credits to those companies who comply with the HHS Mandate while not punishing those companies who do not based upon sincerely held religious beliefs.

Furthermore, the HHS Mandate fails to provide the least restrictive means of furthering Defendants' stated interests of providing contraceptives and abortifacients, as HHS has carved out a number of exemptions for secular purposes such as size of employer, the age and grandfathered status of a health insurance plan, waivers for high grossing employers, inter alia. The HHS Mandate imminently threatens violation of Plaintiffs' rights secured to them by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq.

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

The First Amendment prohibits the government from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. CONST. amend. I. Under the First Amendment, the government may not impose special restrictions, prohibitions, or disabilities on the basis of religious beliefs. *See generally McDaniel* v. *Paty*, 435 U.S. 618 (1978). "The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *Id*. at 626. And as the Supreme Court acknowledged, "This principle that government may not enact laws that

suppress religious belief or practice is . . . well understood. *Church of Lukumi Babalu Aye, Inc*. v. *City of Hialeah*, 508 U.S. 520, 523 (1993).

Unquestionably, the First Amendment protects Plaintiffs' right to express and exercise their religious beliefs. Under the Free Exercise Clause, the Supreme Court has ruled that the government may only pass a law that burdens certain religious exercises when the law is facially neutral and of general applicability. *Id.* at 531 (discussing, when not subject to the scrutiny and analysis of the RFRA, a facially neutral law of general applicability is permissible notwithstanding any incidental burdens it imposes, so long as the law passes rational basis review). However, 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)); *see also Id.* at 547 ("It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited'") (internal quotation and citation omitted).

In *Church of Lukumi*, *supra*, the City of Hialeah enacted an ordinance prohibiting the public sacrifice of animals. *Id.* at 527. The ordinance also contained exemptions for the slaughtering of animals raised for food purposes and for sale in accordance with state law. *Id.* at 528. The ordinance had the stated purpose of promoting "public health, safety, welfare, and the morals of the community" and carried a maximum fine of $500. *Id.* at 528. The ordinance, however, prevented members of the church of Santeria from engaging in a principal aspect of their religious worship, which was the public, sacrificial killing of animals. *Id.* at 524-25. This practice was known to defendant prior to the enactment of the ordinance. *Id.* at 526-27.

In deciding that the ordinance was neither neutral nor generally applicable, the Court examined whether the law "infringe[d] upon or restrict[ed] practices because of their religious motivation," or "in a selective manner impose[d] burdens only on conduct motivated by religious belief." *Id.* at 533, 543. The Court emphasized that the Free Exercise Clause “forbids subtle departures from neutrality, and covert suppression of particular religious beliefs.” *Id.* at 534 (internal quotations and citations omitted).

The Court in *Church of Lukumi* further adopted the reasoning from *Smith* that “in circumstances in which individualized exemptions from a general requirement are available, the government ‘may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.’” *Id.* at 537 (quoting *Employment Div., Dept. of Human Resources of Ore*. v. *Smith*, 494 U.S. at 884; *Bowen* v. *Roy*, 476 U.S. 693, 708 (1986).

1. The HHS Mandate is neither neutral nor generally applicable, and fails strict scrutiny.

Likewise, in the instant case, the HHS Mandate cannot avoid strict scrutiny as the law is neither neutral nor generally applicable, and Defendants have set forth a number of individualized exemptions from the general requirement. Widespread individualized exemptions deny the HHS Mandate of general applicability. *Ward* v. *Polite*, 667 F.3d 727, 740 (6th Cir. 2012) (“At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.”); *see also Newland*, *et al.* v. *Sebelius, et al.,* No. 12-1123 (D. Colo. Jul. 27, 2012) (holding that the scheme of exemptions in the HHS Mandate “completely undermines any compelling interest”) (p 15, Ex. 6).

Despite being informed in detail of the imposition on Catholic belief beforehand, Defendants designed the HHS Mandate and the religious exemptions to the HHS Mandate in a way that made it impossible for Plaintiffs to comply with their religious beliefs. By design, Defendants imposed the HHS Mandate on some religious organizations or religious individuals but not on others, resulting in discrimination among religions. Defendants have created a number of categorical exemptions and individualized exemptions, none of which alleviate the chill imposed on Plaintiffs' free exercise of religion. The Affordable Care Act and the HHS Mandate include exemptions for:

- Individual members of a "recognized religious sect or division" that conscientiously object to acceptance of public or private insurance funds in their totality, such as members of the Islamic faith or the Amish. 26 U.S.C. § 5000A(d)(2)(A)(i) and (ii);
- Employers with health care plans that are considered to be "grandfathered," which, amongst meeting other criteria, have been in place and remain unchanged since March 23, 2010. 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; and
- Non-profit employers who qualify under the narrow exemption of a "religious employer." 45 C.F.R. § 147.130 (a)(iv)(A) and (B).

The HHS Mandate exemptions completely fail to address the constitutional and statutory implications on for-profit, secular employers such as Plaintiffs. Furthermore, there is no exemption available for a member of the Catholic faith who conscientiously objects to the HHS Mandate on religious grounds. The HHS Mandate vests the Health Resources and Services Administration with unbridled discretion in deciding whether to allow exemptions to some, all, or no organizations meeting the definition of "religious employers" or religious individuals.

For these reasons and those articulated in the previous section of this Brief, the substantial burden Defendants anchor onto Plaintiffs' religious exercise is not narrowly tailored to any compelling governmental interest. The HHS Mandate violates Plaintiffs' rights under the Free Exercise Clause of the First Amendment to the United States Constitution.

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

As the United States Supreme Court has long recognized, "spreading one's religious beliefs" and "preaching the Gospel" are activities protected by the First Amendment. *See Murdock* v. *Pennsylvania*, 319 U.S. 105, 110 (1943). Supreme Court precedent also "establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Rev. & Adv. Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995).

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); *see also Id*. at 636 (O'Connor, J., concurring) ("Even the training of outdoor

survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement."). 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).

Indeed, the First Amendment protects the right "to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977). Therefore, Plaintiffs should not be compelled by the government to provide education and counseling against their deeply held beliefs. Plaintiffs should not be compelled to subsidize and endorse private conduct to which it objects — especially when Plaintiffs have chosen to express their faith through religious speech and assembly. Plaintiffs will be hard-pressed to effectively and persuasively communicate the Church's teachings that contraception, abortion, and abortifacients are immoral, yet simultaneously pay for and provide contraceptives. The precepts are irreconcilable.

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.

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.

Defendants cannot compel speech and association they find favorable, yet violative of Plaintiffs' religious beliefs. Based upon this, and all other reasons articulated in this Brief, Plaintiffs have demonstrated a substantial likelihood of prevailing on the merits of their claims.

B. PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITHOUT INJUNCTIVE RELIEF

Plaintiffs will be irreparably harmed absent the issuance of an injunction by this Honorable Court. The HHS Mandate deprives Plaintiffs of their fundamental First Amendment rights. And it is well established 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.")(see p 26, Ex. 3); *see also Connection Distributing Co*. v. *Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (quoting *Elrod*); *Newsome* v. *Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." (citing *Elrod*)).

Additionally, Plaintiffs will suffer financial harm through per-employee-fines for noncompliance with the HHS Mandate. And, by choosing to remain faithful and exercising their religious beliefs, Plaintiffs face substantial competitive disadvantages if they are no longer permitted to offer or purchase health insurance. No matter the path they choose, Plaintiffs will be subjected to severe burdens.

C. GRANTING A TEMPORARY RESTRAINING ORDER WILL CAUSE NO SUBSTANTIAL HARM TO OTHERS

In this case, the likelihood of harm to Plaintiffs is substantial, because Plaintiffs' First Amendment freedoms and Plaintiffs' freedom of religion are at issue, and the deprivation of these rights, even for minimal periods, constitutes irreparable injury.

On the other hand, if Defendants are restrained from enforcing the HHS Mandate 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.") (p 28, Ex. 3). Defendants already exempt a number of other employers and individuals from the HHS Mandate. Allowing Plaintiffs an exemption in order to stop a violation of their deeply held religious beliefs fails to cause harm to Defendants. Any legitimate interest asserted by Defendants or others will remain fully protected by existing provisions of law.

In the final analysis, the question of harm to others as well as the impact on the public interest "generally cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation. . . ." *Connection Distribution Co*., 154 F.3d at 288. If Plaintiffs show that their First Amendment rights have been violated, then the harm to others is inconsequential. As demonstrated, the enforcement of Defendants' HHS Mandate on Plaintiffs violates the First Amendment; therefore, any "harm" to others is inconsequential.

D. THE IMPACT OF THE TEMPORARY RESTRAINING ORDER ON THE PUBLIC INTEREST FAVORS GRANTING THE INJUNCTION

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 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.

In the final analysis, Defendants' HHS Mandate violates Plaintiffs' fundamental Constitutional rights. The HHS Mandate forces Plaintiffs to violate their deeply held religious beliefs of their Catholic faith. Without an injunction, Plaintiffs will continue to be irreparably harmed.

CONCLUSION

Plaintiffs hereby request that this Honorable Court issue an ex parte temporary restraining order, and any other relief it deems appropriate. The HHS Mandate violates both the RFRA and the First Amendment. Unless this Honorable Court issues a temporary restraining order, Plaintiffs inescapably must choose between violating their religious beliefs or suffering massive financial penalties and harm to their goodwill and sustainability. Defendants, conversely, would

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

Dated: April 2, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify, that on April 2, 2013, I electronically filed a document entitled "Plaintiffs' Ex Parte Notice of Motion And Emergency Motion For Temporary Restraining Order And Brief In Support" with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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