UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

MERSINO MANAGEMENT COMPANY; KAREN A. MERSINO, Owner and Shareholder of Mersino Southwest, LLC and Mersino Enterprises, Inc., and RODNEY A. MERSINO, Owner and Shareholder of Mersino Management Company, Global Pump Company, LLC and Mersino Dewatering, Inc., 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; JACK LEW, Secretary of the United States Department of the Treasury; and UNITED STATES DEPARTMENT OF THE TREASURY, Defendants.	Case No. 13-cv-11296-PDB-RSW PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION Judge Paul Borman Magistrate Judge R. Steven Whalen

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PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION & BRIEF IN SUPPORT

PLEASE TAKE NOTICE that at the earliest possible time for the court to hear this motion, Plaintiffs Mersino Management and Karen and Rodney Mersino (collectively "Plaintiffs"), by and through their undersigned counsel, hereby move this Court for a Temporary Restraining Order ("TRO") pursuant to Fed. R. Civ. P. 65(b)(1) and Local Rule 65.1 in order to prevent immediate irreparable injury to Plaintiffs' fundamental rights and interests. Subsequent to this Court's determination on Plaintiffs' Motion for a TRO and by way of this motion, Plaintiffs move for a Preliminary Injunction pursuant to Fed. R. Civ. P. 65(a) in order to prevent irreparable injury to Plaintiffs' fundamental rights and interests after the expiration of time or the Court's decision on the former part of this motion.

Plaintiffs rely upon the pleadings and papers of record, as well as their brief filed with this motion, and the declarations attached hereto. For the reasons set forth more fully below, Plaintiffs hereby request that this court enjoin the enforcement of Defendants' Health and Human Services Mandate (hereinafter "HHS Mandate" or "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*. For the purposes of this request for a temporary restraining order and preliminary injunctive relief, the Plaintiffs focus solely on Claims I-III and VII-VIII of their complaint; however, Plaintiffs do not forfeit any of the claims alleged in their complaint.

1. The purpose of injunctive relief in this case is to permit Plaintiffs to continue to provide insurance to their employees that does not violate Plaintiffs' constitutionally and statutorily granted right to free exercise of religion.

2. Without relief from this Court, the Plaintiffs will be irreparably harmed as the Plaintiffs' constitutional rights will be violated.

3. This motion requires immediate attention for the reasons set forth more fully below. Plaintiffs hereby request that this Court enjoin the enforcement of Defendants' Health and Human Services Mandate (hereinafter "HHS Mandate" or "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.

4. Plaintiffs sincerely hold religious beliefs that disallow providing group health insurance with coverage for contraception and abortifacients.

5. Plaintiffs' group health plan never provided coverage for contraception and abortifacients.

6. On June 1, 2013, the HHS Mandate will begin to apply to Plaintiffs' group health plan this requiring the immediate attention of this Court.

7. On March 22, 2013, Plaintiffs filed their Complaint.

8. Plaintiffs served all Defendants with the Complaint.

9. Plaintiffs have made attempts to resolve this matter prior to seeking this relief from the Court.

10. Pursuant to Local Rule 7.1 and Local Rule 65.1, Plaintiffs sought concurrence in the relief requested by this Motion. Defendants through their counsel at the Department of

Justice, Civil Division, Federal Programs Branch, communicated that there would be no concurrence and a motion to the Court was necessary.

11. Plaintiffs' counsel has provided notice of this request through the Court's electronic filing system. Defendants' counsel has filed an appearance and receives filings through the Court's electronic filing system. The phone number for the Department of Justice, Civil Division, Federal Programs Branch is (202) 514-3367.

Respectfully submitted this 8th day of May, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I certify that a copy of the foregoing has been served by ordinary U.S. Mail upon all parties for whom counsel has not yet entered an appearance electronically: None

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s/ Erin Mersino
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ISSUE PRESENTED

I. Whether forcing Plaintiffs to provide health insurance pursuant to a mandate from the government that directly violates their sincerely held religious beliefs causes irreparable harm sufficient to warrant injunctive relief.

CONTROLLING AUTHORITY

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

Elrod v. Burns, 427 U.S. 347 (1976)

Sherbert v. Verner, 374 U.S. 398 (1963)

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

And the Nineteen Cases in which Courts have granted the same injunctive relief requested by these Plaintiffs:

Monaghan v. Sebelius, No. 12-15488, slip op. (E.D. Mich. December 30, 2012)

Monaghan v. Sebelius, No. 12-15488, slip op. (E.D. Mich. March 14, 2013)

Legatus v. Sebelius, No. 12-12061, slip op. (E.D. Mich. October 31, 2012)

O'Brien v. U.S. Dep't of Health & Human Servs., No. 12-3357, order (8th Cir. Nov. 28, 2012)

Korte v. Sebelius, No. 12-3841, slip op. (7th Cir. Dec. 28, 2012)

Grote Indus. LLC v. Sebelius, No. 13-1077, slip op. (7th Cir. Jan. 30, 2013)

Annex Med. Inc. v. Sebelius, No. 13-1119, slip op. (8th Cir. Feb. 1, 2013)

Am. Pulverizer Co. v. Dep't of Health & Human Servs., No. 12-3459, slip op. (W.D. Mo. Dec. 20, 2012)

Newland v. Sebelius, No. 12-1123, slip op. (D. Colo. July 27, 2012)

Tyndale House Publishers, Inc. v. Sebelius, No. 12-1635, slip op. (D.D.C. Nov. 16, 2012)

Triune Health Group, Inc. v. U.S. Dep't of Health and Human Servs., No. 1:12-cv-06756 (N.D. Ill. Jan. 3, 2013)

Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs., 12-92, slip op. (E.D. Mo. Dec. 31, 2012)

Sioux Chief Mfg. Co., Inc. v. Sebelius, No. 13-36, order (W.D. Mo. Feb. 28, 2013)

Seneca Hardwood Lumber v. Sebelius, No. 12-207, slip op. (W.D. Pa. Apr. 19, 2013)

Lindsay, Rappaport & Postel LLC v. Sebelius, No. 13-1210, order (Mar. 20, 2013)

Gilardi v. Dep't of Health & Human Servs., No. 13-5069 , order (D.C. Cir. Mar. 29, 2013)

Bick Holding, Inc. v. Sebelius, No. 13-462, order (E.D. Mo. Apr. 1, 2013)

Am. Manufacturing Co. v. Sebelius, No. 13-295, slip op.(D. Minn. Apr. 2, 2013)

Hart Electric LLC v. Sebelius, No. 13-2253, order (N.D. Ill. Apr. 18, 2013)

Tonn and Blank Construction v. Sebelius, No. 12-325, order (N.D. Ill. Apr. 1, 2013).

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

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Plaintiffs bring this Motion to enjoin the Health and Human Services Mandate ("HHS Mandate" or "mandate"). Defendants seek to force Plaintiffs to act in violation of their Catholic faith by providing contraceptives and abortifacients to their employees via a self-funded insurance plan.[1] This despoils religious freedom, and is irreconcilable with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA") and the First Amendment. Facing imminent, irreparable harm to their religious freedom, Plaintiffs seek to enjoin the mandate. Nineteen courts, including two within the Eastern District of Michigan, have enjoined the mandate for for-profit companies indistinguishably situated and structured to Plaintiffs.[2]

FACTUAL BACKGROUND

Mersino Management Company is a family-owned, for-profit company. (K. Mersino Decl. at ¶ 3 at Ex. 1; R. Mersino Decl. at ¶ 3 at Ex. 2). Plaintiff Karen and Rodney Mersino are the founders and owners of Mersino Management Company and the companies owned by it. (K. Mersino Decl. at ¶¶ 1, 4-9 at Ex. 1; R. Mersino Decl. at ¶ 1, 5-8 at Ex. 2). Plaintiffs employ 184

[1] At the same time Defendants are forcing Plaintiffs to violate their religious beliefs, Defendants have simply *decided not* to impose the mandate against several Plaintiffs in at least six similar cases brought by for-profit companies and their owners. *See Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092, (Doc. # 41) (E.D. Mo. Mar. 11, 2013); *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-0036, (Doc. # 9) (W.D. Mo. Feb. 28, 2013)); *Hall v. Sebelius*, No. 13-0295, (Doc. # 10) (D. Minn. Apr. 2, 2013); *Bick Holding, Inc. v. Sebelius*, No. 4:13-cv-00462, (Doc. # 1) (E.D. Mo. Apr. 1, 2013); *Tonn and Blank Construction v. Sebelius*, No. 12-325, order (N.D. Ill. Apr. 1, 2013); *Lindsay v. Sebelius*, No. 1:13-cv-01210, (Doc. # 21) (N.D. Ill. Mar. 20, 2013). It seems disingenuous at least to claim that Plaintiffs must preliminarily comply with the mandate while specifically exempting others; such action undermines the Defendants' arguments against injunctive relief.

[2] *Monaghan v. Sebelius*, No. 12-15488, slip op. (E.D. Mich. Dec. 30, 2012 & Mar. 14, 2013); *Legatus v. Sebelius*, No. 12-12061, slip op. (E.D. Mich. Oct. 31, 2012); *see also O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, order (8th Cir. Nov. 28, 2012); *Korte v. Sebelius*, No. 12-3841, slip op. (7th Cir. Dec. 28, 2012), *Grote Indus. LLC v. Sebelius*, No. 13-1077, slip op. (7th Cir. Jan. 30, 2013); *Annex Med. Inc. v. Sebelius*, No. 13-1119, slip op. (8th Cir. Feb. 1, 2013), *Am. Pulverizer Co. v. Dep't of Health & Human Servs*., No. 12-3459, slip op. (W.D. Mo. Dec. 20, 2012); *Newland v. Sebelius*, No. 12-1123, slip op. (D. Colo. July 27, 2012); *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, slip op. (D.D.C. Nov. 16, 2012); *Triune Health Group, Inc. v. U.S. Dep't of Health and Human Servs.*, No. 1:12-cv-06756 (N.D. Ill. Jan. 3, 2013); *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs.*, 12-92, slip op. (E.D. Mo. Dec. 31, 2012); *Sioux Chief Mfg. Co., Inc. v. Sebelius*, No. 13-36, order (W.D. Mo. Feb. 28, 2013); *Seneca Hardwood Lumber v. Sebelius*, No. 12-207, slip op. (W.D. Pa. Apr. 19, 2013); *Lindsay, Rappaport & Postel LLC v. Sebelius*, No. 13-1210, order (Mar. 20, 2013); *Gilardi v. Dep't of Health & Human Servs.*, No. 13-5069 , order (D.C. Cir. Mar. 29, 2013); *Bick Holding, Inc. v. Sebelius*, No. 13-462, order (E.D. Mo. Apr. 1, 2013); *Am. Manufacturing Co. v. Sebelius*, No. 13-295, slip op.(D. Minn. Apr. 2, 2013); *Hart Electric LLC v. Sebelius*, No. 13-2253, order (N.D. Ill. Apr. 18, 2013); *Tonn and Blank Construction v. Sebelius*, No. 12-325, order (N.D. Ill. Apr. 1, 2013).

full-time employees. (K. Mersino Decl. at ¶¶ 47-48 at Ex. 1; R. Mersino Decl. at ¶ 46-47 at Ex. 2). Plaintiffs strive to follow the teachings, mission, and values of the Catholic faith. (K. Mersino Decl. at ¶¶ 10-24, 29 at Ex. 1; R. Mersino Decl. at ¶ 9-25 at Ex. 2). Plaintiff Karen and Rodney Mersino are responsible for setting all policies governing the conduct Mersino Management Company and its companies. (K. Mersino Decl. at ¶ 9 at 1; R. Mersino Decl. at ¶ 8 at Ex. 2). Plaintiffs' first and foremost policy is to "Honor God in all we do." (Compl. at Ex. 1). Plaintiffs align their beliefs with Pope Paul VI's 1968 encyclical Humanae Vitae, which states "any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation, whether as an end or as a means"—including contraception—is sinful. (K. Mersino Decl. at ¶¶ 12, 15-18 at Ex. 1; R. Mersino Decl. at ¶ 11, 14-17 at Ex. 2). Plaintiffs subscribe to authoritative Catholic teaching regarding the proper nature of health care and medical treatment. For instance, Plaintiffs believe, in accordance with Pope John Paul II's 1995 encyclical Evangelium Vitae, that "'[c]ausing death' can never be considered a form of medical treatment," but rather "runs completely counter to the health-care profession, which is meant to be an impassioned and unflinching affirmation of life." *Id.* Plaintiffs do not believe that contraception or abortifacients properly constitute health care, but involve immoral practices. (K. Mersino Decl. at ¶¶ 15-17,29-31 at Ex. 1; R. Mersino Decl. at ¶ 15-16, 28-31 at Ex. 2).

Due to these beliefs, Plaintiffs offer a self-funded group health insurance plan with its third party claims administrator and prescription coverage provider that specifically excludes coverage for contraception and abortifacients. (K. Mersino Decl. at ¶¶ 24-27, 29-32 at Ex. 1; R. Mersino Decl. at ¶ 23-26 at Ex. 2; Lewis Decl. at ¶¶ 4, 5 at Ex. 3; Stacy Decl. at ¶ 5 at Ex. 4). Plaintiffs' plan year begins on June 1, 2013. (K. Mersino Decl. at ¶ 35 at Ex. 1; R. Mersino Decl. at ¶ 34 at Ex. 2). Due to the mandate, Plaintiffs will lose their ability to make health care

insurance decisions in line with their religious views on June 1, 2013. *Id.* The mandate will force Plaintiffs to pay, fund, contribute, provide, or support artificial contraception and abortifacients or related education and counseling, in violation of their Constitutional rights and deeply held religious beliefs.[3] The Affordable Care Act ("ACA") called 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 Defendant Sebelius to determine what would constitute "preventive care." 42 U.S.C § 300gg-13(a)(4). Defendants 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.[4] Prior to adopting those guidelines, Defendants accepted public comments. A large number of groups filed comments, warning of the potential conscience implications of requiring religious individuals and groups to pay for contraception 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 FDA-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.[5] All FDA-approved contraceptives included contraception, abortion, and abortifacients such as birth-

[3] *See* 45 C.F.R. § 147.130 (a)(1)(iv), as confirmed at 77 Fed. Register 8725 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration (HRSA) Guidelines, (http://www.hrsa.gov/womensguidelines).

[4] 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 (published Aug. 3, 2011); 45 C.F.R. § 147.130.

[5] *See* 45 C.F.R. § 147.130 (a)(1)(iv), as confirmed at 77 Fed. Register 8725 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration (HRSA) Guidelines, (http://www.hrsa.gov/womensguidelines).

control pills; prescription contraceptive devices, including IUDs; Plan B, also known as the "morning-after pill"; and ulipristal, also known as "ella" or the "week-after pill"; and other drugs, devices, and procedures.[6] The 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 "preventive care" by making available and subsidizing such contraception, abortion, and abortifacients. The 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 conscience and deeply held religious beliefs.

The ACA and the mandate include a number of exemptions, but Plaintiffs do not fall within them.[7] Plaintiffs' insurance plan is not "grandfathered." (Stacy Decl. at ¶ 7 at Ex. 4).[8] Plaintiffs do not qualify for the "religious employer" exemption contained in 45 C.F.R. § 147.130 (a)(iv)(A) and (B). Plaintiffs cannot be considered for this exemption as Mersino Management Company is for-profit. Defendant Sebelius has announced that there will be no change to the religious exemption, but "[n]onprofit employers who, based on religious beliefs, do not currently provide contraceptive coverage in their insurance plan, will be provided an

[6] (http://www.hrsa.gov/womensguidelines) (*last visited* May 6, 2013).

[7] 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).

[8] Plaintiffs' health care plan is not a grandfathered plan as: (1) the health care plan does not include the required "disclosure of grandfather status" statement; (2) Plaintiffs do not take the position that its health care plan is a grandfathered plan and thus do not maintain the records necessary to verify, explain, or clarify its status as a grandfathered plan nor will it make such records available for examination upon request; and (3) the health care plan has an increase in a percentage cost-sharing requirement measured from March 23, 2010. *See* 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; (K. Mersino Decl. at ¶ 36 at Ex. 1; R.. Mersino Decl. ¶ 35 at Ex. 2; Stacy Decl. at ¶ 7 at Ex. 4).

additional year, until August 1, 2013, to comply with the new law."[9] This provided no relief to Plaintiffs, as a for-profit company is ineligible for the safe-harbor provision.[10] Defendants claim that the temporary safe-harbor provision could become permanent for non-profit companies who object to the mandate.[11] Defendant Sebelius also announced that HHS "intend[s] to require employers that do not offer coverage of contraceptive services to provide notice to employees, which will also state that contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support," acknowledging that contraceptives are readily available without mandating Plaintiffs subsidize them.[12]

Without the injunctive relief of this Court, Plaintiffs are forced to choose: comply with the mandate and violate their deeply held religious beliefs, or disobey federal law and incur the consequences, including severe burdens on their religious exercise, enormous penalties, and substantial competitive disadvantages in employee recruitment and retention if Plaintiffs are no longer able to offer health care.[13] In this motion, Plaintiffs simply seek to maintain the *status quo* and to continue providing health insurance in compliance with their sincere and deeply held religious beliefs. (K. Mersino Decl. at ¶ 45 at Ex. 1; R. Mersino Decl. at ¶ 44 at Ex. 2).

ARGUMENT

"The factors to be weighed before issuing a TRO are the same as those considered for issuing a preliminary injunction." *Monaghan*, slip op. at *6-7 (E.D. Mich. Dec. 30, 2012) (citing *Workman v. Bredesen*, 486 F.3d 896, 904-05 (6th Cir. 2007)). That standard is:

[9] (http://www.hhs.gov/news/press/2012pres/01/20120120a.html) (*last visited* May 6, 2013).
[10] 77 Fed. Register 8725 (Feb. 15, 2012).
[11] (http://www.hhs.gov/news/press/2013pres/02/20130201a.html) (*last visited* May 6, 2013).
[12] (http://www.hhs.gov/news/press/2012pres/01/20120120a.html) (*last visited* May 6, 2013).
[13] Upon not providing insurance to its employees, Plaintiffs would incur a $2,000 annual fine *per employee*, of which they have 184 employees. 26 U.S.C. § 4980H. The fines are even more insurmountable if Plaintiffs were to decide to offer insurance that did not comply with the HHS Mandate. (Karen A. Mersino Decl. at ¶¶ 47-48 at Ex. 1; Rodney A. Mersino Decl. at ¶¶ 46-47 at Ex. 2) ($6,716,000 per year penalty).

> 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.

Connection Distributing Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998); *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. *Id.*

A. Plaintiffs' have a Likelihood of Success on the Merits.

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

The Religious Freedom Restoration Act, 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb *et seq.* ("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," 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." *Id.*; *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (holding that RFRA applies to the federal government); *Newland v. Sebelius*, No. 12-1123, slip op. at *17-18 (D. Colo. July 27, 2012) (granting preliminary injunction from HHS Mandate due to violation of RFRA); *Legatus v. Sebelius*, No. 12-12061, slip op. (E.D. Mich. October 31, 2012) (same); *Monaghan*, slip op. (E.D. Mich. March 14, 2013) (same).

In its formulation of 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 RFRA expressly enacted by Congress to protect religious freedom, the mandate

substantially burdens the Plaintiffs' sincere exercise of religion. 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. A Corporation and its Owners have First Amendment rights.

The corporate form cannot be reason to declare an entity incapable of exercising religion. RFRA applies to "persons," 42 U.S.C. § 2000bb(b), and persons as defined by 1 U.S.C. § 1 includes corporations. This requires the conclusion that corporations can exercise religion. Concluding otherwise would mean that churches, religious hospitals, and religious non-profits cannot bring claims under RFRA or the Free Exercise Clause. Reading the definition of person to cover corporations is consistent with the statutory scheme as corporations already benefit from other civil rights provisions and from the First Amendment Rights RFRA was designed to restore. *See, Thinket Ink. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1058-60 (9th Cir. 2004)(corporations may bring § 1981 actions for racial discrimination); *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 867 (9th Cir. 1984)(corporations may bring § 1983 actions and qualify as "persons" under the 14th Amendment and the equal protection and due process clauses); *NAACP v. Button*, 371 U.S. 415, 428-30 (1963)(corporations can assert the rights of others). Corporations qualify as "persons" under the 14th Amendment, the equal protection clause, and the due process clause. *Id*. Corporations have also brought free exercise cases. *See, Church of the Lukumi Babalu Aye, **Inc.** v. City of Hialeah*, 508 U.S. 520, 525 (1993) (involving "not-for-profit corporation organized under Florida law"); *Okleveuha Native Am. Church of Hawaii, **Inc.** v. Holder*, 676 F.3d 829 (9th Cir. 2012); *Mirdrash Sephardi, **Inc.** v. Town of Surfside*, 367 F. 3d 1214 (11th Cir. 2004); Durham & Smith, *1 Religious Organizations and the Law* § 3:44 (2012) (explaining reasons religious organizations use the corporate form).

The Supreme Court has expressly held that "First Amendment protection extends to corporations," and a right "does not lose First Amendment protection simply because its source is a corporation." *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 899 (2010); *see also Monell v. Dept. of Social Services*, 436 U.S. 658, 687 (1978) ("corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis").[14] For-profit corporations such as the New York Times could never have won seminal cases without possessing such rights. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Just because Plaintiffs have entered the marketplace, they have not abandoned their rights to the exercise of religion. The Supreme Court has recognized that an Amish business owner exercises religion in *United States v. Lee*, 455 U.S. 252, 257 (1982). Although that employer lost on another element of the claim, the Court specifically recognized he exercised religion. *Id.* Other cases likewise show that a for-profit company can exercise religion and bring free exercise

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[14] In *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), the Supreme Court held in its determination of the constitutionality of a law identified as §8:

> The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether § 8 abridges expression that the First Amendment was meant to protect. We hold that it does. . . . We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property. The "materially affecting" requirement is not an identification of the boundaries of corporate speech etched by the Constitution itself. Rather, it amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.

Id. at 775-76, 784 (1978). These protections cannot be reconciled with the government's view that commerce excludes religion. This is as it should be because any effort to make Plaintiffs' surrender fundamental rights in order to use the corporate form would itself be unconstitutional. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) ("our modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected [First Amendment rights] even if he has no entitlement to that benefit"); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government"). Plaintiffs seek to live out religious faith, in part, in the way Plaintiffs conduct the business they own and operate. To force Plaintiffs to violate their conscience or face ruinous fines for doing so substantially burdens Plaintiffs' free exercise under RFRA and the First Amendment.

claims on behalf of itself or its owners. *McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985) (holding that a health club and its owners could assert free exercise claims). The Ninth Circuit allowed two for-profit corporations to assert free exercise claims on behalf of their owners. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119–20 & n.9 (9th Cir. 2009) (pharmacy and its religious owners); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988) (manufacturer on behalf of its religious owners). In *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 200 (2d Cir. 2012), a kosher deli and its owners were allowed to bring Free Exercise and Establishment Clause claims, and each claim was subjected to the applicable level of scrutiny rather than declaring that the for-profit business and its owners were not capable of exercising religion. *See also Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, slip op. at *5-9 (D.D.C. Nov. 16, 2012).

One can exercise religion while engaging in business, and the Free Exercise Clause has often involved the commercial sphere. As discussed in *Sherbert*, an employee's religious beliefs were burdened by not receiving unemployment benefits. 374 U.S. at 399. The same occurred in *Thomas v. Review Brd.*, 450 U.S. 707, 709 (1981). In *U.S. v. Lee*, the Court held that an employer's beliefs were burdened by paying taxes for workers. 455 U.S. at 257. In *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999)(Alito, J.), an employee's bid to continue his employment was burdened by discriminatory grooming rules.[15] No case exists that holds that religious exercise should be confined to the four walls of a person's church, home, or mind. Religion is not an isolated category of human activity. Religion is, *inter alia*, a viewpoint from which people engage in any kind of activity or purpose, not excluding business. *See Goods News Club v. Milford Central School*, 533 U.S. 98, 107-12 (2001) (activities of any

[15] Congress recognizes a corporation s ability to exercise religious beliefs. For example, the ACA lets "facilit[ies]" assert religious beliefs for or against "provid[ing] coverage for" abortions, without requiring them to be nonprofits. 42 U.S.C. § 18023; *see* http://www.aha.org/research/rc/stat-studies/fast-facts.shtml (last visited Apr. 22, 2013).

kind, whether "social," "civic," "recreational," or educational, are not different kinds of activities when religious, they are the same kind of activity simply done from a religious perspective).

RFRA makes no distinction which divides profit vs. non-profit, corporate vs. individual, direct vs. indirect activity. RFRA presents one question: is the government imposing a substantial burden on the exercise of religion? 42 U.S.C. § 2000bb-1. RFRA requires strict scrutiny analysis. The Seventh and Eighth Circuits have echoed four times that such cases present "a sufficient likelihood of success on the merits." *See Annex Medical; O'Brien; Grote; Korte*. The First Amendment has never contained a "dichotomy between religious and secular employers." Corporations are no more purely "secular" or purely religious than are people that run them. It is essential to freedom in America for its citizens to be able to live out their faith in their everyday lives, which includes such things as being employed and running a business.

2. The HHS Mandate substantially burdens Plaintiffs' free exercise of religion.

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, such as the act of Plaintiffs providing self-funded insurance without violating their Catholic faith.

Pursuant to the teachings of the Catholic Church, Plaintiffs' sincerely held religious beliefs prohibit providing or purchasing health insurance coverage for contraception, abortifacients, or related education and counseling. Plaintiffs' compliance with these beliefs is a religious exercise. The mandate creates government-imposed coercive pressure on Plaintiffs to purchase insurance and provide contraception, abortion, and abortifacients—in other words, *to change or violate their beliefs*. By failing to provide an exemption for Plaintiffs' religious beliefs, the mandate not only exposes Plaintiffs to substantial per employee fines for their

religious exercise—at minimum $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 all Plaintiffs to substantial competitive disadvantages if they are no longer permitted to offer or purchase health insurance due to their religious beliefs.[16] The mandate imposes a substantial burden on Plaintiffs' religious exercise by forcing Plaintiffs to violate their deeply held Catholic faith.[17]

3. The HHS Mandate fails to justify a compelling interest.

The 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 the Plaintiffs to provide them. The Defendants must demonstrate a compelling interest and the use of the least restrictive means before this Court, even at the preliminary injunction stage. *Gonzales*, 546 U.S. at 428-30; *Newland*, slip op. at *11 ("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.") In order to prove that its substantial burden on 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 must "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

[16] 26 U.S.C. §§ 4980D & 4980H; *Legatus v. Sebelius*, No. 12-12061, slip op. at *13 (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).

[17] As noted in *Tyndale*, "Because it is the coverage, not just the use, of the contraceptives at issue to which the plaintiffs object, it is irrelevant that the use of the contraceptives depends on the independent decisions of third parties. [E]ven if this burden could be characterized as 'indirect,' the Supreme Court has indicated that indirectness is not a barrier to finding a substantial burden." *Id.* at *13 (citing *Thomas v. Review Brd.*, 450 U.S. 707, 718 (1981)).

S. Ct. 2729, 2738 (2011). "[A]mbiguous proof will not suffice." *Id.* at 2739. Indeed, nineteen times the courts have already ruled that Defendants fail to meet this burden.[18]

There is "no actual problem in need of solving" and forcing Plaintiffs to violate their religious beliefs fails to offer any "actually necessary solution." Forcing Plaintiffs to provide and fund insurance that makes contraceptives and abortifacients available to employees serves only an ambiguous, non-compelling interest and *at best* would serve the interest of *marginally* increasing access to contraceptives and abortifacients. What radically undermines any claim that the mandate is needed to address a compelling harm to its asserted interests is *the tens of millions of employees and participants* for whom Defendants have voluntarily decided to omit. *Newland,* slip op. at *23; *Tyndale,* slip op. at *17. Defendants' interests cannot be compelling against these Plaintiffs when, by the government's own choice in ***not*** applying this mandate to grandfathered plans, nearly 200 million Americans fall outside of the mandate.

Notably, the ACA does impose multiple requirements on grandfathered health plans, but the government has decided that the mandate is not of a high enough order to be imposed. The preventive services Mandate, listed at § 2713 of PPACA, is conspicuously omitted from the provisions that grandfathered plans must observe: §§ 2704, 2708, 2711, 2712, 2714, 2715, and 2718. See list at 75 Fed. Reg. 34,538, 34,542. These include such requirements as dependent coverage until age 26, and restrictions on preexisting condition exclusions, and annual or lifetime limits. Thus Congress itself has deemed that many interests are of the "highest order" to impose on 2/3 of the nation covered in grandfathered plans, but not this Mandate. (The statutory text of § 2713 does not even mention contraception.) It is therefore necessarily true that Congress

[18] *See, e.g.*, *Newland*, slip op. at *17 ("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 also *Legatus,* slip op. at *22 (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").

deemed the mandate to be of a lower order, which fails the compelling interest standard. Defendants have voluntarily granted the equivalent of a preliminary injunction to all non-profit companies satisfying the one-year non-enforcement "safe harbor," so that their employees too are omitted from the mandate and claim that a permanent exemption for non-profit companies is in the rulemaking stage.[19] Furthermore, Defendants have agreed not to enforce the mandate against at least six for-profit companies.[20] Defendants cannot demonstrate a compelling need to require Plaintiffs to comply with a mandate that fails to apply to millions. As in *Gonzales*, where exclusions applied to "hundreds of thousands" (here, tens of millions), RFRA requires "a similar exception for the [hundreds] or so" implicated by Plaintiffs here. *Id.* at 433.

4. The HHS Mandate fails to use the least restrictive means.

The mandate is not the least restrictive means of furthering Defendants' interests. In *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), the Court required the government to use alternatives rather than burden fundamental rights, even when the alternatives might be more costly or less directly effective. In *Riley*, North Carolina sought to curb fraud by requiring professional fundraisers to disclose during solicitations how much of a donation would go to them. 487 U.S. at 786. Applying strict scrutiny, the 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 the alternatives would be costly, less directly effective, and a restructuring of the governmental scheme, strict scrutiny demanded they be viewed as acceptable alternatives. *Id.*

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[19] 77 Fed. Register 8725 (Feb. 15, 2012); *see also* (http://www.hhs.gov/news/press/2013pres/02/20130201a.html) (*last visited* May 6, 2013).

[20] *See Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092, (Doc. # 41) (E.D. Mo. Mar. 11, 2013); *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-0036, (Doc. # 9) (W.D. Mo. Feb. 28, 2013)); *Hall v. Sebelius*, No. 13-0295, (Doc. # 10) (D. Minn. Apr. 2, 2013); *Bick Holding, Inc. v. Sebelius*, No. 4:13-cv-00462, (Doc. # 1) (E.D. Mo. Apr. 1, 2013); *Tonn and Blank Construction v. Sebelius*, No. 12-325, order (N.D. Ill. Apr. 1, 2013); *Lindsay v. Sebelius*, No. 1:13-cv-01210, (Doc. # 21) (N.D. Ill. Mar. 20, 2013).

Defendants could further their interests without coercing Plaintiffs to violate their religious exercise. The government could subsidize contraception itself and give it to employees at exempt entities. This in and of itself shows the mandate fails RFRA's least restrictive means elements. *Gonzales*, 546 U.S. at 428-30. The government could offer tax deductions for the purchase of contraceptives, reimburse citizens who pay to use contraceptives, or provide incentives for pharmaceutical companies to provide such products free of charge. Defendants could offer tax credits to those companies who comply with the Mandate while not punishing those who do not based upon religious beliefs. As in *Riley*, Defendants could add to the already existing HHS website or the website for the exchanges to provide for the availability of free contraceptives. Defendants could arrange—although they admit this is already in place—for the "preventive services" to be made available at community health centers, public clinics, and hospitals. (http://www.hhs.gov/news/press/2012pres/01/20120120a.html) (*last visited* May 6, 2013). In fact the government *already* subsidizes contraception for certain individuals.[21] Of the various ways the government could achieve its interests, it has chosen perhaps the *most burdensome* means for non-exempt employers with religious objections to contraceptive services.[22] HHS has carved out exemptions for secular purposes such as size of employer, the age and grandfathered status of a plan, and waivers for high grossing employers. Granting exemptions to protect rights granted under the First Amendment should be at least as important. There is no evidence that women are helped by making sure that their religious employers

[21] *See, e.g.*, Family Planning grants in 42 U.S.C. § 300, et seq.; the Teenage Pregnancy Prevention Program, Public Law 112-74 (125 Stat 786, 1080); the Healthy Start Program, 42 U.S.C. § 254c-8; the Maternal, Infant, and Early Childhood Home Visiting Program, 42 U.S.C. § 711; Maternal and Child Health Block Grants, 42 U.S.C. § 703; 42 U.S.C. § 247b-12; Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq.; the Indian Health Service, 25 U.S.C. § 13, 42 U.S.C. § 2001(a), & 25 U.S.C. § 1601, et seq.; Health center grants, 42 U.S.C. § 254b(e), (g), (h), & (i); the NIH Clinical Center, 42 U.S.C. § 248; the Personal Responsibility Education Program, 42 U.S.C. § 713; and the Unaccompanied Alien Children Program, 8 U.S.C. § 1232(b)(1).

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

provide contraception for them. If women received free contraception from a different source, there is no evidence these women would face grave or paramount harms. *Gonzales*, 546 U.S. at 435-37. The effect of contraception does not differ based upon who has purchased it. There are less restrictive ways for the Defendants to achieve their stated goals.

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. The government may not impose special restrictions, prohibitions, or disabilities on the basis of religious beliefs. *See McDaniel v. Paty*, 435 U.S. 618 (1978). "This principle that government may not enact laws that suppress religious belief or practice is . . . well understood." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). The 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 (*when not subject to the scrutiny and analysis of RFRA*, a facially neutral law of general applicability is permissible notwithstanding 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)).[23]

In *Church of the 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.*

[23] *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'").

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 the Defendant prior to the enactment of the ordinance. *Id.* at 526-27.

In deciding that the ordinance was not neutral nor generally applicable, the Court emphasized that the Free Exercise Clause "forbids subtle departures from neutrality, and covert suppression of particular religious beliefs." *Id.* at 534. And "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 (internal quotations and citations omitted).

1. The HHS Mandate is not neutral nor generally applicable, and fails strict scrutiny.

The mandate cannot avoid strict scrutiny as the law is not neutral or generally applicable. Defendants have set forth a number of individualized exemptions from the general requirement; widespread individualized exemptions deny the 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."); *Newland*, slip op. at *15 (holding that the scheme of exemptions in the HHS Mandate "completely undermines any compelling interest").

Despite being informed in detail of the imposition on Catholic faith beforehand, Defendants designed the mandate in a way that made it impossible for Plaintiffs to comply with their beliefs. By design, Defendants impose the mandate on some religious organizations or

individuals but not 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 including 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.

- Employers with fewer than 50 full time employees. 26 USC § 4980H(c)(2)(B)(i). While employers with more than 50 full time employees must provide federal government-approved health insurance or pay substantial per-employee fines. 26 U.S.C. § 4980H.

- Non-profit employers who qualify under the narrow exemption of a "religious employer." 45 C.F.R. § 147.130 (a)(iv)(A) and (B).

- All non-profit employers who do not qualify as a "religious employer" but who object to the HHS Mandate on religious grounds. 77 Fed. Register 8725 (Feb. 15, 2012); *see also* (http://www.hhs.gov/news/press/2013pres/02/20130201a.html) (*last visited* May 6, 2013).

The mandate in its exemptions completely fails to address the constitutional and statutory implications on for-profit, Catholic employers such as Plaintiffs who conscientiously object to the mandate on religious grounds. The substantial burden the Defendants anchor onto Plaintiffs' religious exercise is not narrowly tailored to any compelling governmental interest. The mandate violates Plaintiffs' rights under the Free Exercise Clause of the First Amendment. 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 Court. The HHS Mandate deprives Plaintiffs of their fundamental First Amendment rights. 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*, slip op. at *26 ("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*."). Additionally, Plaintiffs will suffer financial harm. Plaintiffs face crippling per employee fines for noncompliance with the mandate. Plaintiffs face substantial competitive disadvantages if they are no longer permitted to offer or purchase health insurance due to remaining faithful to their religious beliefs. Plaintiffs will incur substantial costs and expenses due to the enforcement of the mandate. If an injunction does not issue, Plaintiffs will be forced to violate their religious beliefs or forfeit health insurance.

C. Granting a Preliminary Injunction Will Cause No Substantial Harm to Others.

Contrary to Plaintiffs' irreparable harm, 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 any legitimate interests.[24] 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 the Defendants evidenced by Defendants' consent to enjoin the HHS Mandate at least six nearly identical cases. *Seneca Hardwood Lumber*, slip op. at *22 ("defendants cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in several similar cases. In light of the exemptions granted, and defendants' position with respect to injunctive relief in other cases, this factor weighs strongly in favor of granting the requested

[24] *Connection Distributing Co.*, 154 F. 3d at 288; *Legatus*, slip op. at 28 (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.").

relief.").[25] As demonstrated, the enforcement of the mandate on Plaintiffs violates the First Amendment, and Defendants have consented to allowing any "harm" by issuing injunctive relief.

D. The Public Interest Favors Granting the Injunction.

The impact of an injunction on the public interest turns on whether Constitutional rights are violated by the enforcement of the mandate: "[I]t is always in the public interest to prevent the violation of a party's Constitutional rights."[26] The mandate forces a direct violation of Plaintiffs' fundamental rights, and the public interest is best served by preventing such violation. *Monaghan*, slip. op. at *19 (March 14, 2013) ("It is in the best interest of the public that Monaghan [the Plaintiff] not be compelled to act in conflict with his religious beliefs.")

CONCLUSION

In the final analysis, the Defendants' mandate violates both RFRA and the First Amendment. Without an injunction, Plaintiffs will be irreparably harmed and must choose between acting against their Catholic faith or suffering massive financial penalties and harm to their goodwill and sustainability. Defendants, conversely, would face no harm from an injunction as they already exempts millions of others from providing contraception, sterilization, abortifacients, and counseling and education for the same in their health plans. Plaintiffs hereby request that this court issue injunctive relief.

Respectfully submitted this 7th day of May, 2013.

THOMAS MORE LAW CENTER

s/ Erin Mersino

[25] *See Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092, (Doc. # 41) (E.D. Mo. Mar. 11, 2013); *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-0036, (Doc. # 9) (W.D. Mo. Feb. 28, 2013)); *Hall v. Sebelius*, No. 13-0295, (Doc. # 10) (D. Minn. Apr. 2, 2013); *Bick Holding, Inc. v. Sebelius*, No. 4:13-cv-00462, (Doc. # 1) (E.D. Mo. Apr. 1, 2013); *Tonn and Blank Construction v. Sebelius*, No. 12-325, order (N.D. Ill. Apr. 1, 2013); *Lindsay v. Sebelius*, No. 1:13-cv-01210, (Doc. # 21) (N.D. Ill. Mar. 20, 2013).

[26] *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").

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I certify that a copy of the foregoing has been served by ordinary U.S. Mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

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