IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:12-cv-01123-JLK

WILLIAM NEWLAND;
PAUL NEWLAND;
JAMES NEWLAND;
CHRISTINE KETTERHAGEN;
ANDREW NEWLAND; and
HERCULES INDUSTRIES, INC., a Colorado Corporation;

Plaintiffs,

v.

KATHLEEN SEBELIUS, in her official capacity as
Secretary of the United States Department of Health and Human Services;
HILDA SOLIS, in her official capacity as
Secretary of the United States Department of Labor;
TIMOTHY GEITHNER, in his official capacity as
Secretary of the United States Department of the Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR; and
UNITED STATES DEPARTMENT OF THE TREASURY;

Defendants.

BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Defendants seek to force citizens to violate their sincerely held religious beliefs merely because those citizens operate a business in the United States of America. Defendants' national mandate of birth control and abortifacient coverage in health insurance (hereinafter "Mandate")[1] disregards religious conscience rights that are enshrined in federal statutory and constitutional law. Those rights squarely protect the Plaintiffs in this case, the Newland family and Hercules Industries. The Mandate's burdens on Plaintiffs' beliefs cannot be reconciled with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. (RFRA), because (among many reasons) there are obvious less-religiously-restrictive means for the government to pursue free contraception, abortifacients and sterilization, such as for the government to subsidize it.

Defendants' own behavior shows that their Mandate is not in furtherance of a compelling interest "of the highest order" (as required by *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)). They offer a multitude of secular and even religious exemptions to the Mandate, but refuse to respect the beliefs of Plaintiffs. The Mandate does not apply to approximately 100 million employees in "grandfathered" plans, the Amish, small employers, self-serving churches, and others.

This arbitrary regime of exemptions further illustrates that the Mandate violates the religion clauses of the First Amendment. The Supreme Court insists that a law

[1] As described below, the Mandate consists of a conglomerate of regulations, guidelines, indirect statutory authority and penalties.

cannot burden religious exercise while offering such a variety of other exemptions. *See, e.g.*, *id.* at 542–46; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432–37 (2006). Such a scheme is not "neutral" or "generally applicable."

The Mandate also engages in entanglement with and hostility to religious beliefs in violation of the First Amendment's Establishment Clause. Defendants have purported to decide who is, and who is not, sufficiently "religious" to receive the largesse of their accommodations. The Mandate attempts to marginalize certain expressions of religious beliefs by declaring that entities do not qualify for an exemption unless they are churches or religious orders that primarily serve, hire, and inculcate beliefs upon their own adherents. This establishes a caste system of religious believers, favoring some while punishing others, such as the Plaintiffs here. This is government establishment of religion in one of the most basic senses of the phrase. *Colo. Christian U. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008). Defendants are, additionally, violating Plaintiffs' freedom not to speak through the "counseling" that the Mandate requires.

Defendants' illegal Mandate poses an urgent threat to the Newlands and their family business Hercules Industries. The Mandate will force them to implement, starting in August 2012, the process of inserting objectionable items into their November 1, 2012 health plan. If this Court does not issue preliminary injunctive relief against the applicability of the Mandate to Plaintiffs prior to August 1, Defendants will irreparably trample on Plaintiffs' federal rights and injure their ability to obtain final relief.

FACTUAL BACKGROUND

As is set forth in Plaintiffs' Verified Complaint, incorporated herein by this reference, Plaintiffs are a family that runs an HVAC manufacturing business in Denver. Verified Complaint ("VC") ¶ 11–17 (12-cv-1123, Doc. # 1). William, Paul and James Newland and Christine Ketterhagen are siblings who together are the full owners and Board of Directors of Hercules Industries, Inc. *Id.* William Newland is also the President of Hercules. *Id.* His son Andrew is the Vice President, and will take over as President starting January 2, 2013. *Id.* Together the Newlands are responsible for all of Hercules' operations, which include 265 full-time employees. VC ¶¶ 17, 38.

The Newlands are Catholics, and they strive through their operation of Hercules (and in the other aspects of their lives) to follow the teachings of the Catholic Church. VC ¶¶ 27–29, 31, 34. The Newlands' commitment to Catholic religious ethics permeates their management of Hercules. *Id.* They have established a mission statement of Hercules that strives for the holistic good of their employees, including "spiritually." VC ¶ 33. In recent years under the Newlands' management, Hercules has donated hundreds of thousands of dollars to Catholic educational, evangelistic, religious and charitable efforts in their community. VC ¶ 35. For several years the Newlands have implemented a program within Hercules to more thoroughly conform its management and company culture to religious ethical principles that derive from their Catholic beliefs about how people flourish in the workplace and beyond. VC ¶ 36.

In exercise of their sincerely and deeply held Catholic beliefs, Plaintiffs omit contraception (which includes but is not limited to drugs they deem to be abortifacient) and sterilization from their employee health insurance plan. VC ¶¶ 30–32, 41. Plaintiffs self-insure that plan, and the next plan-year begins November 1, 2012. VC ¶¶ 39–40. To put the details in place for that November 1 plan, and especially to make any changes, Plaintiffs must start logistical arrangements by August 1, 2012. VC ¶ 43.

Defendants have mandated that Plaintiffs violate their deeply held religious beliefs by inserting coverage of contraception, abortifacients, sterilization, and education and counseling in favor of the same into their employee health plan starting in the November 1, 2012 plan year. VC ¶¶ 54–60, 66–71, 87. The Patient Protection and Affordable Care Act of 2010 (PPACA) did not require this Mandate. But it did require that health plans include coverage of yet-to-be-specified preventive health services, including preventive care items for women, at no cost-sharing to patients. 42 U.S.C. § 300gg-13(a)(4). Defendants issued regulations ordering HHS's Health Resources and Services Administration (HRSA) to decide what would be mandated as women's preventive care. 75 Fed. Reg. 41726–60 (July 19, 2010). HRSA issued such guidelines in July 2011, mandating that preventive care for women include "All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." http://www.hrsa.gov/womensguidelines/ . Very shortly thereafter Defendants issued an

"interim final rule" endorsing HRSA's guidelines as applied to plan years beginning after August 1, 2012, and granting "additional discretion" to HRSA to exempt some religious objectors from the Mandate, according to a specific religious definition. 76 Fed. Reg. 46621–26 (Aug. 3, 2011). At last, Defendants issued final regulations by adopting the Aug. 3 regulations "without change." 77 Fed. Reg. 8725–30 (Feb. 15, 2012).

The Mandate triggers a variety of penalties against Plaintiffs if they do not violate their religious beliefs. VC ¶¶ 54–60. Section 1563 of PPACA incorporates the preventive care requirement into the Internal Revenue Code as well as ERISA. See "Conforming Amendments," Pub. L. 111-148, §1563(e)-(f). This results in penalties through the Treasury Department of approximately $100 per employee *per day* on Plaintiffs if they continue providing their employees with generous health insurance coverage but omit the mandated items to which they object. 26 U.S.C. § 4980D. Furthermore, the law imposes a $2,000 per employee per year penalty on Plaintiffs if they omit health insurance altogether. 26 U.S.C. § 4980H. Meanwhile, the Labor Department as well as Plaintiffs' plan participants are authorized to sue Plaintiffs for omitting the objectionable mandated coverage, and those suits can specifically force the Plaintiffs to violate their beliefs by providing the objectionable coverage`. 29 U.S.C. § 1132.

This Court is Plaintiffs' only recourse from the Mandate's assault on their religious freedom. VC ¶ 91. Plaintiffs' health plan is not grandfathered from the Mandate, nor does it meet the variety of other secular or religious exemptions Defendants

and federal law have chosen to provide. VC ¶¶ 64, 74, 78. Plaintiffs have no adequate remedy at law. VC ¶ 92. Unless this Court orders preliminary injunctive relief to Plaintiffs before August 1, 2012, so as to prevent the Mandate's applicability to them, Plaintiffs will suffer irreparable harm by Defendants' coercion, because it blatantly violates longstanding religious conscience protections found in federal statute and the constitution. VC ¶ 91.

ARGUMENT

A preliminary injunction motion turns on four factors: (1) likelihood of success on the merits; (2) likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in the movant's favor; and (4) the injunction is in the public interest. *Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009). Each factor favors injunctive relief here.

I. Plaintiffs Are Likely to Succeed on the Merits.

A. The Mandate violates RFRA.

Defendants' Mandate is a textbook violation of the Religious Freedom Restoration Act (RFRA). That statute provides:

> (a) In general
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates 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. RFRA applies against actions of the federal government. *O Centro Espirita*, 546 U.S. at 424 n.1. RFRA adopts a strict scrutiny rule against federal burdens of religious exercise that Congress deemed to have been curtailed in *Employment Division v. Smith*, 494 U.S. 872 (1990). *See O Centro Espirita*, 546 U.S. at 424.

1. The Mandate substantially burdens Plaintiffs' exercise of religion.

Plaintiffs' operation of their health insurance plan according to their religious beliefs is the "exercise of religion" under RFRA. RFRA "includes 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 religious beliefs. In *Sherbert v. Verner*, 374 U.S. 398, 399 (1963), an employee's religious beliefs forbade her from working on Saturdays. In *Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972), parents had religious beliefs that prohibited them from sending their children to high school. In *Thomas v. Review Board*, 450 U.S. 707, 709 (1981), a worker objected to participating in the production of war materials.[2] *See also Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999)

[2] *Smith* reaffirmed that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts," for example, "abstaining from certain foods or certain modes of transportation." 494 U.S. at 877.

(concerning a police officer's belief that wearing a beard was religiously required). Therefore Plaintiffs' operation of their business in compliance with their religious beliefs against providing coverage of abortifacient, contraceptive and sterilizing items and education thereabout is part of their "exercise of religion" under RFRA.

The Mandate imposes far more than a substantial burden on Plaintiffs' religious beliefs, because it directly mandates that they violate those beliefs. A "substantial burden" is imposed, even in indirect instances, where a law forces a person or group "to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order to accept [government benefits], on the other hand." *Sherbert*, 374 U.S. at 404. *Sherbert* held that it was "clear" that denying unemployment benefits to an employee was a substantial burden, even though the law did not directly command her to violate her beliefs against working on Saturdays. *Id.* at 403–04. Here, the coercion is even more direct: a mandate that Plaintiffs' violate their beliefs against offering coverage of certain items.

In *Yoder*, the Court treated it as a substantial burden when the parents who refused to send their children to high school "were fined the sum of $5 each." 406 U.S. at 208. Here, Plaintiffs face crippling fines and lawsuits unless they violate their religious principles by providing coverage of contraception and related items to which they religiously object. Defendants' Mandate imposes penalties of $100 per employee per day if they omit these items from their plan, and $2,000 per employee per year if they

drop health insurance (plus the inherent harm to their employees, and to their competitive provision of benefits, that would come from dropping coverage). 26 U.S.C. §§ 4980D & 4980H. The Mandate further authorizes lawsuits by plan participants and the Secretary of Labor to force the Plaintiffs to provide coverage in violation of their beliefs. 29 U.S.C. § 1132. The mere fact that the Mandate creates a federal law requirement on Plaintiffs puts them at risk in innumerable arrangements, such as contracts, that may require them to comply with "all federal laws."

The Supreme Court considered "a fine imposed against appellant" to be a quintessential burden. *Sherbert*, 374 U.S. at 403–04. That is the penalty present here.

2. Other means would be less restrictive of Plaintiffs' religious exercise.

Before this memo addresses why Defendants cannot show a compelling interest, it is worthwhile considering that even if such an interest existed, the government could not possibly show that the Mandate is "the least restrictive means of furthering" it under 42 U.S.C. 2000bb-1. Defendants bear the burden to show both of these elements—compelling interest and least restrictive means—including at the preliminary injunction stage. *O Centro Espirita*, 546 U.S. at 428–30 ("[T]he burdens at the preliminary injunction stage track the burdens at trial. . . . RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the [compelling interest] test," such as for speech claims under the First Amendment.).

Defendants fail the least restrictive means test simply because the government could, if the political will existed, achieve its desire for free coverage of birth control *by providing that benefit itself*. Rather than coerce Plaintiffs to provide this coverage in their plan, the government could possibly create its own "contraception insurance" plan covering all the items the Mandate requires, and then allow free enrollment in that plan for whomever the government seeks to cover. Or the government could directly compensate providers of contraception or sterilization. Or the government could offer tax credits or deductions for contraceptive purchases. Or the government might impose a mandate on the contraception manufacturing industry to give its items away for free. [3] These and other options could fully achieve Defendants' goal while being less restrictive of Plaintiffs' beliefs. There is no essential need to coerce Plaintiffs or other religious objectors to provide the objectionable coverage themselves.

Defendants cannot deny that the government could pursue its goal more directly. This conclusion is not only dictated by common sense, but is also proven because the federal government and many states already directly subsidize birth control coverage for many citizens through Title XIX/Medicaid and Title X/Family Planning Services funding. Thus the Court's RFRA analysis may stop here: the Mandate is not the least restrictive means of furthering Defendants' interest. Other options may be more difficult

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

to pass as a political matter (which further illustrates the public's disbelief that the Mandate's interest is "compelling"). Indeed PPACA itself does not require the Mandate. But political difficulty does not exonerate the Mandate's burdens on Plaintiffs religious beliefs, or allow it to pass RFRA's strict scrutiny. Since many methods less restrictive of religious beliefs exist, this alone fatally undermines Defendants' burden under RFRA and the Mandate from applying to Plaintiffs.

3. The Mandate is not justified by a compelling interest.

Defendants cannot establish that their coercion of Plaintiffs is "in furtherance of a compelling governmental interest." RFRA, with "the strict scrutiny test it adopted," *O Centro Espirita*, 546 U.S. at 430, imposes "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). A compelling interest is an interest of "the highest order," *Lukumi*, 508 U.S. at 546, and is implicated only by "the gravest abuses, endangering paramount interests," *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Defendants cannot propose such an interest "in the abstract," but must show a compelling interest "in the circumstances of this case" by looking at the particular "aspect" of the interest as "addressed by the law at issue." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000); *O Centro Espirita*, 546 U.S. at 430–32 (RFRA's test can only be satisfied "through application of the challenged law 'to the person'—the particular claimant"); *see also Lukumi*, 508 U.S. at 546 (rejecting the assertion that

protecting public health was a compelling interest "in the context of these ordinances"). The government must "specifically identify an 'actual problem' in need of solving" and show that coercing Plaintiffs is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (June 27, 2011). If Defendants' "evidence is not compelling," they fail their burden. *Id.* at 2739. To be compelling, the government's evidence must show not merely a correlation but a "caus[al]" nexus between their Mandate and the grave interest it supposedly serves. *Id.* The government "bears the risk of uncertainty . . . ambiguous proof will not suffice." *Id.*

Defendants' interest in coercing the Plaintiffs to provide coverage of contraception and sterilization is not compelling. No "grave" or "paramount" crisis justifies this Mandate on Plaintiffs. Never in the history of the United States has the federal government forced religiously objecting employers to cover contraception and sterilization in their health plans. Even to this day, no such federal mandate exists—the Mandate in this case does not go into effect until August 1, 2012 at the earliest. Yet a large majority of Americans already have contraceptive coverage.[4] Defendant Sebelius has admitted that "contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support." [5] Such "income-based

[4] Nine out of ten employers, pre-Mandate, already provide a "full range" of contraceptive coverage. Guttmacher Institute, "Facts on Contraceptive Use in the United States," June 2010, *available at* http://www.guttmacher.org/pubs/fb_contr_use.html (last accessed Apr. 28, 2012).

[5] "A statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius," (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last accessed Apr. 28, 2012).

support" is available through federal government subsidies in Title XIX/Medicaid and Title X/Family Planning Services, as well as through subsidies by state governments.[6] And the availability of contraceptive items for sale is ubiquitous, now reaching even vending machines on college campuses. Defendants therefore cannot claim a grave interest in scarcity of contraception in health insurance. To the extent they claim an interest in increasing access to contraception on the margins, *Brown* declared: "government does not have a compelling interest in each marginal percentage point by which its goals are advanced." 131 S. Ct. at 2741.

Defendants cannot show, as they must, a compelling interest with respect to the even-tinier fraction of American employees who work for religiously-objecting employers. A generalized, "abstract" interest in the benefits of contraception for women will not suffice; Defendants must demonstrate their interest with respect to Plaintiffs' own employees, *see O Centro Espirita*, 546 U.S. at 430–32, proving the government has no choice but to coerce Plaintiffs. Yet the Mandate references no scientific and compelling data about Plaintiffs' employees, and no data even about the broader category

[6] Recently Defendants showed that they do not believe a compelling interest exists to promote contraceptive access. In Texas, HHS has decided to cease providing 90% of funding of a $40 million Texas Women's Health family planning program. Texas had been using that funding to provide thousands of women with family planning, but Texas required funding providers to not, directly or indirectly, provide abortion. On this basis alone HHS withdrew federal funding, which Defendant Sebelius admitted would cause "a huge gap in family planning." HHS decided that protecting the interests of abortion providers is more important than providing contraception access. *See* CBS News "Feds to stop funding Texas women's health program" (Mar. 9, 2012), *available at* http://www.cbsnews.com/8301-501363_162-57394686/feds-to-stop-funding-texas-womens-health-program/ (last accessed Apr. 28, 2012).

of objecting religious employers' employees. Defendants cannot show a crisis among those employees. In *O Centro Espirita*, the Court held evidence to be insufficient showing that Schedule I controlled substances were "extremely dangerous," because that "categorical" support could not meet the government's RFRA burden to consider the "particular" exception requested by the plaintiffs. *Id.* at 432. The government's lack of particular evidence here similarly cannot satisfy their compelling interest burden.

Defendants' burden must be supported even more precisely than this. They must show that their alleged harm to Plaintiffs' employees is not mild, but extreme: that it threatens the "gravest," "highest" and most "paramount" consequences for Plaintiffs' employees absent the Mandate. But the Mandate's regulations cite no rash of contraception-deprived deaths among employees of religiously-devout employers. They also cite no pandemic of unwanted births causing catastrophic consequences among such employees. It could be that employees of Plaintiffs and similar entities experience zero negative health consequences absent the Mandate, for any number of reasons. At best, Defendants do not know. But Defendants "bear the risk of uncertainty," and cannot satisfy their burden under RFRA with speculation and generalizations.

And under *Brown*, Defendants must additionally demonstrate a *causal* connection between some allegedly grave harm to Plaintiffs' employees, and Plaintiffs' failure to comply with the Mandate. But even if gravely at-risk employees exist, it is possible that they all obtain the mandated items outside of Plaintiffs' coverage. Defendants cannot

connect the Mandate to *causation* of grave harm among Plaintiffs' employees. *See also O Centro Espirita*, 546 U.S. at 438 (where "the Government did not even *submit* evidence addressing" the specific consequences of an alleged interest, but only offered affidavits "attesting to the general importance" of that interest, "under RFRA invocation of such general interests, standing alone, is not enough.")

The most ironic flaw in Defendants' assertion of a compelling interest is that the federal government itself has voluntarily omitted millions of employees from the Mandate for secular and religious reasons, but Defendants still refuse to exempt Plaintiffs. The Mandate does not apply to thousands of plans that are "grandfathered" under PPACA. See Mandate, 76 Fed. Reg. at 46623 & n.4. The government estimates that close to 100 million employees will be in grandfathered plans *not* subject to the Mandate in 2013.[7] In addition, employers with less than 50 full-time employees are not required by PPACA to provide health insurance coverage at all, which may allow them to avoid Mandate.[8] Also, the Mandate does not apply to members of a "recognized religious sect or division" that conscientiously objects to acceptance of public or private

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[7] HealthReform.gov, "Fact Sheet: Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans," *available at* http://www.healthreform.gov/newsroom/keeping_the_health_plan_you_have.html (last accessed Apr. 28, 2012) (estimating that 55% of 113 million large-employer employees, and 34% of 43 million small-employer employees, will be in grandfathered plans in 2013).

[8] See 26 U.S.C. § 4980H(c)(2) (employers are not subject to penalty for not providing health insurance coverage if they have less than 50 full-time employees); HealthCare.gov, "Small Business," *available at* http://www.healthcare.gov/using-insurance/employers/small-business/#provide (last accessed Apr. 28, 2012).

insurance funds. 26 U.S.C. §§ 5000A(d)(2)(a)(i) and (ii). And the Mandate exempts from its requirements "religious employers" defined as churches or religious orders that primarily hire and serve their own adherents and that have the purpose of inculcating their values. Mandate, 76 Fed. Reg. at 46626. The federal government has decided that employers in any of these categories simply do not have to comply with the Mandate.

These are massive exemptions that cannot coexist with a compelling interest against Plaintiffs. Defendants cannot claim a "grave" or "paramount" interest to impose the Mandate on Plaintiffs or other religious objectors while allowing nearly 100 million employees to be "unprotected." "[T]he government is generally not permitted to punish religious damage to its compelling interests while letting equally serious secular damage go unpunished." *United States v. Friday*, 525 F.3d 938, 958 (10th Cir. 2008). "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 520. No compelling interest exists when the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Id*. at 546–47. The exemptions to the Mandate "fatally undermine[] the Government's broader contention that [its law] will be 'necessarily . . . undercut'" if Plaintiffs are exempted too. *O Centro Espirita*, 546 U.S. at 434.

Defendants' immense grandfathering exemption in particular has nothing to do with a determination that those nearly 100 million Americans do not need contraceptive

coverage while Plaintiffs' employees somehow do. The exemption was instead a purely political maneuver to garner votes for PPACA by letting the president claim, "If you like your health care plan, you can keep your health care plan." If the government can toss aside such a massive group of employees for political expediency, their "interest" in mandating cost-free birth control coverage cannot possibly be "paramount" or "grave" enough to justify coercing Plaintiffs to violate their religious beliefs. *See O Centro Espirita*, 546 U.S. at 434 ("Nothing about the unique political status of the [exempted peoples] makes their members immune from the health risks the Government asserts").

The Mandate on its face also is inconsistent with a compelling interest rationale. Defendants have used their discretion to write a "religious employer" exemption into the Mandate for certain self-focused churches. Mandate, 76 Fed. Reg. at 46626. How can Defendants claim that allowing religious exemptions would undermine an alleged compelling interest, when they have allowed religious exemptions? There is no nexus between the Mandate exemption's criteria and Defendants' alleged interest, such that a compelling interest exists for non-exempt entities but is absent for exempt ones. On the contrary, Defendants essentially admit that employees of religious objectors do implicate their "interest," because Defendants refuse to expand their exemption to include more religious employers. Defendants have simply engaged in political line-drawing based on what the president's political base will accept, weighed against how much election-year

resistance he may encounter.[9] Plaintiffs cannot be denied a religious exemption on the premise that Defendants can pick and choose between religious objectors. *See O Centro Espirita*, 546 U.S. at 434 (since the law does "not preclude exceptions altogether; RFRA makes clear that it is the obligation of the courts to consider" whether exceptions" must also be afforded because of RFRA).

In *O Centro Espirita* the Supreme Court held that no compelling interest existed behind a law that had a much more urgent goal—regulating extremely dangerous controlled substances—and that had many fewer exemptions than the broad swath of omissions from the Mandate. In that case the Court dealt with the Controlled Substances Act's prohibition on "all use," with "no exception," of a hallucinogenic ingredient in a tea along with other Schedule I substances. 546 U.S. at 423, 425. But because elsewhere in the statute there was a narrow religious exemption for Native American use of a different substance, peyote, the Court held that the government could not meet its compelling interest burden even in its generalized interest in to regulate Schedule I substances as applied to the plaintiffs in that case. *Id.* at 433. Even moreso here, the government cannot satisfy its burden by pointing to general health benefits of contraception. Halting the use of extremely dangerous drugs is far more urgent than forcing religious objectors to provide contraception coverage. Defendants' grant of

[9] The New York Times describes in great detail the politically-driven deliberation that led to the Mandate. "Rule Shift on Birth Control Is Concession to Obama Allies" (Feb. 10, 2012), *available at* http://www.nytimes.com/2012/02/11/health/policy/obama-to-offer- accommodation-on-birth-control-rule-officials-say.html?pagewanted=all (last accessed Apr. 28, 2012).

secular and religious exemptions for millions of other employees betrays any alleged compelling interest they may have in forcing Plaintiffs to comply with the Mandate against their religious beliefs.

B. The Mandate violates Plaintiffs' right to Free Exercise of Religion.

The Mandate also violates the free exercise clause of the First Amendment of the United States Constitution. "At minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. When the "object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id*. at 533. The object of a law can be determined by examining its text and operation. *Id*. at 534–35.

1. The Mandate is not generally applicable because it disfavors religion.

The Mandate lacks "general applicability." Laws lack general applicability when they are underinclusive. *Id*. at 543. "The Free Exercise Clause protects religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 542–43 (internal quotation marks and citation omitted). In *Lukumi*, the Court said that the underinclusiveness of city's ban on animal sacrifice was "substantial" because it "fail[ed] to prohibit nonreligious conduct

that endangers these interests [in public health and preventing animal cruelty] in a similar or greater degree than Santeria sacrifice does." *Id.*

The Mandate is massively underinclusive, yet Defendants refuse to offer Plaintiffs an exemption. As described above, nearly 100 million employees will be exempt from the Mandate in 2013 because their plans will be grandfathered. Mandate, 76 Fed. Reg. at 46623 & n.4; see *infra* n.7. The Mandate also does not apply to small employers who have the option of dropping insurance; to religious sects opposed to insurance; and to "religious employers" that the Mandate defines as exempt. Health insurance plans covering millions of Americans can omit all the mandated items and cause all the same harm alleged by Defendants; But Plaintiffs still must comply even in violation of their religious beliefs.

In the case of the grandfathering exemption, those employees are exempted from the Mandate for reasons purely based on the politics of passing PPACA, not based on any scientific rationale. There is no physiological difference between humans that work for religious-minded employers and other humans, making contraception beneficial for the latter but not for the former. Defendants have chosen to offer an exemption for some religious employers based on politically-derived criteria, but they refuse to exempt Plaintiffs based on their religious beliefs. The overall massive underinclusiveness of the Mandate, selectively allowing secular and religious exemptions, shows that it is a quintessential not-generally-applicable law.

The Mandate is not "generally applicable" because it contains both categorical and discretionary exemptions for a variety of reasons, but refuses to exempt objectors such as Plaintiffs. In cases striking down religiously burdensome laws containing exemptions, then-Judge Alito explained for the Third Circuit that strict scrutiny applies when discretionary or categorical exemptions exist but religious objections are denied. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209–11 (3d Cir. 2004); *Fraternal Order of Police*, 170 F.3d at 365. Here, in addition to the Mandate's categorical exemptions such as for grandfathered plans, Defendants admit that they possess "discretion" over the exemption they created for "religious employers" *and the scope of who is covered*. Mandate, 76 Fed. Reg. at 46623–24; 77 Fed. Reg. at 8726. Defendants admit that they could have exempted Plaintiffs and other non-church religious objectors, but they chose not to. Meanwhile, their scheme exempts tens of millions for secular reasons.

2. The Mandate is not neutral towards religion.

The Mandate' exemptions also show it is not neutral towards religion. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Lukumi*, 508 U.S. at 533. The Mandate explicitly exempts some "religious employers" but not others. This exemption is based on a variety of religious criteria including whether the "inculcation of religious values is the purpose" of the entity, whether "persons who share the religious tenets of" the group are those whom the group primarily hires or serves, and whether the group is a church or

religious order. Mandate, 76 Fed. Reg. at 46626. The religious employer definition in the Mandate imposes Defendants' *theological* notion that employers are only religious if they are churches who stay in their own four walls and focus on self-serving purposes. Defendants have created a caste system of religious employers, favoring one kind of objector because their religion is insular, while penalizing Plaintiffs because they pursue their religious tenets within society instead of in church. The text of the Mandate itself therefore shows an unconstitutionally discriminatory "effect of a law in its real operation," thus showing "strong evidence" that religious objectors beyond Defendants' narrow definition are the "object" of the Mandate, rather than contraceptive access. *Lukumi*, 508 U.S. at 535.

The Mandate constitutes "an impermissible attempt to target" religious objectors that are not insularly-focused. *Id*. Indeed, the Mandate's criteria impose a governmental view of what really "counts" as religion, even though some religions do not even use the vocabulary of "churches" and do not primarily exercise their beliefs in isolation. This lack of neutrality regarding the notion of what religion *is* bespeaks of a Free Exercise Clause violation. *See Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (noting that "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."); *see also Lukumi*, 508 U.S. at 532 (identifying a Free Exercise Clause violation where a policy

prefers some religions to others).

As in *Lukumi*, the effect of the Mandate is to pick and choose between specifically religious objectors. There, the Supreme Court found an ordinance against animal sacrifice not facially neutral because its operative terms included "sacrifice" and "ritual," terms not typically associated with secular meanings. *Lukumi*, 508 U.S. at 534. But in practice, it was clear that the object of the ordinance was to exclude the "religious exercise of Santeria church members." *Id*. at 535. For example, the ordinance exempted from its prohibition almost all killings of animals, except for religious sacrifice. *Id*. at 536. The Court called this a "religious gerrymander," an impermissible attempt to target [the church] and their religious practices." *Id*. at 535. As in *Lukumi*, the Mandate here exempts "religious employers" that primarily engage in the "inculcation of religious values" and focus on "persons who share the[ir] religious tenets" and are churches or religious orders. Yet the Mandate also does not apply to hundreds of millions of employees for secular reasons, including that they are in grandfathered plans or work for small employers, and for religious reasons if they are in a religious sect opposed to insurance. The fact that most employers already cover contraception, combined with the Mandate's constricted definition of religion, shows that the Mandate is a thinly-veiled an attempt not to advance health but to target society's religious "hold outs" who possess beliefs against providing such coverage.[10] The Mandate and its exemptions establish

[10] The Mandate's religious employer definition was drafted by the ACLU in California exclude most religious objectors. See ACLU Press Release, "ACLU Applauds CA Supreme Court

nothing less than a "religious gerrymander" designed to target most religions objectors to contraception, while letting millions of secular employers off the hook. This demonstrates the lack of neutrality. *Id*. at 537–39.

3. The Mandate fails strict scrutiny.

Because the Mandate is neither generally applicable nor neutral it is subject to strict scrutiny, *id.* at 546. As explained above, Defendants cannot meet this standard.

C. The Mandate violates the Establishment Clause.

The Mandate also violates the Establishment Clause of the First Amendment. The Mandate's "religious employer" exemption, as discussed above, sets forth Defendants' notion of what "counts" as religion and what doesn't for the purposes of who will be exempt under the Mandate. But the government may not a caste system of different religious organizations and belief-levels when it imposes a burden. Instead it "must treat individual religions and religious institutions 'without discrimination or preference.'" *Colo. Christian U. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008); *Larson v. Valente*, 456 U.S. 228 (1982); *see also Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990) (holding that section 19 of the National Labor Relations Act, which exempts from mandatory union membership any employee who "is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which

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Decision Promoting Women's Health and Ending Gender Discrimination in Insurance Coverage" (Mar. 1, 2004) ("The ACLU crafted the statutory exemption [at issue]…."), *available at* http://www.aclu.org/reproductive-freedom/aclu-applauds-ca-supreme-court-decision-promoting-womens-health-and-ending-gend (last accessed Apr. 28, 2012).

has historically held conscientious objections to joining or financially supporting labor organizations," is unconstitutional because it discriminates among religions and would involve an impermissible government inquiry into religious tenets), *cert. denied*, 505 U.S. 1218 (1992).

Defendants used their unfettered discretion to pick and choose what criteria qualify a group as "religious" enough for an exemption, and they imposed their constricted theological view of religion on all Americans. The Mandate's four-pronged religious exemption emphasizing "the inculcation of religious values" necessarily requires the government to explorer a religious organization's purpose in impermissible ways. The exemption deems religious organizations insufficiently "religious" if they do not focus on co-religionists in hiring and service, which would involve the government's probing of what exactly count as the organization's religious "tenets," and which disfavors religious believers such as Plaintiffs who exercise their beliefs not by only working with or for Catholics but by witnessing their faith by treating everyone with dignity according to the Catholic Church's notion of what human flourishing means. The exemption's restriction of religious employers to a tax code provision identifying churches and religious orders, whose purpose relates to whether paperwork should be filed, bears no reasonable relation to Defendants' alleged interest and is designed to discriminate against religious objectors such as Plaintiffs. These factors involve the

government in "intrusive judgments regarding contested questions of religious belief or practice" in violation of the First Amendment. *Weaver*, 534 F.3d at 1261.

In *Weaver* the Tenth Circuit held unconstitutional a discrimination-among-religions policy that is very similar to the Mandate. The discrimination among religions in that case attempted to treat "pervasively sectarian" education institutions differently than other religious institutions, based on whether: the employees and students were of one religious persuasion; the courses sought to "indoctrinate"; the governance was tied to particular church affiliation; and similar factors. *Id.* at 1250–51. The Mandate here likewise draws its line around "religious employers" based on whether the people they "hire" or "serve" share the same "religious tenets," whether its purpose is to "inculcate" values, and whether the entity is a church or affiliate. The Tenth Circuit held that such a discriminatory line violates the First Amendment, and the Court rejected as "puzzling and wholly artificial" the government's argument that their law "distinguishes not between types of religions, but between types of institutions." *Id.* at 1259–60. The Court held that "animus" towards religion is not required to find a First Amendment violation in the presence of such facial discrimination. *Id.* at 1260.

D. The Mandate violates Plaintiffs' Freedom of Speech.

The Mandate additionally violates the First Amendment by coercing Plaintiffs to provide for speech that is contrary to their religious beliefs. The "right to speak and the right to refrain from speaking are complementary components of the broader concept of

'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Accordingly, the First Amendment protects the right to "decide what not to say." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (internal quotation marks omitted). Thus, "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 624, 642 (1994). The "First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way [the government] commands, an idea they find morally objectionable." *Wooley*, 430 U.S. at 715. Here, the Mandate unconstitutionally coerces Plaintiffs to speak a message they find morally objectionable by requiring that they cover in their insurance plan not only contraception etc., but "patient education and counseling" in favor those items, forcing Plaintiffs to contradict their own religious beliefs.

II. Plaintiffs Will Suffer Irreparable Harm Absent an Injunction.

Plaintiffs seek to continue offering their employee insurance plan without providing abortifacients, contraception, sterilization, and counseling/education for the same, and without being subject to the Mandate's harsh penalties, lawsuits and other liability. Without the requested injunction, Plaintiffs will be coerced in violation of their rights under RFRA and the First Amendment, causing actual and imminent loss of their

religious conscience rights. This is irreparable injury. *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA"); *accord Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir 1996) and *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009). *See also Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")

III. An Injunction Will Cause No Harm to Defendants.

The federal government has never imposed this Mandate against religious objectors, even to this day, since its effective date at the earliest is August 1, 2012. Defendants can offer no evidence to show that harm will come to Plaintiffs' employees if an injunction issues preventing the Mandate's applicability in violation of RFRA and the First Amendment. Both the ubiquity of contraception access and government subsidization thereof, and the fact that the government has exempted nearly 100 million employees from the Mandate already, make it impossible for Defendants to claim that a preliminary injunction in this case will cause harm.

IV. The Public Interest Favors a Preliminary Injunction.

"Vindicating First Amendment freedoms is clearly in the public interest." *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005). *See also Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001) ("Because we

have held that Utah's challenged statutes also unconstitutionally limit free speech, we conclude that enjoining their enforcement is an appropriate remedy not adverse to the public interest."). The public interest is best served by preventing government officials from compelling individuals to violate their religious conscience rights protected by RFRA, the First Amendment and other laws.

CONCLUSION

Defendants' Mandate violates both RFRA and the First Amendment due to its massive inapplicability and its discrimination among religions. Unless this Court issues a preliminary injunction prior to August 1, 2012, when Plaintiffs need to implement logistics for their November 1 plan-year, Plaintiffs will face the choice of violating their beliefs or suffering massive financial penalties, lawsuits, and potential other liability. Defendants would face no harm from an injunction against their illegal regulatory scheme that already exempt millions of others. Plaintiffs respectfully request that this Court issue a preliminary injunction against Defendants' requirement that Plaintiffs cover contraception, abortifacients, sterilization, and counseling and education for the same, in their health plan. A form of order is attached.[11]

[11] Because the public interest in this case, the lack of any financial harm to Defendants from an injunction, and all of the other factors that weigh in Plaintiffs' favor, Plaintiffs request that the Court impose a bond of zero dollars in this instance. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009) (court has discretion to order no bond).

Respectfully submitted this 30th day of April, 2012.

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CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiffs, Michael J. Norton, hereby certifies that the following counsel for Defendants were served with the preceding document by email and by placing the document in the mail, on April 30, 2012, at the following addresses:

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