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.

REPLY IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

There is no business exception in RFRA or the Free Exercise Clause. Nothing in the Constitution, the Supreme Court's decisions, or federal law requires—or even suggests—that families forfeit their religious liberty protection when they try to earn a living, such as by operating a corporate business. The idea that "a corporation has no constitutional right to free exercise of religion" is "conclusory" and "unsupported." *McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985).

Congress did not adopt the government's proposed prohibition on free exercise of religion in business. Instead, RFRA requires strict scrutiny whenever a government action substantially burdens religion. The Mandate here forces the Newland family and the entity through which they act, Hercules Industries, Inc., to choose between violating their religious beliefs, paying fines on their property, or abandoning business altogether. This pressure constitutes a substantial burden on religious exercise. *See Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010).

The strict scrutiny required by RFRA is true strict scrutiny as applied under First Amendment doctrines like free speech. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006). The Court has confirmed that strict scrutiny cannot be satisfied where, as here, the government exempts others selectively. *See id.* at 433. In *O Centro* the government's exemption of merely "hundreds of thousands" required a RFRA exemption for a few hundred more, *id.*. Here the

government has excluded 100 *million* employees from the Mandate under its politically-motivated grandfathering clause. It cannot claim that "paramount" interests will suffer from an injunction protecting the Plaintiffs. The government incorrectly labels its grandfathering exclusion a "phase-in," but PPACA, its website, and the government's own data indicate that the exclusion will encompass tens of millions indefinitely. The government provides no evidence that religious businesses constitute more than a microscopic fraction of others the government has excluded.

The government could fully accomplish its identified interests in giving women free contraception to achieve health and equality by providing such items itself instead of by applying the Mandate against Plaintiffs' beliefs. The government seeks to neuter the least restrictive means test by not actually considering alternative options. This is flatly inconsistent with RFRA's text and with relevant caselaw.

AMENDED COMPLAINT

The Plaintiffs' First Amended Verified Complaint contains the same sworn factual allegations from the original complaint at the same paragraph numbers, and adds several paragraphs immediately prior to the causes of action. Therefore Plaintiffs' motion for preliminary injunction relies, by reference, on the same amended complaint affirmations their opening brief cited from the original complaint, plus the additional paragraphs cited below. This brief does not address claims that only pertain to the government's motion to dismiss. The amended complaint is referenced herein as "Compl."

ARGUMENTS IN REPLY

I. The Mandate violates RFRA.

The government's argument is an attempt to amend RFRA and the Free Exercise Clause. It tries to exclude categories from "free exercise" that Congress and the Constitution did not exclude: profit vs. non-profit activity, corporate vs. individual activity, and direct vs. indirect activity. RFRA asks a much simpler question: whether the government is imposing a substantial burden on the exercise of religion. 42 U.S.C. § 2000bb-1. RFRA requires strict scrutiny, which the government has not satisfied.

A. The Newlands exercise religious beliefs in their operation of Hercules.

The government argues that the Newlands forfeited their rights to religious liberty as soon as they endeavored to earn their living by running a corporation. Yet caselaw is to the contrary. For example, in both *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119–20 & n.9 (9th Cir. 2009), and *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988), the Ninth Circuit recognized that individual owners of a for-profit and even "secular" corporation had their religious beliefs burdened by regulation of that corporation. Moreover, each corporation could sue to protect those beliefs. *Id.*

The government's premise seems to be that one cannot exercise religion while engaging in business.[1] But free exercise of religion is an expansive term indicating the

[1] The government appears to adopt a literal interpretation of the Bible's injunction that you "cannot serve both God and money," Matthew 6:24. But no federal law enacts the government's particular reading of the Gospel of Matthew as a limitation on religious exercise.

practice of religious beliefs in any context. Judicially, that context has usually involved the pursuit of financial gain in employment and commerce. In *Sherbert v. Verner*, 374 U.S. 398, 399 (1963), an employee's religious beliefs were burdened by not receiving unemployment benefits; likewise in *Thomas v. Review Board*, 450 U.S. 707, 709 (1981). In *United States v. Lee*, 455 U.S. 252, 257 (1982), the Court held an employer's religious beliefs were burdened by paying taxes for workers. In *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999), an employee's bid to continue his employment was burdened by discriminatory grooming rules.

Congress has rejected the government's view. PPACA itself lets employees and "facilit[ies]" assert religious beliefs for or against "provid[ing] coverage for" abortions, without requiring them to be non-profits.[2] 42 U.S.C. § 18023. Congress has repeatedly authorized similar objections, including to contraceptive insurance coverage.[3] These protections cannot be reconciled with the government's view that commerce excludes religion. A Mandate on a family business burdens the family's religious beliefs.

The Tenth Circuit has likewise recognized the robust meaning of "free exercise." Both RFRA (42 U.S.C. § 2000bb-2) and "RLUIPA" define free exercise under 42 U.S.C. § 2000cc-5, which "include[s] 'any exercise of religion, whether or not compelled by, or

[2] One out of every five community hospitals is for-profit. American Hospital Association, http://www.aha.org/research/rc/stat-studies/fast-facts.shtml (last visited July 16, 2012).

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

central to, a system of religious belief.'" *Abdulhaseeb*, 600 F.3d at 1314 (quoting *Kay v. Bemis*, 500 F.3d 1214, 1221 (10th Cir. 2007)). Many of the government's case citations interpret, not "free exercise," but other terms such as "religious employer" in Title VII.

The government argues that because its Mandate applies to Hercules, the Newlands are isolated from its effect. *Stormans* and *Townley* instead recognize the common sense view that an imposition on a family business corporation is no less an imposition on the family owners. This can be seen in the present case. First, as a "close corporation," Hercules is characterized by "unity of ownership and control."[4] The Mandate on Hercules can only possibly be implemented by Hercules' family owners, Board, and officers: the Newlands. Hercules' corporate papers cannot implement the Mandate, nor can its brick-and-mortar buildings. The government's emphasis on a corporation's limited liability is a *non sequitor*. Limited liability is only one corporate characteristic, and not the morally relevant one here. The Newlands have duties as shareholders, Board members, and officers, and the Mandate's lawsuit remedy is extensive. 29 U.S.C. § 1132. The corporate form does not isolate the Newlands from the Mandate—it is actually the mechanism the Mandate uses to impose its burden.

Second, the four Newland owner-Plaintiffs are the sole owners of Hercules. Hercules is not only their well-being but also their property. The Mandate coerces them

[4] Harwell Wells, "The Rise of the Close Corporation and the Making of Corporation Law," 5 *Berkeley Bus. L.J.* 263, 274 (Fall 2008).

to use their property in a way that violates their religious beliefs, and penalizes their property if they do not comply. This is an intense burden. The government could not claim that when it fines a person it is not burdening her, it is merely burdening her bank account and assets. The Supreme Court has stated that coercion against an individual's financial interests is a substantial burden on religion. *Sherbert*, 374 U.S. at 403–04.

Finally, to the extent the government is arguing that its Mandate does not really burden the Newlands because they are free to abandon their jobs, their livelihoods, and their property so that others can take over Hercules and comply, this expulsion from business would be an extreme form of government burden.

B. Hercules, Inc. can and does exercise religious beliefs.

The Mandate also burdens Hercules, Inc.'s own free exercise. Notably, Plaintiffs' detailed factual affirmation that Hercules has actually adopted and followed the Newlands' religious beliefs is left unchallenged by the government. (PI Brief at 3–4.) Instead the government contends that for-profit corporations cannot engage in "free exercise" as a categorical matter. But no law forbids a corporation from operating according to religious principles (or, for that matter, environmental or other principles).

Colorado law generously empowers Hercules to operate according to its religious beliefs. The government alleges that Hercules' articles of incorporation state its "overriding" purpose of HVAC manufacturing. But like most corporate articles, in addition to stating manufacturing and other business purposes Hercules' articles distinctly

declare "general" purposes "to have and to exercise all of the powers conferred by law upon corporations formed under the laws of this State, and to do any or all things hereinbefore set forth to the same extent as natural persons might or could do."[5] The government omitted mention of these purposes in its brief.

Hercules' "all legal powers" purpose triggers Colo. Rev. Stat. § 7-103-101(1), under which for-profit corporations are empowered to "engage[e] in any lawful business unless a more limited purpose is stated in the articles of incorporation."[6] Hercules' purposes are not so limited: the purpose to exercise every lawful activity is not textually limited by the other expressed purposes. Therefore Colorado law empowers Hercules to operate according to its adopted religious norms. Colorado law does not let the government object here that Hercules' lacks this power. Only shareholders or a dissolution action can so object; otherwise, "the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act." Colo. Rev. Stat. § 7-103-104. Notably, Colorado law also acknowledges that an "institution" or "facility" can have a "religious" objection to providing contraception, without requiring it to be a non-profit. Colo. Rev. Stat. § 25-6-102(9). As noted above, the government's view also contradicts PPACA itself and multiple federal statutes.[7]

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[5] Hercules, Inc., Articles of Incorporation at 1, *available at* http://www.sos.state.co.us/biz/ViewImage.do?fileId=19871159893&masterFileId=19871159893 (last visited July 16, 2012).

[6] Attempts to create a "benefit corporation" structure in Colorado have failed. "Colorado Lawmakers Hobble to End of Special Session," Aurora Sentinel (May 16, 2012), *available at* http://www.aurorasentinel.com/news/colorado-lawmakers-hobble-to-end-of-special- session/ .

[7] See supra n.2, n.3 & accompanying text.

The government's exclusionary attitude would push religion out of every sphere of life except the four walls of church. This is not the legal meaning of "free exercise." "First Amendment protection extends to corporations," and a First Amendment right "does not lose First Amendment protection simply because its source is a corporation." *See Citizens United v. Federal Election Com'n*, 130 S. Ct. 876, 899 (2010) (regarding speech). If for-profit corporations can have no First Amendment "purpose," newspapers and other media would have no rights. Instead of imposing categorical exclusions, the Court asks "whether [the challenged statute] abridges [rights] that the First Amendment was meant to protect." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Here the Mandate compels a family business to violate the beliefs they have pursued to earn a living. If the government's view is adopted, it would prevent businesses from operating according to any kind of ethical norm, charitable effort, stewardship of nature, or just plain honesty, on the basis that its profit motive is "overriding."[8] The First Amendment has never excluded religion from business.

The government incorrectly asserts that no case recognizes the free exercise of religion through a business or corporation. But counter-examples are numerous. The Ninth Circuit considered this point specifically in *Stormans*, affirming not only that a for-profit pharmacy corporation's owners could assert free exercise claims, but that

[8] To the extent the government is contending that corporations can adopt ethics as long as they are not *religious* ethics, that position would be unconstitutional viewpoint discrimination. *See Rosenberger v. Rector and Visitors of U. of Va.*, 515 U.S. 819, 831 (1995).

Stormans, Inc. itself could present those claims on the owners' behalf. 586 F.3d at 1119–20. It was particularly relevant in *Stormans* that the business was a multi-generational family owned entity—the Court allowed for no relevant distinction between the burden on the owners' beliefs and the applicability of the mandate to the corporation. *Id.*; *see also EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d at 620 n.15 (recognizing free exercise claims asserted by a mining equipment manufacturer).

As stated by the Minnesota Supreme Court, the "conclusory assertion that a corporation has no constitutional right to free exercise of religion is unsupported by any cited authority." *McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985) (citing *Bellotti*, 435 U.S. 765, and *United States v. Lee*, 455 U.S. 252). *See also Jasniowski v. Rushing*, 678 N.E.2d 743, 749 (Ill. App. Dist. 1, 1997) (for profit corporation may assert free exercise claim), *vacated*, 685 N.E.2d 622 (Ill. 1997). Other cases have likewise recognized free exercise claims by corporations. *See, e.g., Prima Iglesia Bautista Hispana of Boca Raton v. Broward County*, 450 F.3d 1295, 1305 (11th Cir. 2006) (declaring that not only the plaintiff, but corporations generally "possess Fourteenth Amendment rights of equal protection, due process, and through the doctrine of incorporation, the free exercise of religion"); *Morr-Fitz, Inc. et al. v. Blagojevich*, No. 2005-CH-000495, slip op. at 6–7 at (Ill. Cir. Ct. 7th, Apr. 5, 2011) (ruling in favor of the free exercise rights of three pharmacy corporations and their owners); *Roberts v. Bradfield*, 12 App. D.C. 453, 464 (D.C. Cir. 1898) (recognizing that the right of "free

exercise of religion" inheres in "an ordinary private corporation"). *See also Commack Self-Service Kosher Meats, Inc. v. Hooker*, 800 F. Supp. 2d 405 (E.D.N.Y. 2011) (analyzing free exercise claims without regard profit motive); *Maruani v. AER Services, Inc.*, 2006 WL 2666302 (D. Minn. 2006) (analyzing religious First Amendment claims by a for-profit business).

The government relies heavily on *United States v. Lee* for its claim that religion is incompatible with earning a living. But *Lee* made no such finding. Instead, the Court found that the Social Security tax *did* create an "interfere[nce] with the[] free exercise rights" of the Amish employers. 455 U.S. at 257. It only resolved the case *after* recognizing the religious liberty interest of the employer, when it applied the required scrutiny level. The government brief's oft-repeated quote from *Lee* about plaintiffs who "enter into commercial activity" is lifted out of context to suggest that people in businesses can assert no free exercise burdens. Instead the quote came under the court's scrutiny standard. As explained below, that standard is weaker than RFRA and, even under *Lee's* reasoning, shows that the Mandate is illegal.

To the extent that the government insists on a formalistic approach, the Newlands amended their articles to explicitly add what was always true: that Hercules' all lawful powers continue to allow them to adopt and follow religious beliefs.[9] The government

[9] Hercules Supply Co., Inc., Articles of Amendment (June 25, 2012), *available at* http://www.sos.state.co.us/biz/ViewImage.do?fileId=20121346636&masterFileId=19871159893 (last visited July 16, 2012).

offers no rebuttal of the factual affirmation that Hercules follows religious beliefs. This also illustrates the religious identity between the Newlands and Hercules.

C. The Mandate substantially burdens each Plaintiff's beliefs.

The government argues that the Mandate presents no substantial burden on Plaintiffs' beliefs. To the extent the government is questioning the centrality of their beliefs, such an effort is improper and inaccurate. Plaintiffs' beliefs against complying with the Mandate are affirmed thoroughly. Compl. ¶¶ 7–36, 41, 71. Also notably, the prestigious Catholic Cardinal Raymond Burke recently declared that a Catholic employer who provides coverage of items required in the Mandate engages in "formal cooperation" in evil: "There is no way to justify it. It is simply wrong."[10] Pope Benedict XVI declared:

> It is not "consistent to profess our beliefs in church on Sunday, and then during the week to promote business practices . . . contrary to those beliefs . . . . Any tendency to treat religion as a private matter must be resisted. Only when their faith permeates every aspect of their lives do Christians become truly open to the transforming power of the Gospel."[11]

Thus the Plaintiffs have provided unrebutted evidence that the Mandate compels them to violate fundamental religious beliefs. *See Hall v. Griego*, 896 F. Supp. 1043, 1047–48 (D. Colo. 1995) (plaintiff pled elements of RFRA claim to survive summary judgment).

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[10] "Cardinal Burke Discussing Religious Freedom," Apr. 11, 2012, *available at* http://catholicaction.org/2012/04/cardinal-raymond-burke-discussing-religious-freedom/ (last visited July 16, 2012).

[11] "Celebration of Vespers and Meeting with the Bishops of the United States of America: Address of His Holiness Benedict XVI," Apr. 16, 2008, *available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080416_bishops-usa_en.html (last visited July 16, 2012).

The government improperly second-guesses Plaintiffs' beliefs. Under *Thomas v. Review Board* the burden on a religious belief "is not to turn upon a judicial perception of the particular belief or practice." 450 U.S. at 714. Only the plaintiff can "dr[a]w a line" over the burden, "and it is not for us to say that the line he drew was an unreasonable one." *Id.* at 715. Any "coercive impact" on this boundary constitutes a substantial burden. *Id.* at 717–18. *See also Employment Div. v. Smith*, 494 U.S. 872, 886–87 (1990) (rejecting the "centrality" test). Nor can *Braunfeld v. Brown*, 366 U.S. 599 (1961) sustain the Mandate as if it "does not make unlawful the religious practice itself" or is "indirect." The Mandate *does* directly punish, with fines and lawsuits, the exercise of Plaintiffs' religious beliefs against providing contraceptive insurance. In *Sherbert* as well as in *Thomas*, there was no law *requiring* Saturday work or tank manufacturing, but a substantial burden existed anyway from the mere denial of unemployment benefits.

The Tenth Circuit directs that "[i]n assessing this burden, courts must not judge the significance of the particular belief or practice in question." *Abdulhaseeb*, 600 F.3d at 1314 n.6 (quoting *Lovelace v. Lee*, 472 F.3d 174, 187 n. 2 (4th Cir. 2006)). "Neither this court nor defendants are qualified to determine that" the Mandate "*should* satisfy [Plaintiffs'] religious beliefs." *Id.* at 1314 n.7 (emphasis added; citation omitted). Even if "the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.* at 1315 (quoting *Thomas v. Review Bd.*, 450 U.S. at 717–18). A substantial burden exists if "a government . . . requires participation in an activity

prohibited by a sincerely held religious belief" or "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief." *Id.* at 1315. Requirement and pressure describe the Mandate's application to Plaintiffs.

The government contends that because the Plaintiffs' taxes fund government programs that provide contraceptive coverage, there is no substantial burden in forcing Plaintiffs to provide contraception coverage themselves. Gov. Brief at 21 (citing *Seven-Sky v. Holder*, 661 F.3d 1, 5 n.4 (D.C. Cir. 2011)). This argument is incorrect on several levels. First, it is another improper attempt to challenge the sincerity of beliefs, rather than their substantiality. As described above, the substantiality of a burden is not a measure of importance or centrality—though in this case the Plaintiffs have attested to both. Instead, it weighs the kind of coercion the government is imposing, which here involves heavy financial penalties and lawsuits. To "*compel* a violation of conscience," as here, is a quintessential substantial burden. *Thomas v. Review Bd.*, 450 U.S. at 717.

Second, the fact that everyone is required to pay taxes does not give the government a license to coerce citizens to *do* whatever it *funds*. The federal government's budget exceeds $3 trillion annually, funding nearly every possible activity from capital punishment to war to animal vivisection. No case has ruled that the free exercise of religion categorically excludes objection to these practices, or is instead limited to only things-the-government-doesn't-do. Nor are taxes voluntary, such that they could be cited as an example of willing activity. Taxation is not a license to violate

religion. *Thomas v. Review Board* could not have recognized a free exercise right not to manufacture tank turrets under the government's view, since that plaintiff, like all citizens, paid taxes to fund the purchase of those exact tanks. *Id.* at 709–11, 718.

Third, the district court's rationale referenced in *Seven-Sky* relies on distinct facts. There, it was "unclear how § 1501 puts substantial pressure on Plaintiffs to modify their behavior and to violate their beliefs, as it permits them to pay a shared responsibility payment in lieu of actually obtaining health insurance," and those plaintiffs agreed to do the same. *Mead v. Holder*, 766 F. Supp. 2d 16, 42 (D.D.C. 2011). But here the government offers no "escape clause," much less one consistent with Plaintiffs' beliefs.

Fourth, *Seven-Sky/Mead*'s plaintiffs objected in a broader fashion than the claims Plaintiffs bring here. The objection in *Seven-Sky* was to paying into any health insurance. *Id.* This was arguably akin to those plaintiffs' payment of the designated Social Security (though, as mentioned above, *Thomas v. Review Board* undermines such rationale). But here, the Mandate requires Plaintiffs to buy a particular insurance benefit and give it to others without the government as a mediary. There is no designated tax for "contraceptive coverage" analogous to *Mead*'s reference to Social Security. The government can only point to the fraction of pennies of Plaintiffs' taxes that the government itself uses, from its general fund, completely outside of Plaintiffs' control.

Finally, the federal government recognizes that mandates to provide contraceptive coverage substantially burden religious exercise. Federal statutes shield companies from

contraception coverage mandates.[12] Even under the present Mandate the government created a four-part religious exemption and proposed other accommodations, implicitly conceding that the Mandate imposes a substantial burden on religious beliefs.

D. No compelling interest exists to burden the Plaintiffs' beliefs.

1. By excluding 100 million employees and others for various reasons, the government shows that it does not believe its interest is compelling.

The government's self-defined interest is to provide women free contraception and sterilization to promote their health and equality. It argues that its voluntary exclusion of 100 million employees from its Mandate somehow does not "leave[] appreciable damage to [its] supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). But if the government really had an interest "of the highest order" to justify coercing Plaintiffs, *id.*, the government could not use grandfathering to omit 100 million employees from exactly the same Mandate, just to preserve the political argument that "if you like your health plan you can keep it." Such a cosmically large exclusion shows the alleged interest is not remotely paramount, and that exempting Plaintiffs would in no way decimate the value that the government actually attaches to this interest. The government is content to leave tens of millions of women at the same "competitive disadvantage" it insists must be prevented at Hercules.

[12] *See, e.g.,* Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, Title VII, Div. C, § 727 (protecting religious health plans in the federal employees' health benefits program from being forced to provide contraceptive coverage); *id.* at Title VIII, Div. C, § 808 (affirming that

The government presents three alternate grounds to justify its exclusion of 100 million employees from its Mandate while fighting Plaintiffs' RFRA claim. First, it says the exemption is not from the Mandate itself, but from PPACA overall. This is not relevant to the analysis. The question isn't how you *label* the grandfathering omission, but whether the government "leaves appreciable damage to [its] supposedly vital interest unprohibited." *Id.* The government is responsible for PPACA and its entire regulatory scheme. It voluntarily left massive "appreciable damage" to the Mandate's supposedly grave interests of health and equality. Bureaucrats have no compelling interest to do something that Congress rendered non-compelling by a galaxy-sized exclusion. Notably, PPACA itself does impose several mandates on *grandfathered* plans.[13] But it omitted *this* Mandate from those requirements, because its interest is not compelling.

Second, the government argues that the grandfathering exclusion is transitory. This contradicts the text of PPACA, the government's website, and its own data. HealthCare.gov continues to trumpet the fact that to garner votes for PPACA, "President Obama made clear to Americans that 'if you like your health plan, you can keep it.'"[14] The grandfathering regulation "makes good on that promise by [p]rotecting the ability of individuals and businesses to keep their current plan." The government insists it

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the District of Columbia must respect the religious and moral beliefs of those who object to providing contraceptive coverage in health plans).

[13] HealthCare.Gov, "Grandfathered Health Plans," *available at* http://www.healthcare.gov/law/features/rights/grandfathered-plans/ (last accessed July 16, 2012).

"preserves the ability of the American people to keep their current plan if they like it," and "allows plans that existed on March 23, 2010 to innovate and contain costs by allowing insurers and employers to make routine changes without losing grandfather status." "Most of the 133 million Americans with employer-sponsored health insurance through large employers will maintain the coverage they have today." In contrast to speculation that the grandfathering rule is temporary, the government admits that "[t]here is considerable uncertainty about what choices employers will make over the next few years" regarding whether they will abandon grandfathered status. *Id.* Thus the government itself describes the grandfathering rule as indefinite—except here.

There is no sunset on grandfathering status in PPACA or its regulations. Instead, a plan can keep grandfathered status in perpetuity, even if it raises fixed-cost employee contributions and, for several items, even if the increases exceed medical inflation plus 15% every year. *Id.* The government repeatedly calls it a "right" for a plan to maintain grandfathered status. See 75 Fed. Reg. 34,538, at 34,540, 34,558, 34,562, & 34,566.

The government asserts here that more than half of employers (51%, actually) are expected not to be grandfathered in 2013. Gov. Brief at 33.[15] But that is true alongside the fact that grandfathered plans will cover approximately 100 million employees in

[14] HealthCare.Gov, "Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans," *available at* http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (last visited July 16, 2012).

[15] The government cites 75 Fed. Reg. 34,552, whose last paragraph references the 51% "mid-range estimate" for "all employer plans" in Table 3 at 75 Fed. Reg. 34,553.

2013. *Id.* Most of the non-grandfathered plans are from small employers. *Id.* The government presents no evidence showing that grandfathered employer plans will disappear, much less that it will occur in an imminent or expected timeframe. This lack of evidence fails to satisfy the government's burden to show a compelling interest.

The government does not satisfactorily explain why the 250 employees of Hercules must be subject to its Mandate while it voluntarily omits 100 million employees. Even if recognizing an exemption for the Plaintiffs under RFRA means that other devoutly religious businesses will obtain the same (that question is not before the Court in this motion), the government provides zero data about how many of those employers exist. Their total number of employees would not appear to constitute even a fraction of a percent of the tens of millions of employees the government is voluntarily omitting.[16] This is a quintessential illustration of *Brown v. Entm't Merchs.*'s insistence

[16] The four businesses, all Catholic, that have filed suit against the Mandate encompass 490 employees. (Newland Compl. ¶ 9 (265 full-time employees); *O'Brien v. HHS*, NO. 4:12-cv-476 (E.D. Mo.), First Am. Compl. ¶ 24 (doc. # 19, filed June 11, 2012) (87 employees); *Legatus v. Sebelius*, No. 2:12-cv-12061-RHC-MJH (E.D. Mich.), Compl. ¶ 73 (doc. # 1, filed May 7, 2012) (110 full-time employees); *Geneva College v. Sebelius*, No. 2:12-cv-00207-JFC (W.D. Pa.), First Am. Compl. ¶ 90–91 (doc. # 32, filed May 31, 2012) (28 employees of Hepler plaintiffs).

This is a mere 0.0005% (five ten-thousandths of one percent) of the 100 million employees the government voluntarily excludes from its allegedly compelling interest. If 100 times this number of businesses possessed similar objections, and in an unprecedented wave of litigation every one of them sued and won, leading to an exclusion of 50,000 employees, it would still constitute only 0.05% of the 100 million employees that the government is voluntarily excluding from its allegedly compelling interest. And supposing that half of all estimated grandfathered plans drop their privileged status in a known, proximate timeframe—a figure not supported by any of the government's data—those theoretical 100-fold objecting businesses would still encompass only one tenth of one percent of the 50 million employees the government would be voluntarily omitting from its supposedly compelling interest.

that the "government does not have a compelling interest in each marginal percentage point by which its goals are advanced." 131 S. Ct. 2729, 2741 (2011). As in *O Centro*, where government exclusions apply to "hundreds of thousands" (here, millions), RFRA requires "a similar exception for the 130 or so" affected here. 546 U.S. at 433.

2. The government misinterprets the compelling interest test.

The government relies extensively on *United States vs. Lee* to characterize RFRA's scrutiny as not being very strict in commercial contexts, but the government gives short shrift to *O Centro Espirita*. That case does not allow the Court to apply a "strict scrutiny lite" for any RFRA claim. "[T]he compelling interest test" of "RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test," such as in speech cases. 546 U.S. at 430. *O Centro* explicitly cabined *Lee* to its context of a tax that was nearly universal, and did not allow the government to claim "that a general interest in uniformity justified a substantial burden on religious exercise." *Id.* at 435. Entities like *The New York Times* are accorded First Amendment protection despite being commercial. RFRA requires strict scrutiny.

The government insists from *U.S. v. Lee* that conscience should not be applied "on the statutory schemes which are binding on others in that activity." 455 U.S. at 261. But the Mandate is emphatically not "binding on others in th[e] activity" of employer-provided insurance. Whereas *Lee*'s tax contained only a tiny exemption for some Amish, the Mandate here is not "binding" on: Amish; "religious employers";

small employers who can drop coverage; and approximately 100 million people in grandfathered plans. The Mandate is many things, but "uniform" is not one of them.

O Centro was impatient with uniformity arguments such as are asserted here:

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

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

The law upheld in *U.S. v. Lee* was a tax to raise government funding. Governments cannot function without taxes. *Lee* ruled that if exemptions were allowed "[t]he tax system could not function." 455 U.S. at 260. The United States has functioned for over 200 years without a federal mandate of employer contraception coverage in insurance. The Mandate is not a "government program." It does not require the plaintiffs to give tax to fund government activity, but instead to give specific services to their employees. The program is private, not governmental. The government elsewhere provides contraception, but here the government has decided *not* to pursue its goals with a government program, but to conscript religiously objecting citizens.

The government's reliance on *Lee* is misplaced. *Lee* was a precursor to *Smith*, which expanded on *Lee* to adopt the standard that RFRA affirmatively rejected. RFRA specifies that it is codifying its test "as set forth in *Sherbert*, 374 U.S. 398 and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb. RFRA omits *U.S. v. Lee* from this

list. *Lee* never says it is requiring a "compelling interest" or "least restrictive means." But *Sherbert* and *Yoder did* apply RFRA's test. *Sherbert* involved a plaintiff's bid for financial gain, despite the government's generally applicable law. As scholars note:

> The standard thus incorporated [by RFRA] is a highly protective one. . . . The cases incorporated by Congress explain "compelling" with superlatives: "paramount," "gravest," and "highest." Even these interests are sufficient only if they are "not otherwise served," if "no alternative forms of regulation would combat such abuses". . . .[17]

3. The government has failed to show compelling evidence.

The government asserts that its Mandate as applied to the Plaintiffs will achieve women's health and equality by reducing unintended pregnancy. But its "evidence is not compelling." *Brown v. Entm't Merchs.*, 131 S. Ct. at 2739. It points only to generic interests, marginal benefits, correlation not causation, and uncertain methodology.

The IOM report ("2011 IOM"), of which the government cites 11 pages (19–20, 102–110), does not demonstrate the government's conclusions. At best, its studies argue for a generic health benefit from contraception. But the Mandate is broader, and under *O Centro* its showing must be tailored to the exemption requested. 546 U.S. at 430–31. The government fails to show that women (1) covered by employers such as Plaintiffs, (2) do not use the Mandated items, (3) because they are not covered, (4) and as a result suffer serious health consequences, (5) which the Mandate is the only method to prevent.

[17] Douglas Laycock and Oliver S. Thomas, "Interpreting the Religious Freedom Restoration Act," 73 TEX. L. REV. 209, 224 (1994)

Nowhere does the IOM cite evidence showing that the Mandate would increase contraception use. Instead, the IOM's sources show: 89% of women avoiding pregnancy are already practicing contraception;[18] among the other 11%, lack of access is not a statistically significant reason why they do not contracept;[19] even among the most at-risk populations, cost is not the reason those women do not contracept;[20] and, as discussed below, higher-income health-insured women are not an at-risk group. The studies cited at 2011 IOM pp. 109 do not show that cost leads to non-use generally, but relate only to women switching between contraception methods. The government cites a Guttmacher Institute opinion report that contains no scientific citations. Gov. Brief at 8.

The government asserts that women incur more preventive care costs generally, citing 2011 IOM at 19–20. But the IOM does not say those studies specifically include contraception as part of "preventive care." Nor, if they do, does the IOM say what percentage of the preventive care gap contraception accounts for. PPACA erases most if

[18] The Guttmacher Institute, "Facts on Contraceptive Use in the United States (June 2010)," *available at* http://www.guttmacher.org/pubs/fb_contr_use.html (last visited July 16, 2012).

[19] Mosher WD and Jones J, "Use of contraception in the United States: 1982–2008," Vital and Health Statistics, 2010, Series 23, No. 29, at 14 and Table E, *available at* http://www.cdc.gov/NCHS/data/series/sr_23/sr23_029.pdf (last visited July 16, 2012).

[20] R. Jones, J. Darroch and S.K. Henshaw "Contraceptive Use Among U.S. Women Having Abortions," *Perspectives on Sexual and Reproductive Health* 34 (Nov/Dec 2002): 294–303 (*Perspectives* is a publication of the Guttmacher Institute). The Centers for Disease Control released a study this year showing that even among those most a risk for unintended pregnancy, only 13% cite cost as a reason for not using contraception. CDC, "Prepregnancy Contraceptive Use Among Teens with Unintended Pregnancies Resulting in Live Births — Pregnancy Risk Assessment Monitoring System (PRAMS), 2004–2008," Morbidity and Mortality Weekly Report 61(02);25-29 (Jan. 20, 2012), *available at* http://www.cdc.gov/mmwr/preview/ mmwrhtml/ mm6102a1.htm?s_cid=mm6102a1_e (last visited July 16, 2012).

not all of this gap by mandating other coverage to which Hercules does not object.[21] There is no evidence that any gap will remain, much less a grave one.

The government's evidence apparently does not apply here. Women who suffer "unintended pregnancy" are primarily young, unmarried, and low income. 2011 IOM at 102. Hercules' employees have insurance that includes maternity benefits and outreach to increase wellness and decrease risk factors. Compl. ¶¶ 93–95. The lowest paid worker in Hercules' health plan earns at least $21,000 per year; only four employees earn $22,000 or less; the median wage is $38,500 and the average wage is $50,213 (omitting Hercules' owners). Compl. ¶ 96. Hercules employees impacted by the Mandate earn well above the federal poverty level, on top of which they have health insurance.[22] Thus the lowest-earning employees in Hercules' plan are nearly four times *less* likely to experience unintended pregnancy than persons the Mandate seeks to protect.[23]

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[21] Under 42 U.S.C. § 300gg-13, these include nearly all preventive services that the government's studies show women generally access in higher rates, whether they are woman-specific, U.S. Dep't of Health & Human Servs., Women's Preventive Servs.: Required Health Plan Coverage Guidelines: Affordable Care Act Expands Prevention Coverage for Woman's Health and Well-Being, *available at* http://www.hrsa.gov/womensguidelines/; or evidence based, U.S. Preventive Services Task Force, USPSTF A and B Recommendations (2010) http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm; or immunizations, Advisory Comm. on Immunization Practices (ACIP), Ctr. for Disease Control and Prevention, Dep't of Health and Human Serv., Advisory Committee on Immunization Practices (ACIP) http://www.cdc.gov/vaccines/pubs/ACIP-list.htm; or evidence-informed preventive care and screenings for children (including females).

[22] 2012 HHS Poverty Guidelines, *available at* http://aspe.hhs.gov/poverty/12poverty.shtml (last visited July 16, 2012), set the poverty level at $11,170.

[23] "The unintended pregnancy rate ranged from 112 per 1,000 among women whose income was below the poverty line to 29 per 1,000 among those whose income was at least twice the poverty level." Finer, L. B., and S. K. Henshaw. 2006. Disparities in rates of unintended pregnancy in the

The government fails to show that the Mandate would prevent negative health consequences. "Nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology." *Brown v. Entm't Merchs.*, 131 S. Ct. at 2739 (quotation marks omitted). The IOM admits that for negative outcomes from unintended pregnancy, "research is limited." 2011 IOM at 103. The IOM cites its 1995 report, which similarly emphasizes the fundamental flaws in determining which pregnancies are "unintended," and "whether the effect is caused by or merely associated with unwanted pregnancy."[24]

The 1995 IOM admits that no causal link exists for most of its alleged factors. This makes sense, since the intendedness or unintendedness of a pregnancy cannot itself physiologically change its health effect. Thus, a delay in seeking prenatal care upon unintended pregnancy is "no longer statistically significant" for women not already disposed to delay or who have a "support network"[25]—both unlike beneficiaries of Hercules' health plan. The alleged increase in smoking and drinking drops significantly where studies control for other causes; while data on domestic violence and depression "provide little systematic assessment" and merely "suggest" association (not causation).[26]

United States, 1994 and 2001. *Perspectives on Sexual and Reproductive Health* 38(2):90–96. *available at* http://www.guttmacher.org/pubs/journals/3809006.html (last visited July 16, 2012)) (cited at 2011 IOM at 102).

[24] Institute of Medicine, *The Best Intentions* (1995) ("1995 IOM"), available at http://books.nap.edu/openbook.php?record_id=4903&page=64 (last visited July 16, 2012).

[25] *Id.* at 68.

[26] *Id.* at 69, 73, 75.

The government's allegation that the Mandate will reduce low birth weight and prematurity overlooks the fact that, like other cited factors, these are merely "associated" with, not caused by, unintended pregnancy (1995 IOM at 70; 2011 IOM at 103), and several studies show no connection between it and pregnancy-spacing in the U.S.[27] The 2011 IOM claims to cite a systematic review on low birth weight—but the citation is incorrect.[28] The IOM then cites three studies alleging a mere "associat[ion]" between low birth weight and shorter pregnancy *intervals*. 2011 IOM at 103. This further distances the evidence from the government's interest in preventing *unintended pregnancy*. The IOM failed to consider the offsetting risks of low birth weight that come from *using* contraception: a 2009 Canadian study shows that women who conceive within 30 days of going off oral contraceptive pills significantly increase the risk of low birth weight and *very low* birth weight.[29] The government's reliance on the health need of some women to avoid pregnancy, such as because of diabetes, inherently encompasses a far smaller group of women than the Mandate covers. Focused care to help them in their conditions could achieve the Mandate's goals, with the government providing mandated services itself.[30]

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[27] *Id.* at 70–71.

[28] 2011 IOM at 103, 166 (citing "Shah, et al., 2008"). The Shah study is not a systematic review and does not address low birth weight. *See* http://care.diabetesjournals.org/content/31/8/1668.full (last visited July 16, 2012).

[29] Chen, et al., "Recent oral contraceptive use and adverse birth outcomes," 144 *European Journal of Obstetrics & Gynecology and Reproductive Biology* 40–43 (May 2009), *abstract available at* http://www.ejog.org/article/S0301-2115(09)00074-8/abstract (last visited July 16, 2012).

[30] Also suspect is the government's assertion that contraception would certainly cause pregnancy-prevention. In 48% of all unintended pregnancies, contraception was used. Finer &

Notably, no evidence shows that the Mandate is the only method to provide the items in question. Plaintiffs suggest that such evidence would not be possible, since government-provided contraception is just as free and effective as any other kind.

E. Other means could fully achieve the government's interests.

The fact that the government could subsidize contraception itself for employees at exempt entities, and already does so on a wide scale, shows the government fails RFRA's least restrictive means requirement. Realizing this, the government seeks to redefine the least restrictive means test to be something entirely different: merely asking whether an exemption would undermine the government's interest, and saying that the government needs only to consider its chosen means rather than alternatives. Gov. Brief at 27–28. The government's test therefore would not consider either restrictiveness or means.

Henshaw, supra at n.23 (cited in 2011 IOM at 102). Multiple peer-reviewed studies demonstrate that there is no scholarly consensus that increased contraception use reduces either abortion (which occurs upon pregnancy) or sexually transmitted diseases. K. Edgardh, et al., "Adolescent Sexual Health in Sweden," Sexual Transmitted Infections 78 (2002): 352-6 (http://sti.bmjjournals.com/cgi/content/full/78/5/352); 36 Sourafel Girma, David Paton, "The Impact of Emergency Birth Control on Teen Pregnancy and STIs," Journal of Health Economic, (March 2011): 373-380; A. Glasier, "Emergency Contraception," British Medical Journal (Sept 2006): 560-561; 37 J.L. Duenas, et al., "Trends in the Use of Contraceptive Methods and Voluntary Interruption of Pregnancy in the Spanish Population During 1997–2007," Contraception (January 2011): 82-87. One of the IOM's cited researchers recently told the New York Times that "pregnancy prevention rates are probably lower than scientists and pill makers originally thought . . . in some studies as low as 52 percent...." Pam Belluck, "Abortion Qualms on Morning-After Pill May Be Unfounded," *New York Times* (June 5, 2012), *available at* http://www.nytimes.com/2012/06/06/health/research/morning-after-pills-dont-block-implantation-science-suggests.html?pagewanted=all (last visited July 16, 2012). This "uncertain[]" and "ambiguous proof will not suffice" to meet the government's burden that the Mandate will serve its interests. *Brown v. Entm't Merchs.*, 131 S. Ct. at 2739.

RFRA, in contrast, requires the Mandate to be "the least restrictive means," not the least restrictive means the government chooses. And it imposes its burden on the government, not the Plaintiffs. 42 U.S.C. § 2000bb-1. The government's view is inconsistent with *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988). There, North Carolina sought to curb fraud by requiring professional fundraisers to disclose during solicitations how much of the donation would go to them. 487 U.S. at 786. Applying strict scrutiny, the Supreme Court declared that the state's interest could be achieved by publishing the same disclosures itself online, and by prosecuting fraud. *Id.* at 799–800. Although these alternatives would be costly, less directly effective, and a restructuring of the governmental scheme, strict scrutiny demanded they be viewed as acceptable alternatives. *See id.* Here RFRA similarly requires full consideration of other ways the government can and does provide women free contraception. "The lesson" of RFRA's pedigree of caselaw "is that the government must show something more compelling than saving money."[31]

The government's interpretation of *United States v. Wilgus*, 638 F.3d 1274, 1284–95 (10th Cir. 2011), is also inconsistent with strict scrutiny. The government contends that under *Wilgus*, least restrictive means need only consider the government's chosen means. Gov. Brief at 27–28. But according to *Wilgus*, a less restrictive means does not have to work within the existing governmental scheme or be equal or less in cost

[31] Laycock & Thomas, *supra* n.17, at 224.

than the challenged policy. *See* 638 F.3d. at 1289. Instead, *Wilgus* requires the government to "support its choice of regulation" and "refute the alternative schemes offered by the challenger," not to assume its choice and refuse to contemplate alternates.

The government this standard, for at least two reasons. First, exemptions would not undermine the government's interest if it adopted other means. The government already provides free contraception to women, and provides health insurance including contraception outside the "employer-based" system (such as by Title X funding and Medicaid). There is no compelling reason that the government cannot do so for women working at exempt entities, without coercing religiously objecting employers. *O Centro*'s distinction of *U.S. v. Lee* shows that the present case is not like the situation where taxes cannot be raised if people opt out of paying them, or like *Braunfeld*, 366 U.S. 599 (plurality opinion), where all businesses cannot be closed on Sunday if some businesses are open. 546 U.S. at 435. The government could achieve its interest of providing women free contraception in many ways, even when Plaintiffs are exempt.

Second, the government's reinterpretation of the least restrictive means test to encompass only the employer-based insurance market actually *redefines the government's interest.* The government defines its interest as providing women free contraceptive coverage to prevent unintended pregnancy and to assure women's equality. Gov. Brief at 22–24. But the government has not shown that it has a compelling interest in achieving that goal *by* coercion of religiously objecting employers. Nothing in the

government's actual interest requires coercion of Plaintiffs, and coercion is not a compelling interest in itself. Recognizing this problem, the government contends that under subsidies or government coverage, women would be burdened by having to use a different method to get their free contraception. But the government has presented no evidence that the sole inconvenience of having to carry two health cards instead of one amounts to a grave burden on health or equality. In truth, the government's own provision of free contraceptive coverage to women would fully achieve its interest *in providing free contraception to women*. "[T]he Government has not offered evidence demonstrating" compelling harm from an alternative. *O Centro*, 546 U.S. at 435–37

II. The Mandate violates the Free Exercise Clause.

For the reasons stated above regarding the effect of the grandfathering and other exemptions on showing the government's interests not to be compelling, those exemptions demonstrate that the Mandate within PPACA is not generally applicable. The Mandate cannot be considered "generally applicable" while it voluntarily excludes tens of millions employees, applies multiple exemptions, and proposes accommodations.

III. The Mandate violates the Establishment Clause.

The government claims that the Mandate does not violate the Establishment Clause because it does not "favor one *religion, denomination,* or *sect* over another," and does not "facially regulate religious issues." Gov. Brief at 3, 42 n.25. It seeks to distinguish *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008),

claiming *Weaver* dealt with denying "public benefits [] afforded to all other institutions" while the Mandate seeks to exempt entities from a generally applicable law. *Id.* As discussed above, however, the Mandate with its 100 million excluded employees and varied exemptions is not even remotely generally applicable.

The government's attempt to distinguish *Weaver* is nowhere present in that court's reasoning. Under *Weaver*, discrimination "*among* religions," and because of different types of religious practice, itself violates the constitution. 534 F.3d at 1256, 1259. The Mandate does indeed "facially" pick and choose between different kinds of religious people and practices, so as to respect some and coerce others. The government promises this effort will only use "neutral, objective criteria," and that its bureaucrats will not "second-guess" or "troll through" anyone's religious beliefs. Gov. Brief at 44 n.26. But the preference of some religious objectors to others, due to characteristics the government considers more worthy of the designation "religious," is not "neutral" or "objective." The government has decided employers can only be religious if they limit their hiring and benefits to co-religionists and focus only on inculcation of religion. And their brief makes clear that one cannot practice Catholicism while selling air conditioners. Any determination of whether an employer meets these criteria will necessarily involve the government in deciding what are the tenets of religion; whether certain purposes are consistent with religious exercise; who counts as a co-religionist; etc. That is precisely the type of non-neutrality and entangling that the Establishment Clause prohibits.

The government's new brief adds citations to *Bowen v. Kendrick*, 487 U.S. 589 (1988), and *Romer v. Bd. of Pub. Works of Maryland*, 426 U.S. 736 (1976), as examples of "government monitoring" of religious groups. Gov. Brief at 43. But unlike the Mandate's four-part religious test, the educational standards criteria in *Bowen* and the audits in *Roemer* did not involve deciding who is "religious enough," nor did it measure adherence to theological tenets. The only extent to which either case recognized a weighing of religious quality was in their distinction regarding "pervasively sectarian" entities. But *Weaver* ruled that the "pervasively sectarian" categorization has been abrogated. *Weaver*, 534 F.3d at 1251–52. The government cannot resurrect it here.

IV. The Mandate violates the Free Speech Clause.

The government contends that the Mandate requires conduct, not speech. But the conduct it requires in this instance is "inherently expressive," in two ways. First the Mandate requires Plaintiffs to cover "education and counseling" in favor of items to which they object. Education and counseling are, by definition, speech.

Second, the Mandate requires the Plaintiffs to fund this objectionable speech. The Supreme Court has explained that its compelled speech jurisprudence is triggered when the government forces a speaker to fund objectionable speech. *See, e.g, Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 234-35 (1977) (forced contributions for union political speech); *United States v. United Foods*, 533 U.S. 405, 411 (2001) (forced contributions for advertising). The Supreme Court recently reaffirmed that "compulsory subsidies for

private speech" violate the First Amendment unless they involve a "mandated association" that meets the compelling interest / least restrictive means test. *Knox v. Service Employees Intern. Union*, --- U.S. ---, 2012 WL 2344461 at *9 (June 21, 2012). Here there is no "mandated association" because the government omits many employers from the Mandate, and the Mandate violates the compelling interest test. Allowing the Mandate in light of *Knox* would be like allowing half of a company's employees to not join a union, but still forcing speech-objectors to pay the union's full dues. These factors, and because the Mandate is not a condition on government funding, distinguish it from *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47 (2006).

V. Plaintiffs are entitled to a preliminary injunction.

A. The Mandate's harm to Plaintiffs is highly imminent.

The government argues against the existence of irreparable and imminent injury on the grounds that the Mandate does not apply to Plaintiffs until its November 1, 2012 plan. But November 1 is nearly here. The Plaintiffs are not aware of any caselaw indicating that three months is too long advance time to justify a preliminary injunction. The government itself admits that knowledge of plan coverage is necessary far in advance, because the Mandate needed a year of notice. See 75 Fed. Reg. 41,726, 41729.

As the Complaint attests, the November 1 health plan does not happen on October 31. Plaintiffs must undergo extensive preparation to have a plan in place by November 1, none of which is optional. Compl. ¶¶ 101–11. Plaintiffs must know at the outset

what the exact coverages of the plan will be. These preparations include, notably, a one-month enrollment period for employees. Apparently the government does not consider it a harm to deprive employees of their enrollment period by preventing a ruling before November 1. Plaintiffs have further shown that prior to the enrollment period, Plaintiffs must undergo a bid, negotiation and contract process with a third-party plan administrator, and with stop-loss providers who require plans to be finalized before they bid. *Id.* That process begins in August and takes many weeks to complete.

B. An injunction preserves the status quo and the public interest.

The government argues that an injunction would harm the public interest. But as it also explains, "when an alleged constitutional right is involved, most courts hold no further showing of irreparable injury is necessary." Gov. Brief at 56 (quoting *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001)). The government argues as if this motion requests a ban on contraception. But Defendant Sebelius admits that contraception is widely available for sale as well as in "community health centers, public clinics, and hospitals with income-based support."[32] And as mentioned above, the government could satisfy the Mandate's interests itself, but has chosen not to.

A preliminary injunction is only a temporary maintenance of the status quo pending litigation. The government itself has provided its many equivalent "injunctions"

[32] "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 visited July 16, 2012).

from this Mandate. These include not only the massive grandfathering exclusion, but also the government's current "temporary safe harbor" for religious groups that fail the four-part exemption test.[33] The government is voluntarily refraining from coercing those religious entities for an additional year, until as late as July 2014. The government cannot claim that a preliminary injunction here will devastate the public interest, when it excludes tens of millions by grandfathering and it is giving many groups a remedy that it contends has the same effect as the injunction Plaintiffs request.[34]

The public has lived without this federal Mandate for all of American history. It does not go into effect until August 1 for anyone, not until November 1 for Plaintiffs, and maybe never for tens of millions of employees in grandfathered plans. But failure to issue an injunction will cause the Plaintiffs to face crippling penalties or add religiously objectionable coverage into their plan for the 2012–13 year.

CONCLUSION

For these reasons and the reasons offered in their opening brief, the Plaintiffs respectfully request that this Court grant their motion for a preliminary injunction.

[33] HHS, "Guidance on the Temporary Enforcement Safe Harbor" (Feb. 10, 2012), available at http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited July 16, 2012).

[34] In litigation brought by such groups, the government claims its safe harbor fully removes any of the Mandate's burdens. *See, e.g.*, Gov. Mot. to Dismiss at 14–16, *Belmont Abbey College v. Sebelius*, No. 1:11-cv-01989-JEB (D.D.C. doc.# 23-1, Apr. 5, 2012).

Respectfully submitted this 16th day of July, 2012.

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CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiffs, Matthew S. Bowman, hereby certifies that the following counsel for Defendants was served with the preceding document by the Court's ECF filing system on July 16, 2012:

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