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.

RESPONSE IN OPPOSITION TO
MOTION TO DISMISS

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INTRODUCTION

On July 27, 2012, the Court granted (Doc. # 30, hereinafter "Order") Plaintiffs' Motion for Preliminary Injunction on the Religious Freedom Restoration Act ("RFRA") claim filed by the Newland family and Hercules Industries, Inc. (collectively, "the Newlands" or "Plaintiffs"). It is therefore necessarily true that Plaintiffs' First Amended Verified Complaint filed on June 26, 2012 (Doc. # 19), to which Defendants' Motion to Dismiss (Doc. # 25) is directed, does not "fail to state a claim upon which relief may be granted" under Fed. R. Civ. P. 12(b)(6). Since relief has already been granted, it is clear that "relief may be granted." The government's position to the contrary amounts to a motion for reconsideration of the preliminary injunction order, and should therefore be denied as a matter of course. The government has not made a different showing warranting reconsideration—indeed, it is using exactly the same brief (Doc. ## 25, 26).

In its Order, the Court concluded that "Plaintiffs' RFRA challenge provides adequate grounds for the requested injunctive relief," and thus it "[declined] to address [Plaintiffs'] challenges under the free Exercise, Establishment and Freedom of Speech Clauses of the First Amendment." Order at 10 (citing *United States v. Hardeman*, 297 F.3d 1116, 1135-36 (10th Cir. 2002) (en banc) for the principle of adhering to judicial restraint and constitutional avoidance). Likewise, the government's motion to dismiss the Newlands' non-RFRA claims should be denied at this time without prejudice to raising the same arguments at final judgment. This case will proceed to final judgment

on the RFRA claim in any event. Since all Plaintiffs' claims rely on exactly the same transactions and occurrences, no economy in the discovery process would result from dismissal of the constitutional and Administrative Procedure Act claims. On the contrary, the Court might prevent itself from ever needing to opine on the Newlands' constitutional and APA claims, if the Newlands receive final judgment in their favor on their RFRA claim. And if the government somehow makes a radically different showing regarding RFRA, the other claims will be at issue and the government will still be able to raise all its arguments against them. Judicial economy and constitutional avoidance counsel in favor of deferring consideration of these claims until final judgment.

The government filed a single brief opposing a preliminary injunction and supporting dismissal. Similarly, to prevent repetition of arguments already briefed, the Newlands seek to incorporate by reference here their arguments in support of their four claims under RFRA and the First Amendment against dismissal. This brief will address those claims only with respect to the procedural characteristics specific to a motion to dismiss. The brief will then elaborate more fully on why the Newlands' Due Process and Administrative Procedure Act claims are also not subject to dismissal.

ARGUMENTS IN RESPONSE

I. The Mandate Violates RFRA and the First Amendment.

For the reasons stated in the Newlands' briefs in support of their preliminary injunction motion (Doc. ## 5-1, 27), Plaintiffs have stated claims upon which relief may

be granted, to wit: the Mandate violates their rights under RFRA and the Free Exercise, Free Speech and Establishment Clauses of the Constitution. Just as the government presented its arguments in a single dismissal/preliminary injunction brief (Doc. ## 25, 26), the Newlands respectfully incorporate their same responsive arguments herein.

The standard for dismissal under Rule 12(b)(6) differs from the preliminary injunction standard, but not in a way favoring dismissal. Where a preliminary injunction can involve fact-finding, for a 12(b)(6) motion "the facts alleged are presumed true." *In re Oppenheimer Rochester Funds Group Securities Litigation*, 838 F. Supp. 2d 1148 (D. Colo. 2012). Fed. R. Civ. P. 8 requires a "short and plain statement" to "give the defendant fair notice." *Falk v. City of Glendale*, 2012 WL 2390556, at *2 (D. Colo. June 25, 2012) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). To raise sufficiently "plausible" claims, allegations need only be not "so general that they encompass a wide swath of conduct, much of it innocent." *Id.* (quoting *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012)). "No specific facts are required." *Id.*

Nearly all of the elements in the Newlands' claims appear to be legal in character with respect to a motion to dismiss. Indeed many of the elements of the claims impose strict scrutiny burdens on the government, not on Plaintiffs. Any factual components that set up the claims must be read in the Newlands' favor, and, as was acknowledged by counsel for Defendants at the Preliminary Injunction Hearing, significant factual issues are not in dispute. Relevant facts include: the factual allegations about Plaintiffs

themselves and their business practices; the existence of Plaintiffs' religious beliefs and the Mandate's inconsistency therewith; and the sincerity of those beliefs (to which the government has stipulated; Hearing Transcript at 3, lines 20–21 (Doc. # 34)). This satisfies any factual component of Plaintiffs' "free exercise of religion."

Regarding possible factual characteristics of a "substantial burden" on religious free exercise, the government relies on Title VII cases that probe exactly how religious a "religious employer" is. But, as argued in the briefs, Congress did not adopt Title VII's "religious employer" scope in RFRA. The First Amendment and Congress instead simply ask whether the plaintiff has religious beliefs and "exercises" them. Facts supporting that far simpler concept are presumed true under this motion (and largely were found true and/or conceded by the government for the preliminary injunction).

The "substantiality" of a burden therefore does not and cannot probe the *centrality* that the Newlands' religious beliefs possess with respect to their activities or consciences, and the Court itself observed as much. Order at 12 n.9. Instead, substantiality is a measure of the weight of government penalties attached to a requirement or point of pressure. In this case the weight is quintessentially substantial, being a direct mandate, as argued in Plaintiffs' briefs. Thus, it appears to Plaintiffs that the substantiality factor in free exercise claims is either not factual, not subject to "line drawing," not in dispute, or supported by the complaint's extensive allegations in any event.

It is likewise a legal question whether an economic exception should be read into Congress' protection of "any free exercise of religion" and the First Amendment's similarly exceptionless norm. Whether a family-held corporation can follow state law authorizing it to follow any legal power by exercising ethical beliefs derived from religion, and whether the family owners' religious exercise is burdened by government penalties on their business activities, are thoroughly pled in the complaint.

The predicates to the Newlands' non-RFRA First Amendment claims seem primarily legal as well, or amply pled to overcome 12(b)(6) dismissal. It is basically a legal question and not a deficiency of complaint pleading whether the Mandate is neutral and generally applicable, whether it requires compelled speech, and whether it favors some religious concepts over others. And the strict scrutiny applicable to the RFRA and First Amendment claims cannot be dismissed based on any supposed failure of factual pleading. Those burdens rest on the government, requiring *it* to show compelling evidence. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2739 (2011).

II. The Motion to Dismiss the Non-RFRA Claims Should Be Denied Without Prejudice.

Because the motion to dismiss the Newlands' RFRA claim should be denied, judicial economy and constitutional avoidance are best served by denying Defendants' motion to dismiss the remainder of the complaint without prejudice to reasserting these contentions at a later stage of these proceedings. The government will not suffer any

harm from such denial since this case will proceed to discovery anyway. Partial dismissal will not save the government from otherwise applicable burdens of discovery since the factual predicate for the RFRA claim is the same as the factual predicate for all other claims. The government likewise would receive no benefit from not needing to brief some claims at a later time, since it has already briefed the substantive legal issues for those claims and it will do so in its reply brief on this motion.

Moreover, the Court would expend unnecessary resources addressing other claims now when it might never need to do so. If the government continues to fail to meet its burden under RFRA, the Newlands could well receive full relief under that claim alone. On the other hand, the Newlands are entitled to bring multiple claims for the same relief. *Cf. Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). If the government were somehow to improve its showing on the RFRA claim, those other claims could and would be addressed fully at final judgment, allowing the government to bring the same arguments it asserts now. Denying the motion to dismiss without prejudice will preserve judicial resources while in no way harming the government's interests.

III. The Mandate Violates Due Process.

The Mandate violates the Newlands' rights under the Due Process Clause of the Fourteenth Amendment because it creates a standardless, blank check for Defendants to discriminatorily select whatever they want to call "religious" and offer or withhold whatever accommodations they choose, and that is exactly what Defendants have done.

When a law is so "standardless that it authorizes or encourages seriously discriminatory enforcement," the law does not comport with due process. *United States v. Williams*, 553 U.S. 285, 304 (2008); *see also F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). If a law is so vague that it "fails to provide a person of ordinary intelligence fair notice of what is prohibited," it fails to provide constitutional due process. *Williams*, 553 U.S. at 304.

The PPACA provision underlying the Mandate, Public Health Service Act § 2713, (encoded at 42 U.S.C. § 300gg-13), authorizes Defendants to exempt religious employers—this is conceded by Defendants themselves. 76 Fed. Reg. at 46623 (asserting that § 2713 grants HHS/HRSA "authority to develop comprehensive guideless" under which Defendants believe "it is appropriate that HRSA, in issuing these Guidelines, takes into account the effect on the religious beliefs of certain religious employers") Yet the statutory authority in this regard is unfettered. Not only may HRSA decide whatever it wants to decide about which organizations are religious "enough" to warrant different kinds of accommodations, there is no limit on HRSA deciding whether or not contraception, abortifacients, and other services are preventive in the first place. Section 2713 literally contains no standards regarding these decisions; it offers zero guidance, not even key words or phrases, about who counts as religious and what kind of accommodation such religious persons or entities should be provided. No

person can read § 2713 and have any notion of who Defendants may define as religious objectors or what accommodations such religious objectors may receive.

Section 2713 is therefore a quintessential law so "standardless that it authorizes or encourages seriously discriminatory enforcement." Defendants could literally decide that Buddhists get exemptions while Sikhs do not, without running afoul of the standards of Section 2713, because the section has no standards. The law practically invites discriminatory enforcement, and that is exactly what Defendants have done with it. As discussed further in the Newlands' briefing of their Establishment Clause claim, Defendants have arbitrarily and discriminatorily determined the following: (1) Real religion only occurs in churches or religious orders, authorizing a Mandate exemption. (2) Quasi-religion exists in some non-profit contexts but they must still give their employees plans that cover objectionable items through their insurers under the vague proposals of the ANPRM. (3) Every other religious person or entity in America, such as the Newlands and Hercules Industries, have no cognizable religious exercise at all but instead are "secular." (4) February 10, 2012 is a date of such cosmic significance that non-profit entities who covered contraception all the way up to February 9 are allowed to maintain their consciences but non-profits who covered contraception on February 11 are prohibited from repenting from pro-contraception views, (5) The Newlands, despite not having covered contraception since before this magic deadline, still are deemed by the government not to have a conscience.

The discriminatory character of these determinations is palpable. They involve the government deciding who the religious are and what religion is, to the detriment of the Newlands and their business; what levels of moral participation should be acceptable to conscience; whose religion gets put into castes that are afforded different levels of accommodation; and who is allowed to convert to religious views considered unorthodox by the federal government, and by what date such conversion may occur.

As if to leave no doubt that it is engaging in "arbitrary and discriminatory enforcement" unrestricted by statutory standards, the government keeps changing its rules about who it will *enforce* the Mandate against. Just this month the government issued a newly amended "safe harbor" Guidance. In this new iteration the government changes the Mandate's scope yet again, this time so as to partially refrain from enforcement against some religious entities whose health plans did provide some contraception after the February 10, 2012 confluence date, but *still not* including the Newlands. HHS, Guidance on the Temporary Enforcement Safe Harbor (Aug. 15, 2012), *available at* http://cciio.cms.gov/resources/files/prevservices-guidance-08152012.pdf . The government's discriminatory purpose in making this change was to try to undermine the legal standing of non-profit entities who fit the unique characteristics of their new definition, while continuing to impose the Mandate substantively on those same entities by refusing to exempt them from lawsuits that the Mandate authorizes their employees and plan participants to file (and while continuing to

apply the Mandate to the Newlands in full force). *See, e.g.*, Motion to Dismiss Memo at 12–13, 22 n.7, in *Wheaton College v. Sebelius*, No. 1:12-cv-01169-ESH (D.C.D., doc. 17-1, filed Aug. 10, 2012); Motion to Dismiss Reply at 2, 4, in *Louisiana College v. Sebelius*, No. 1:12-cv-00463-DDD-JDK (W.D. La., doc # 50, filed Aug. 24, 2012); Motion to Dismiss at 15–16, *Geneva College v. Sebelius*, No. 2:12-cv-00207-JFC (W.D. Pa., doc # 40, filed Aug. 2, 2012). Defendants' views of whose consciences "count" are entirely fluid and unconstrained by § 2713. They are using that discretion to gerrymander their rules so as to deny relief to religious objectors.

Note that the Newlands' Due Process claim is not based on the (also true) idea that "religious employer" exemption HHS adopted is internally vague. The claim is, instead, that no standards guide its discriminatory creation of that definition, of the ANPRM process, and of its ever-changing "safe harbor" enforcement regime.

In reality, as argued in the Newlands' briefing, RFRA (not HHS) sets forth the exemption that Defendants must create for § 2713: namely, any free exercise of religion against coverage of abortifacients, contraception or sterilization cannot be forced to suffer under the Mandate's clearly substantial burdens, due to the government's inherent lack of compelling interest and its ample other means of providing contraceptive availability. Defendants instead believe they can create their own bureaucratic schema of who are the religious and what counts as true religious practice in the United States. The Due Process Clause shields against such an overreaching assumption of discretion.

IV. The Mandate Violates the Administrative Procedure Act.

The Newlands' APA claim can be subdivided into three aspects.

A. Defendants refused to meaningfully consider objections before finalizing the Mandate.

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

"Consideration" of comments must be real: "[c]onsideration of comments as a matter of grace is not enough." *McLouth Steel Products Corporation v. Thomas* stated, 838 F.2d 1317, 1323 (D.C. Cir. 1988). "An agency is required to provide a meaningful opportunity for comments, which means that the agency's mind must be open to considering them." *Grand Canyon Air Tour Coalition v. F.A.A.*, 154 F.3d 455, 468 (D.C. Cir. 1998) (citing *McLouth*, 838 F.2d at 1323).

The Court need not engage in any subjective judgment about whether Defendants provided due consideration to objections to the Mandate. In this case Defendants essentially admit that they did not do so. Central to this implicit concession are three facts acknowledged by Defendants themselves:

(1) PPACA prohibits the Mandate from going into effect until one year after it is in final, unchanged form.

(2) Defendants themselves insisted, in August 2011, prior to the comment period, that they believed the Mandate must exist in final form unchanged from as it was written on August 1, 2011.

(3) After adopting the interim August 2011 rule "without change" in February 2012, Defendants admitted in a new regulatory process that the same objections offered in the 2011 comment period required alterations that they refused to consider in 2011.

Combined, these admissions demonstrate that the Mandate was enacted in complete disregard to meaningful consideration of comments for interim final rules.

First, PPACA prohibits the Mandate from applying to plans, including the Newlands' plan, until a year after its finalization. Defendants admit this. 75 Fed. Reg. at 41726; see also 76 Fed. Reg. at 46624.

Second, precisely because of this first fact, Defendants published the Mandate as an interim final rule—issued prior to the notice and comment period ordinarily required—on August 1, 2011, with a notice and comment period to follow afterwards. 76 Fed. Reg. 46621–26. Defendants explained that their reason for this "shoot first and ask questions later" approach was that "[m]any college student policy years begin in

August" so that if Defendants did not concretize their Mandate prior to the notice and comment period, "many students could not benefit from the new prevention coverage without cost sharing following from the issuance of the guidelines until the 2013–14 school year, as opposed to the 2012–13 school year." *Id.* at 46624. In other words, female college students would have to wait another year for free contraception, abortifacients, and sterilization if the Mandate was not promulgated in final form on or by August 1, 2011.

By this assertion Defendants essentially admitted that they never had any intention of meaningfully considering the comments and religious objections submitted post-August 1, 2011, because doing so would destroy their supposed need to impose the Mandate in August 2012. Defendants admitted in August 2011 that such adoption was a foregone conclusion in order to ensure no-cost-sharing contraception and abortifacients to female college students as soon as possible. This was a concession that, no matter what objections would be or were raised in the comment period after August 1, 2011, such objections had no chance of persuading Defendants against finalizing the August 2011 rule "without change" as they did in February 2012. HHS stated that it "received over 200,000 responses to the request for comments" on the August 2011 rule. 77 Fed. Reg. at 8726. Yet they adopted their Mandate "without change" on February 10, 2012. 77 Fed. Reg. 8725–30.

The mere fact that there was a comment period after issuance of the August 2011 interim final rule does not show that Defendants meaningfully considered those comments with a mind that was open to changing the Mandate. Nor is such meaningful consideration illustrated by Defendants' claim that consideration occurred. Defendants admitted in August 2011 that they could not possibly tolerate a change after August 1, 2011, due to the statutorily required one year delay that would prevent free contraception from flowing to female college students in August 2012.

Third, Defendants themselves proved that they were closed to true consideration of the 2011 comments because Defendants initiated a new rulemaking process in March 2012 *to change the Mandate based on the 200,000 comments they ignored when they finalized the 2011 Mandate*. A political firestorm ensued when HHS announced in early 2012 that it was not open to changing the Mandate. This led Defendants to finalize the Mandate "without change" anyway, but to initiate a new pre-rulemaking process that inherently concedes they should have not finalized the rule without change because changes were in fact needed. The ANPRM is wholly unnecessary if Defendants really considered those same objections prior to finalizing the August 2011 Mandate. No new information existed in 2012, only new political calculations. The drive for the ANPRM comes from the exact concerns contained in those 200,000 comments Defendants purposefully ignored in 2011. The entire ANPRM is an implicit admission that the

objections Defendants were closed-minded to the 200,000 comments filed in 2011 even though Defendants now admit those comments showed that a change was necessary.

The combination of Defendants' admission in August 2011 that it could not possibly change the Mandate, and their admission in March 2012 that the objections registered really did merit a change but they had finalized their Mandate "without change" anyway, proves that Defendants' mind was closed in 2011 to making changes in February 2012 that would have reset the Mandate clock against the Newlands. The February 2012 finalization "without change" was a foregone conclusion that Defendants had conceded in August 2011 despite admitting in March 2012 that changes were needed.

The government wishes to have its cake of finality and eat it too. The government desires that the Mandate apply to the Newlands now, because it was absolutely final in August 2011 to ensure free contraception and abortifacients for plans starting after August 2012. But the government also insists it is now considering further changes to the August 2011 rule based on objections they refused to pay meaningful attention to before they finalized that rule. If Defendants had not been close-minded about their Mandate it would not have been finalized without change in February 2012, and would still not be finalized (because the March 2012 process continues indefinitely). Thus if the government had complied with the APA the Newlands would not have needed a preliminary injunction; they would be more than a year away from threatened compliance with the Mandate in the first place.

Defendants' mockery of the notice and comment process has led to palpable injury to the Newlands—without it they would not face the Mandate soon, and maybe not at all. The Mandate's adoption of HRSA's preventive services guidelines against religious objectors should be vacated and remanded to the Defendant agencies until they actually finalize a Mandate after meaningful consideration of objections and then wait an additional year to impose it. The Newlands have stated a claim for relief that the Mandate failed "observance of procedure required by law" under the APA.

B. The Mandate violates the APA for being illegal.

The Mandate also violates the APA for being "contrary to law" and "constitutional right" under 5 U.S.C. § 706(2)(A) & (B). *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–17 (1971). It is contrary to law and constitutional right, first, for all the reasons stated above: its violation of RFRA, the First Amendment clauses, and the Due Process Clause. The Mandate is also contrary to several other laws recited in the complaint, for each of which the government offers reasons supporting dismissal.

1. The Mandate is contrary to PPACA's ban on abortion mandates.

The Mandate is contrary to the provision of the PPACA which states that "nothing in this title"—i.e., title I of the Act, which includes the provision dealing with "preventive services"—"shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits for any plan year." Section 1303(b)(1)(A) (codified at 42 U.S.C. § 18023). Some drugs included as "FDA-approved

contraceptives" under the Mandate are abortifacient by causing the demise of human embryos after conception and before and/or after implantation in the uterus. These include not only drugs such as the "morning after pill" and other contraceptives which can have a pre-implantation effect, and the IUD which is widely considered to result in the same, but also "ella," a newly approved drug that acts to end embryonic life *after* implantation into the uterus.[1] These factual allegations must be assumed true under a motion to dismiss. The government cannot win such a motion based on its factual dispute about whether such activities ought to be labeled abortifacient.

The government asks the Court to dismiss, under Fed. R. Civ. P. 12(b)(1), the Newlands' assertion that they are being forced to cover "ella" abortions in violation of PPACA section 1303, because the Newlands' health plan is not offered in a health "exchange." Under the government's interpretation, therefore, *PPACA fully empowers the federal government to force all health plans outside of exchanges to cover abortion*. This aggressive stance contradicts several positions the government has promoted to the general public about PPACA. President Obama's Executive Order 13535 issued with the passage of PPACA on March 24, 2010 was instrumental in quelling opposition to the

[1] European Medicines Agency, "CHMP Assessment Report for EllaOne," (Doc.Ref.: EMEA/261787/2009). See also Attardi et al., "In vitro Antiprogestational/Antiglucocorticoid Activity and Progestin and Glucocorticoid Receptor Binding of the Putative Metabolites and Synthetic Derivatives of CDB-2914, CDB-4124, and Mifepristone," 88 Journal of Steroid Biochemistry & Molecular Biology (2004): 277–288, 286. For further explanation see Dr. Donna Harrison, Comment to Docket No. FDA–2010–N–0001 Advisory Committee for Reproductive Health Drugs; Notice of Meeting Ulipristal acetate tablets, (NDA) 22–474,

bill by purporting to guarantee that nothing in PPACA would authorize the Defendants in this case to force people to provide abortions in health plans.[2] Moreover, the Institute of Medicine itself, whose report the government adopted here, stated that it desired to mandate abortion as preventive care but felt it could not do so "given the restrictions contained in the ACA." IOM Report at 22.[3] And the Defendants themselves express agreement with the IOM that "that abortion services are outside the scope of permissible recommendations." Gov. Br. at 53 (Doc. # 25). It is therefore highly disturbing that the government would contradict itself by asserting abortion services are *not* outside the scope of permissible recommendations, but that instead PPACA writes HHS a blank check to force all non-exchange health plans to cover abortions through all nine months of pregnancy for any reason. The Newlands have stated a claim for relief that PPACA prohibits the mandate of "ella" and other abortifacient coverage.

2. The Mandate is contrary to the Weldon Amendment.

The Mandate is contrary to the provisions of the Weldon Amendment to the Consolidated Appropriations Act of 2012, Public Law 112-74, § 507(d)(1), 125 Stat 786, 1111 (Dec. 23, 2011), which provides that "[n]one of the funds made available in this Act [making appropriations for Defendants Department of Labor and Health and Human

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Laboratoire HRA Pharma. *available at* http://www.aaplog.org/wp-content/uploads/2010/06/AAPLOG-Ulipristal-Comments_2010.pdf (last visited Aug. 29, 2012).

[2] Available at http://www.whitehouse.gov/the-press-office/executive-order-patient-protection-and-affordable-care-acts-consistency-with-longst (last visited Aug. 29, 2012).

[3] Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* (2011).

Services] may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."

The preventive services Mandate and Defendants' enactment and enforcement thereof are a program of the Labor and HHS Departments. Those Defendants are using funds appropriated under the 2012 and previous Appropriations Acts to subject the Newlands (as a self-insured "health insurance plan," *id.* at § 507(d)(2)) to adverse discrimination due to their refusal to cover drugs and methods that are abortifacients. As mentioned above, the complaint construed in favor of the Newlands alleges that some Mandated items do constitute abortion, after conception and not only before but after embryonic implantation. Thus Defendants' protestations from legislative history that pre-implantation embryocide does not count as "abortion" are insufficient because by anyone's definition, destruction of an embryo after implantation is "abortion." The Mandate has no "ella" exception. For that and other reasons, the Mandate violates the Weldon Amendment.

3. The Mandate is contrary to 42 U.S.C. § 300a-7(d).

The Mandate also violates the provisions of the Church Amendment, 42 U.S.C. § 300a-7(d), which provides that "No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in

whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions." Defendants have contended that the Mandate is a program which they administer, such that they cannot tolerate exemptions to it. To the extent they administer it, they draw applicable funding to do so. Under the Mandate the Newlands are "required to perform or assist in the performance of any part of a health service program" even though their "performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions." The Newland individual Plaintiffs are, of course, individuals. As the 100% owners and operators of Hercules Industries, the Mandate forces them to assist in the performance of abortions in violation of their religious beliefs and moral convictions upon penalty of destroying their property ownership and family livelihood. Such is a "require[ment]" violating § 300a-7(d).

C. The Mandate violates the APA for failing to address objections.

The Mandate additionally violates the APA for being "arbitrary and capricious" under 5 U.S.C. § 706(2)(A) (*see Volpe*, 401 U.S. at 415–17), for failing to sufficiently, if at all, consider the objection that it would violate employers' religious beliefs. "An agency must [] demonstrate the rationality of its decision-making process by responding to those comments that are relevant and significant." *Grand Canyon Air Tour Coalition*,

154 F.3d at 468 (citing *Professional Pilots Fed'n v. FAA*, 118 F.3d 758, 763 (D.C. Cir. 1997), and *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977)).

Defendants failed to respond to comments that the Mandate would violate entities' religious beliefs. Some commenters to the August 2011 interim final rules raised concerns "about paying for such [contraceptive] services and stated that doing so would be contrary to their religious beliefs," and that "the narrower scope of the exemption raises concerns under the First Amendment and the Religious Freedom Restoration Act." 77 Fed. Reg. at 8727. But Defendants responded with only a cursory statement that the Mandate satisfies RFRA. 77 Fed. Reg. at 8729. This statement in no way explains why or how the Mandate satisfies each of the four prongs of RFRA; it does nothing but recite its elements.[4] Thus it utterly fails to "*cogently explain* why it has exercised its discretion in a given matter." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983). The statement similarly recites the elements of a First Amendment claim without offering an explanation. And Defendants also did not attempt to explain any response to organizations' objections that the Mandate "would be contrary to their religious beliefs" as an independent concern.

[4] "Likewise, this approach complies with the Religious Freedom Restoration Act, which generally requires a federal law to not substantially burden religious exercise, or, if it does substantially burden religious exercise, to be the least restrictive means to furthering a compelling government interest." *Id.*

CONCLUSION

For the reasons stated above and in their preliminary injunction briefing, the Plaintiffs respond as aforesaid and referenced herein, and respectfully request that this Court deny Defendants' motion to dismiss.

Respectfully submitted this 30th day of August, 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 August 30, 2012:

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