IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

HOBBY LOBBY STORES, INC., MARDEL, INC., DAVID GREEN, BARBARA GREEN, STEVE GREEN, MART GREEN, AND DARSEE LETT, Plaintiffs, v. KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, HILDA SOLIS, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY, Defendants.	Case No. CIV-12-1000-HE

PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION AND OPENING BRIEF IN SUPPORT

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INTRODUCTION

Plaintiffs, a devout Christian family, have built one of largest and most successful retail chains in America. Their faith is woven into their business. It is reflected in what they sell, in how they advertise, in how they treat employees, in how much they give to charity, and in the one day of the week when their stores are closed. In a profound way, their business is a ministry.

The Defendant government officials have issued a rule (the "mandate") that requires millions of American business owners, including Plaintiffs, to cover abortion-inducing drugs and devices in employee health insurance. Plaintiffs' religious convictions forbid them from complying. Thanks to the mandate, the price of those convictions will be steep. Plaintiffs face fines of millions of dollars if they do not give in. The fines start January 1, 2013.

Levying fines on someone for following their faith is wrong. It is alien to our American traditions of individual liberty, religious tolerance, and limited government. It also violates federal law and the United States Constitution. Plaintiffs have therefore filed this lawsuit and simultaneously brought this motion for preliminary injunction pursuant to Federal Rule of Civil Procedure 65 and Local Civil Rule 7.1.

In the only similar decision to date, a federal district court in Colorado granted a preliminary injunction to another family business who faced imminent exposure to the mandate. *See Newland* v. *Sebelius*, No. 1:12-cv-1123, slip op. at 17-18 (D. Colo. July 27, 2012) (order granting preliminary injunction) (Ex. 1). Plaintiffs are in the same position, and deserve the same remedy. Preliminary relief is warranted because the mandate

violates the Religious Freedom Restoration Act (RFRA) and the First Amendment, and because Plaintiffs otherwise face the imminent prospect of irreparable harm to their religious freedom, to their businesses, and to their employees' well-being.

FACTUAL BACKGROUND

I. THE GREEN FAMILY AND HOBBY LOBBY

As set forth in Plaintiffs' Verified Complaint, incorporated herein, Plaintiffs are a family that, through various trusts, owns and operates Hobby Lobby Stores, Inc. Verified Compl. ("VC") ¶¶ 2-3, 18-24, 38. Founded by Plaintiff David Green in 1970, Hobby Lobby has grown from a small picture frame company into one of the nation's leading arts and crafts chains, operating over 500 stores in over 40 with over 13,000 full-time employees. VC ¶¶ 2, 18, 32-34. Steve is Hobby Lobby's President, Darsee a Vice-President, and Mart a Vice-CEO and the founder and CEO of Mardel, Inc., an affiliated chain of Christian bookstores. VC ¶¶ 18-22, 36-38. The Green family operates Hobby Lobby and Mardel through a management trust. VC ¶¶ 23-24, 38.

The Greens run Hobby Lobby according to their Christian faith. VC ¶¶ 39-47. As explained in the company's statement of purpose, they are committed to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." VC ¶ 42. The family members sign a Statement of Faith and a Trustee Commitment obligating them to conduct themselves and their businesses according to their faith. VC ¶ 38.

That faith is woven into how the family runs Hobby Lobby. The company takes out hundreds of full-page ads every Christmas and Easter celebrating the religious nature of

the holidays. VC ¶ 47. The stores carry religiously themed items and play Christian music. VC ¶ 43. The family monitors merchandise, marketing, and operations to make sure all reflect their beliefs, and they avoid participating in activities they believe to be immoral or harmful to others. VC ¶¶ 43-44. They give millions from their profits to fund ministries around the world. VC ¶¶ 39-40. Chaplains, spiritual counseling, and religiously-themed financial management classes are made available for employees who wish to participate. VC ¶ 51. And, as is well-known, the Greens close all stores on Sundays to give employees a day of rest, even though they risked losing millions in sales by doing so. VC ¶ 45.

The Green family also provides excellent employee health insurance through a self-funded plan. VC ¶ 52. As with all aspects of their business, the Greens believe it is imperative that these benefits honor their religious convictions. *Id.* Because of their beliefs about unborn human life, their prescription coverage excludes contraceptive devices that can cause abortion (such as IUDs) and pregnancy-terminating drugs like RU-486. VC ¶¶ 53-54. When a recent review of the company's health plans revealed that a drug formulary inadvertently included two drugs that could cause abortion—namely the "morning after pill" (Plan B), and the "week-after pill" (Ella)—the family immediately excluded them. VC ¶ 55. The Green family cannot in good conscience knowingly offer coverage for abortion-causing drugs or devices. VC ¶¶ 53-58.

II. THE HHS MANDATE

Federal regulations now mandate that employer health insurance include free coverage for all FDA-approved contraceptive drugs and sterilization methods. 42 U.S.C

§ 300gg–13(a)(4); 75 Fed. Reg. 41726, 41728 (July 19, 2010); 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011); VC ¶¶ 94-95. This mandate includes drugs and devices—such as "Plan B," "Ella" and certain IUDs—that may prevent implantation of a fertilized egg in the womb. VC ¶ 95.[1] The mandate is enforceable by government penalties, regulatory action, and private lawsuits. 26 U.S.C. §§ 4980H, 4980D; 29 U.S.C. §§ 1185d, 1132; VC ¶¶ 135, 142, 144. Certain non-profit religious employers—essentially those qualifying as houses of worship under the Internal Revenue Code—are exempt from the mandate. *See* 45 C.F.R. § 147.130(a)(1)(iv)(B)(1)-(4) (setting forth exemption criteria); VC ¶ 123. For non-exempt employers (such for-profit business owners), the mandate takes effect beginning with the first insurance plan year after August 1, 2012. 42 U.S.C. § 300gg-13(b); 76 Fed. Reg. 46621, 46623; VC ¶¶ 121, 132.

In response to public outcry,[2] the government announced a "safe harbor," which delays the mandate's enforcement for one year against certain non-profit, non-exempt organizations. VC ¶¶ 125-26. The government also announced its intention to formulate an additional rule during that year that would address those organizations' concerns. *See* "Advance Notice of Proposed Rulemaking" (ANPRM), 77 Fed. Reg. 16501 (published

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[1] *See* Women's Preventive Services: Required Health Plan Coverage Guidelines, *available at* http://www.hrsa.gov/womensguidelines/ (last visited Sept. 9, 2012); FDA Birth Control Guide, *available at* http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM282014.pdf (last visited Sept. 9, 2012).

[2] *See* 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011); 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012) (discussing public comments). Further, currently pending against the mandate are 26 lawsuits by more than 80 organizations and individuals. *See* Dkt [#5], Notice of Related or Companion Cases (Sept. 12, 2012).

Mar. 21, 2012); VC ¶ 129-30. Neither the safe harbor nor the proposed rulemaking apply to for-profit businesses. VC ¶¶ 126, 130.

III. THE MANDATE'S IMMINENT IMPACT ON PLAINTIFFS

The mandate will take effect against Plaintiffs on January 1, 2013. *See* VC ¶¶ 131-32 (alleging that Plaintiffs' plan year begins on January 1). Because they own a for-profit business, Plaintiffs are not covered by the religious employer exemption, the safe harbor, or the proposed future rulemaking. VC ¶¶ 124, 126, 130.[3] Nor are Plaintiffs' health plans "grandfathered" under the Affordable Care Act. VC ¶ 59. Consequently, in less than four months, Plaintiffs must either violate their faith by covering abortion-causing drugs, or expose themselves to ruinous penalties. VC ¶¶ 134-44.

Hobby Lobby currently has over 13,000 full-time employees. VC ¶ 136. If Hobby Lobby continues to offer employee health insurance without the mandated items on January 1, 2013, it will incur penalties of about $1.3 million per day, VC ¶ 144; 26 U.S.C. § 4980D, and will expose itself to private enforcement suits. 29 U.S.C. §§ 1185d(a)(1), 1132. If it instead ceases to offer employee insurance, it will face annual penalties of about $26 million per year. VC ¶ 144; 26 U.S.C. § 4980H. Mardel faces similar penalties with respect to its 372 full-time employees. VC ¶ 137.

[3] The fact that Plaintiffs do not not qualify for the safe harbor and could not benefit from the proposed rulemaking sharply distinguishes their situation from that of Belmont Abbey College and Wheaton College, whose lawsuits were recently dismissed without prejudice for lack of standing and ripeness. *See Belmont Abbey College* v. *Sebelius*, No.11-1989, slip op. at 14-22 (D.D.C. July 18, 2012) (order dismissing lawsuit without prejudice); *Wheaton Coll.* v. *Sebelius*, No. 12-1169, slip op. at 7-18 (D.D.C. Aug. 24, 2012) (same).

As they do every fall, Plaintiffs are now planning for the 2013 insurance plan year. VC ¶¶ 140-41. This is a complex and time-consuming process. *Id* The approaching mandate casts grave uncertainty on Plaintiffs' ability to provide insurance for thousands of employees and their families next January—less than four months' time. VC ¶ 142. A lapse in coverage would be disastrous for Plaintiffs' businesses and for the employees and their families who depend on Plaintiffs' insurance. VC ¶¶ 142-43.

IV. PROCEDURAL HISTORY

Plaintiffs filed their complaint on September 12, 2012, challenging the mandate on a variety of constitutional and statutory grounds. They simultaneously filed this motion seeking preliminary injunctive relief.

ARGUMENT

To obtain a preliminary injunction, Plaintiffs must show (1) a likelihood of success on the merits, (2) a threat of irreparable harm, which (3) outweighs any harm to the non-moving party, and that (4) the injunction would not adversely affect the public interest. *Awad* v. *Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012). Plaintiffs need not meet the heightened standard for "disfavored" injunctions because the relief sought would preserve the status quo and require no government action. *See Newland*, slip op. at 6-7 (citing *O Centro Espirita Beneficente Uniao do Vegetal* v. *Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), aff'd and remanded, *Gonzales* v. *O Centro Espirita Beneficente do Vegetal*, 546 U.S. 418 (2006)). Moreover, if the equities strongly favor Plaintiffs, they may show likelihood-of-success simply by showing the issues are "so serious, substantial, difficult, and doubtful as to make the[m] ripe for litigation and

deserving of more deliberate investigation." *Newland*, slip op. at 7-8 (citing *Okla. ex rel. Okla. Tax Comm'n* v. *Int'l Registration Plan, Inc.*, 455 F.3d 1107, 1113 (10th Cir. 2006)). In any event, Plaintiffs would be entitled to preliminary relief even under the heightened standard. *See, e.g., Awad*, 670 F.3d at 1126 (declining to decide whether "less demanding standard" applies because plaintiff "meets the heightened standard").

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

A. The mandate violates the Religious Freedom Restoration Act.

Under RFRA, the federal government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000bb-1(b); *see also, e.g., United States* v. *Hardman*, 297 F.3d 1116, 1125 (10th Cir. 2002) (en banc). RFRA thus restored strict scrutiny to religious exercise claims. *Gonzales*, 546 U.S. at 424, 431; *see also* 42 U.S.C. § 2000bb(b)(1) (RFRA "restore[s] the compelling interest test as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972))."[4] A plaintiff makes a prima facie case under RFRA by showing the government substantially burdens its sincere religious exercise. *Kikumura* v. *Hurley*, 242 F.3d 950, 960 (10th Cir. 2001). The burden then shifts to the government to show that "the compelling interest test is satisfied through application of the challenged law 'to the

[4] Although RFRA is unconstitutional as applied to States, it "independently remains applicable to federal officials." *Hardman*, 297 F.3d at 1126 (quotes omitted). Further, RFRA applies "to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3(a).

person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonazles*, 546 U.S. at 430-31 (quoting 42 U.S.C. § 2000bb-1(b)).[5]

1. Plaintiffs' sincere abstention from providing abortion-causing drugs and devices qualifies as a religious exercise.

RFRA broadly defines "religious exercise" to "include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" 42 U.S.C. § 2000bb-2(4), *as amended by* 42 U.S.C. § 2000cc-5(7)(A); *see also Kikumura*, 242 F.3d at 960 (explaining that "a religious exercise need not be mandatory for it to be protected under RFRA").

The Green family has maintained a commitment to running their business in harmony with their faith despite risking the loss of millions in profits. VC ¶¶ 39-49. They conscientiously oppose supporting activities or products they regard as immoral or harmful to others. VC ¶¶ 43-44. This includes abortion-causing drugs and devices, which are explicitly excluded from their insurance plans. VC ¶ 53-56. Abstaining for religious reasons from providing such items easily qualifies as "religious exercise," just as much as abstaining from work on certain days, *see Sherbert* v. *Verner*, 374 U.S. 398 (1963), refusing to manufacture objectionable items, *see Thomas* v. *Review Bd.*, 450 U.S. 707 (1981), or providing alternative education for children, *see Wisconsin* v. *Yoder*, 406 U.S. 205 (1972)). *See also* 42 U.S.C. § 2000bb(b)(1) (incorporating *Sherbert* and *Yoder* in RFRA); *and see Employment Div.* v. *Smith*, 494 U.S. 872, 877 (1990) (observing that

[5] These burdens are the same at the preliminary injunction stage as at trial. *Id.* at 429-30 (citing *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004)).

"the 'exercise of religion' often involves not only belief and profession but the performance of (*or abstention from*) physical acts") (emphasis added).

2. The mandate substantially burdens Plaintiffs' religious exercise by forcing them to choose between following their convictions and paying enormous fines.

The government "substantially burdens" religious exercise when a law "ha[s] a substantial effect on the exercise of religious belief." *United States* v. *Friday*, 525 F.3d 938, 947 (10th Cir. 2008) (quoting *Hardman*, 297 F.3d at 1126-27). Under RFRA's companion statute, RLUIPA, the Tenth Circuit finds a substantial burden when the government:

(1) "requires participation in an activity prohibited by a sincerely held religious belief,"

(2) "prevents participation in conduct motivated by a sincerely held religious belief," or

(3) "places substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief[.]"

Abdulhaseeb v. *Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010).[6] The mandate easily qualifies as a substantial burden under the first and third prongs of that test.

As to the first prong, the mandate compels Plaintiffs to provide employees with insurance coverage they believe implicates them in an immoral practice. VC ¶¶ 53-56. As to the third prong, the mandate pressures Plaintiffs by exacting a steep price for

[6] *See also Comanche Nation* v. *United States*, 2008 WL 4426621, at *3 (W.D. Okla. Sept. 23, 2008) (observing that Tenth Circuit had defined "substantial burden" under a pre-RLUIPA version of RFRA as a government action which "must 'significantly inhibit or constrain conduct or expression' or 'deny reasonable opportunities to engage in' religious activities") (citing *Thiry* v. *Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996)).

maintaining their beliefs. The Greens can continue to exercise their faith only by dropping insurance and facing penalties of about $26 million per year, or by offering insurance without the mandated coverage and facing penalties of $1.3 million per *day* (as well as the prospect of private lawsuits). 26 U.S.C. §§ 4980D, 4980H; 29 U.S.C. § 1132 (a); VC ¶¶ 142-44. This is "a Hobson's choice—an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief." *Abdulhaseeb*, 600 F.3d at 1615.

The Supreme Court has invalidated indirect pressure on religious exercise that was less weighty than the direct and severe pressure imposed by the mandate. *See, e.g.*, *Sherbert*, 374 U.S. at 404 (potential loss of unemployment benefits for refusing to work on Sabbath placed "unmistakable" pressure on plaintiff to abandon that observance); *Yoder*, 406 U.S. at 208, 218 (five dollar fine on plaintiffs' religious practice was "not only severe, but inescapable"). Fining someone for exercising his faith is the paradigm example of a substantial burden. *See, e.g.*, *Sherbert*, 374 U.S. at 403-04 (explaining that forcing choice between plaintiff's faith and unemployment benefits "puts the same kind of burden upon the free exercise of religion as would a fine imposed against [plaintiff] for her Saturday worship").

3. The mandate cannot satisfy strict scrutiny.

Consequently, Defendants must "'demonstrate[] that application of the burden to [Plaintiffs]' represents the least restrictive means of advancing a compelling interest." *Gonzales*, 546 U.S. at 423 (quoting 42 U.S.C. § 2000bb-1(b)); *Hardman*, 297 F.3d at 1126. If a less restrictive alternative would serve Defendants' purpose, "the legislature

must use that alternative." *United States* v. *Playboy Ent'mt Group, Inc.*, 529 U.S. 803, 813 (2000) (emphasis added). RFRA imposes "the most demanding test known to constitutional law." *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997). Defendants cannot meet it.

a. The mandate furthers no compelling interest because the government has issued numerous exemptions and because contraception is already widely available.

To demonstrate a compelling interest, Defendants must show the mandate furthers interests "of the highest order." *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 546 (1993); *Hardman*, 297 F.3d at 1127. This determination "is not to be made in the abstract" but rather "in the circumstances of this case" by examining how the interest is "addressed by the law at issue." *Cal. Democratic Party* v. *Jones*, 530 U.S. 567, 584 (2000); *see also Lukumi*, 508 U.S. at 546 (rejecting City's assertion that protecting public health was compelling "in the context of" the ordinances at issue). "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" of religious exercise. *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945); *Hardman*, 297 F.3d at 1127. Further, Defendants "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys. Inc.* v. *FCC*, 512 U.S. 624, 664 (1994).

The mandate aims to increase access to contraceptives, a measure Defendants believe will promote women's health and equality. 77 Fed. Reg. 8725, 8727-28 (Feb. 15, 2012). However weighty that interest is in the abstract, Defendants cannot demonstrate that it is "compelling" in the context of the mandate. An interest cannot be "compelling" where

the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Lukumi*, 508 U.S. at 546-47; *Friday*, 525 F.3d at 958. The mandate provides a textbook example of such a failure.

Defendants have chosen *not* to mandate contraceptive coverage in millions of policies. Over 100 million "grandfathered" plans are not required to comply with the mandate; nor are "small employers" who employ over 20 million people. *See Newland*, slip op. at 13-14 (citing 42 U.S.C. § 18011; 26 U.S.C. § 4980H(c)(2)).[7] Churches and religious orders are exempt. 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012). Certain religious groups who object to insurance and members of "health care sharing ministries" are exempt from the Affordable Care Act altogether and therefore need not cover contraceptives. 26 U.S.C. § 5000A(d)(2)(A), (B), (ii). The "safe harbor" gives certain non-exempt religious non-profits an additional year before the mandate will be enforced against them, and the government recently expanded the safe harbor to include additional non-profits. VC ¶¶ 125-26 & n.2. This wide-ranging scheme of exemptions, as Judge Kane correctly found, "completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs." *Newland*, slip op. at 15.

The Supreme Court's decision in *Gonzales* compels this conclusion. In that RFRA case, the government claimed a compelling interest in uniformly applying federal

[7] *See also* 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 Sept. 9, 2012); http://www.census.gov/econ/smallbus.html (last visited Sept. 9, 2012). HHS has predicted that a majority of large employers, employing more than 50 million Americans, will continue to use grandfathered plans through at least 2014, and that a third of small employers with between 50 and 100 employees may do likewise. *Id*.

narcotics laws and protecting public health justified refusing to exempt a church's religious use of a dangerous narcotic (*hoasca*, which the church used in a tea). The Court unanimously rejected the argument, because the narcotics laws themselves authorized exemptions and the government had already granted one for a different hallucinogen (peyote) used by a larger religious group (Native Americans). *Gonazles*, 546 U.S. at 432-35. The Court thus held that "the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the [church's] sacramental use of *hoasca*." *Id.* at 439.

In light of *Gonzales*, Defendants' alleged interests in increased contraceptive access and promoting health cannot qualify as "compelling" where they have deliberately chosen *not* to mandate contraceptive coverage in over 100 million insurance policies. *Gonzales* found that *one* exemption to the narcotics laws for a *different* drug undermined the government's "compelling" interest in uniformity and health. Here, Defendants have crafted *numerous* exemptions, applicable to various secular and religious organizations, for the *same* drugs. Moreover, as in *Gonazles*, several of those exemptions (i.e., the "religious employer" exemption from the mandate, and the other religious exemptions from the Affordable Care Act) were granted to relieve the same burden Plaintiffs claim. In light of the exemptions already recognized, "RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required" for those like Plaintiffs, whose faith is burdened by the mandate in a manner just as severe as the millions of persons who have already been exempted. *Gonzales*, 546 U.S. at 434.

A related reason why Defendants' asserted interest cannot be compelling assert is that the problem Defendants target is minuscule. Defendants cannot legitimately assert there is a grave, widespread crisis of access to contraceptives justifying their coercive mandate, because they have confirmed publicly that the mandated drugs are already widely available. In a January 20, 2012 press release, Defendant Sebelius explained that:

- "[B]irth control … is the most commonly taken drug in America by young and middle-aged women";
- "[C]ontraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support";
- "[L]aws in a majority of states…already require contraception coverage in health plans[.]"

Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius, *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Sept. 9, 2012). Defendants therefore cannot credibly claim an interest "of the highest order" in marginally increasing access to contraceptives—much less in doing so by conscripting Plaintiffs' participation against their own faith. *See Brown* v. *Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011) (noting that "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced").

Judge Kane's conclusion in *Newland* is therefore inescapable: "The government has exempted over 190 million health plan participants and beneficiaries from the preventive care coverage mandate; this massive exemption completely undermines any compelling interest in applying the … mandate to Plaintiffs." Slip op. at 14-15.

b. Defendants already have numerous less restrictive means of furthering their interest.

Even assuming a compelling interest, the mandate still fails strict scrutiny because there are other readily-available means of enhancing contraception coverage that are far less burdensome to Plaintiffs' rights. *See, e.g.*, *Hardman*, 297 F.3d at 1130 (explaining that, under strict scrutiny, government must "demonstrate that *no alternative forms of regulation would combat such abuses without infringing First Amendment rights*") (quoting *Sherbert*, 374 U.S. at 407) (emphasis in original). Defendants *must* employ feasible less restrictive alternatives, instead of burdening religious objectors. *See, e.g.*, *Playboy Ent'mt Group*, 529 U.S. at 813 (explaining that, if a less restrictive alternative would serve the government's purpose, "the legislature must use that alternative"). Further, the government must adduce specific evidence that its chosen means is the least restrictive option—"[m]ere speculation is not enough to carry this burden." *Hardman*, 297 F.3d at 1130.

Defendants have a host of readily available alternatives for expanding contraceptive access that would avoid any need to conscript religious objectors. Defendants could:

- Directly provide the drugs at issue, or directly provide insurance coverage for them.
- Allay the costs of the drugs through subsidies, reimbursements, tax credits or tax deductions.
- Empower willing actors—for instance, physicians, pharmaceutical companies, or the interest groups who champion free access—to deliver the drugs themselves and to sponsor education about them.
- Use their own considerable resources to inform the public that these drugs are available in a wide array of publicly-funded venues.

This array of alternatives is real, not hypothetical. On its own website, Defendant HHS announces that it plans to spend over $300 million in 2012 to provide contraceptives directly through Title X funding.[8] Moreover, the federal government, in partnership with state governments, has constructed an extensive funding network designed to increase contraceptive access, education, and use, including:

- $2.37 billion in public outlays for family planning in fiscal year 2010.
- $228 million in fiscal year 2010 for Title X of the Public Health Service Act, the only federal program devoted specifically to supporting family planning services.
- $294 million in state spending for family planning in fiscal year 2010. [9]

The same report notes that public funding for family planning increased 31% from fiscal year 1980 to fiscal year 2010. *Id.* Nothing prevents Defendants from using such pre-existing sources to further their interest in increasing women's access to contraceptives. As Judge Kane aptly concluded in *Newland*:

> Defendants have failed to adduce facts establishing that government provision of contraceptive services will necessarily entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women. Once again, the current existence of analogous programs heavily weighs against such an argument.

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[8] *See* Department of Health and Human Services, Office of the Assistant Secretary of Health, Office of Population Affairs, *Announcement of Anticipated Availability of Funds for Family Planning Services Grants*, available at *https://www.grantsolutions.gov/gs/preaward/previewPublicAnnouncement.do?id=12978* (last visited Sept. 10, 2012) (announcing that "[t]he President's Budget for Fiscal Year (FY) 2012 requests approximately $327 million for the Title X Family Planning Program").

[9] *Facts on Publicly Funded Contraceptive Services in the United States* (Guttmacher Inst. May 2012) (citations omitted), *available at* http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited Sept. 10, 2012).

Newland, slip op. at 17. Using those already-existing public programs would further Defendants' goals without coercing Plaintiffs to violate their faith.

Moreover, there is no indication that Defendants even *considered* using these kinds of alternatives, which automatically violates the least restrictive means requirement. *See, e.g.*, *Grutter* v. *Bollinger*, 539 U.S. 306, 339 (2003) (narrow tailoring requires "serious, good faith consideration of workable…alternatives that will achieve" the stated goal). If Defendants cannot show they even investigated less restrictive alternatives—especially in light of the fact that numerous public comments alerted them to religious employers' objections to the mandate—their rule cannot survive strict scrutiny.

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In sum, Plaintiffs are likely to prevail on their claim that the mandate violates the Religious Freedom Restoration Act.

B. The mandate violates the Free Exercise Clause.

In addition to violating RFRA, the mandate also violates the Free Exercise Clause because it is not "neutral and generally applicable." *Lukumi*, 508 U.S. 20 at 545 (citing *Employment Division* v. *Smith*, 494 U.S. 4572, 880 (1990)). The mandate is therefore subject to strict scrutiny which, for the reasons discussed above, it cannot meet. *See Lukumi*, 508 U.S. at 546 (explaining that such laws "undergo the most rigorous of scrutiny").[10]

[10] Neutrality and general applicability overlap and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531.

1. The mandate is not neutral because it exempts some religious employers while compelling others.

The mandate fails neutrality at the most basic level by explicitly discriminating among organizations on a religious basis. *See, e.g.*, *Lukumi,* 508 U.S. at 533 (explaining that "the minimum requirement of neutrality is that a law not discriminate on its face"). On its face, the religious employer exemption divides religious objectors into favored and disfavored classes, forgetting *Lukumi*'s warning that "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Lukumi*, 508 U.S. at 533 (emphasis added).

That religious employer exemption protects only certain religious bodies, which it defines by reference to their internal *religious* characteristics. Namely, it exempts only organizations whose "purpose" is to inculcate religious values; who "primarily" employ and serve co-religionists; and who qualify as churches or religious orders under the tax code. 45 C.F.R. § 147.130(a)(iv)(B)(1)-(4). This openly does what *Lukumi* says a neutral law cannot do: refer to religious qualities without any discernible secular reason. *Lukumi*, 508 U.S. at 533. There is no conceivable secular purpose, for instance, in limiting conscience protection to religious groups that "primarily serve" co-religionists while denying it to those (like Plaintiffs) who serve persons regardless of their faith. Whatever motivated these criteria, they practice religious "discriminat[ion] on [their] face" and therefore trigger strict scrutiny. *Lukumi*, 508 U.S. at 533.

2. The mandate is not generally applicable due to its numerous exemptions.

The mandate also fails the related requirement of general applicability. A law is not generally applicable if it regulates religiously-motivated conduct, yet leaves unregulated similar secular conduct. *See, e.g.*, *Lukumi*, 508 U.S. at 544-45 (finding animal cruelty and health ordinances not generally applicable because they failed "to prohibit nonreligious conduct that endanger[ed] these interests in a similar or greater degree"—such as animal hunting, euthanasia, and medical testing). Such inconsistency suggests that "society is prepared to impose [the law] upon [religious adherents] but not upon itself," which is the "precise evil . . . the requirement of general applicability is designed to prevent." *Id.* at 545. Because they fail to impose "across-the-board" treatment of regulated conduct, *Smith*, 494 U.S. at 884, such laws are subject to strict scrutiny.

Under those standards, the mandate is not generally applicable. While the purpose of the mandate is to increase access to all FDA-approved contraceptives, well over 100 million organizations and plans are categorically exempted from providing the mandated preventive services. *See supra* Part I.A.3.a (describing exemptions for grandfathered plans, small employers, and certain religious groups). Thus, Defendants deliberately chose not to pursue their goal of increased contraceptive access with respect to a broad array of plans and individuals, while at the same time pursuing it against non-exempt religious objectors like Plaintiffs. *See Newland*, slip op. at 13-14 (finding Defendants' uniformity argument "undermined by the existence of numerous exemptions to the preventive care coverage mandate"). This is the classic case of a law that fails the basic requirement of general applicability.

* * *

Because the mandate cannot qualify as a neutral and generally applicable law under the Free Exercise Clause, Defendants must clear the high bar of strict scrutiny to justify their decision not to exempt other religious objectors, like Plaintiffs, from the mandate. As discussed above, they cannot do so. *See supra* Part I.A.3. Consequently, Plaintiffs are likely to prevail on their claim under the Free Exercise Clause.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY RELIEF.

It is settled that a potential violation of Plaintiffs' rights under the First Amendment and RFRA threatens irreparable harm. *See, e.g*, *Kikumura* v. *Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (noting that "courts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA"); *Newland*, slip op. at 8 (noting "it is well-established that the potential violation of Plaintiffs' constitutional and RFRA rights threatens irreparable harm") (citation omitted); *see also Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury").

These harms will fall on Plaintiffs imminently. "Plaintiffs need only demonstrate that absent a preliminary injunction, '[they] are likely to suffer irreparable harm before a decision on the merits can be rendered.'" *Newland*, slip. op. at 8 (quoting *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). Plaintiffs do not qualify for the one-year safe harbor and therefore face the certain prospect of violating the mandate in less than five months' time—by January 1, 2013—and incurring steep penalties. And, as explained

above, the disruptions occasioned by this impending deadline are occurring *now*, as Plaintiffs arrange their 2013 policies. *See*, *e.g.*, *Newland*, slip op. at 8-9 (reasoning that "[i]n light of the extensive planning involved in preparing and providing its employee insurance plan, and the uncertainty that this matter will be resolved before the coverage effective date, Plaintiffs have adequately established that they will suffer imminent irreparable harm absent injunctive relief"). This factor therefore strongly weighs in favor of preliminary injunctive relief.

III. THE BALANCE OF EQUITIES TIPS IN PLAINTIFFS' FAVOR.

Granting preliminary injunctive relief will merely prevent Defendants from enforcing the mandate against the named Plaintiffs. This will preserve the status quo between the parties, counseling in favor of granting preliminary relief. *See Newland*, slip op. at 6-7 (applying normal standard because the injunction would preserve the status quo). Defendants have already exempted a number of churches and church-related entities from the mandate, delayed enforcement of the mandate against many religious organizations until August 2013, and given many non-religious employers an open-ended exemption in the form of grandfathering. Preventing Defendants from enforcing the mandate against Plaintiffs would therefore not "substantially injure" Defendants' interests. Balanced against any *de minimis* injury to Defendants is the real and immediate threat to Plaintiffs' religious liberty. Moreover, Plaintiffs face the imminent prospect of severe fines for dropping employee insurance, which would gravely impact employees and their families.

In sum, any minimal harm to Defendants in temporarily not enforcing the mandate "pales in comparison to the possible infringement upon Plaintiffs' constitutional and statutory rights." *Newland*, slip op. at 9.

IV. AN INJUNCTION IS IN THE PUBLIC INTEREST.

Finally, a preliminary injunction will serve the public interest by protecting Plaintiffs' First Amendment and RFRA rights. The public has no interest in enforcing a regulation against religious business owners that coerces them to violate their own faith. *See, e.g.*, *Newland*, slip op. at 9-10 (finding "'there is a strong public interest in the free exercise of religion even where that interest may conflict with [another statutory scheme]'") (quoting *O Centro*, 389 F.3d at 1010); *see also, e.g.*, *Pac. Frontier* v. *Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005) ("Vindicating First Amendment freedoms is clearly in the public interest."). Furthermore, any interest of Defendants in uniform application of the mandate "is … undermined by the creation of exemptions for certain religious organizations and employers with grandfathered health insurance plans and a temporary enforcement safe harbor for non-profit organizations." *Newland*, slip op. at 9.

CONCLUSION

Plaintiffs respectfully ask the Court to enter a preliminary injunction against Defendants in accordance with the relief sought in Plaintiffs' Complaint.

Respectfully submitted this 12th day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed through the Court's ECF filing system on September 12, 2012, and that a copy was served via first-class mail, postage prepaid, on the following:

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/s/ Charles E. Geister III
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