IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PRIESTS FOR LIFE,

Plaintiff,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services;

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

HILDA SOLIS, in her official capacity as Secretary, United States Department of Labor;

UNITED STATES DEPARTMENT OF LABOR;

TIMOTHY GEITHNER, in his official capacity as Secretary, United States Department of the Treasury; and

UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

Case No. 1:12-cv-00753-FB-RER

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER / PRELIMINARY INJUNCTION

Hon. Frederic Block

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INTRODUCTION

Plaintiff Priests for Life ("Plaintiff"), an international, pro-life, Catholic organization, is challenging the implementing regulations of the Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("Affordable Care Act" or "Act"), that require it, as an organization, to provide healthcare coverage for contraception, sterilization, and abortifacients contrary to its sincerely held religious beliefs. (*See* First Am. Compl. at ¶¶ 54-70, 79-145 [Doc. No. 12]).

This case presents an exceedingly important and ultimately straightforward question of federal law that directly impacts fundamental constitutional and statutory rights: Can the federal government compel Plaintiff, a private religious organization, to provide access to contraceptive coverage to its employees when doing so would directly violate and thus substantially burden Plaintiff's sincerely held religious beliefs? And the answer is no. Under the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act, such governmental coercion is unlawful. Consequently, Plaintiff is entitled to an order immediately enjoining the government's unlawful mandate. *See* Fed. R. Civ. P. 65. At a minimum, granting the requested injunction will maintain the *status quo* *between the parties* pending the final outcome of this litigation. *See Newland v. Sebelius*, No. 1:12-cv-1123-JLK, 2012 U.S. Dist. LEXIS 104835 (D. Colo. July 27, 2012) (granting a preliminary injunction enjoining the enforcement of the contraception mandate).

STATEMENT OF FACTS

I. The Contraception Mandate.

Pursuant to 42 U.S.C. § 300gg-13, "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage *shall*, *at a minimum provide coverage for* and shall not impose any cost sharing requirements for . . . (4) with respect to women, such

additional *preventive care* and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph."[1] 42 U.S.C. § 300gg-13(a)(4) (emphasis added).

On July 19, 2010, the Department of Health and Human Services ("HHS"), along with the Department of Labor and the Department of the Treasury, published interim final regulations "implementing the rules for group health plans and health insurance coverage in the group and individual markets under provisions of the Patient Protection and Affordable Care Act regarding preventive health services." 75 Fed. Reg. 41726 (July 19, 2010). Among other things, the interim final regulations required health insurers to cover "preventive care" for women "as provided for in guidelines supported by the Health Resources and Services Administration." *Id*. at 41759.

On July 19, 2011, the Institute of Medicine ("IOM") published a report of its study regarding preventive care for women. Among other things, IOM recommended that preventive services include "[a]ll Food and Drug Administration approved contraceptive methods [and] sterilization procedures." (*See* IOM, Clinical Preventive Services for Women: Closing the Gaps (2011)). FDA-approved contraceptive methods include devices and procedures, birth control pills, prescription contraceptive devices, Plan B (also known as the "morning after pill"), and

[1] The contraception mandate operates by virtue of the Affordable Care Act. However, under the Act, there are exemptions from the insurance requirement for certain religions, *see* 26 U.S.C. § 5000A(d)(2)(a)(i) & (ii) (mandate to purchase insurance does not apply to members of a "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds), and for certain individuals, *see* 26 U.S.C. § 5000A(d)(3) & (4) (mandate to purchase insurance does not apply to "[i]ndividuals not lawfully present" and "[i]ncarcerated individuals"). Moreover, grandfathered healthcare plans are exempt from the contraception mandate. *See* 42 U.S.C. § 18011 (grandfathering of existing healthcare plans). And Defendants created a regulatory exemption to the contraception mandate for a narrow category of religions organizations. 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011). None of these exemptions apply to Plaintiff. Consequently, the contraception mandate is not generally applicable because Congress and Defendants permit exemptions from the insurance requirements for some individuals and organizations, but not others.

ulipristal (also known as "ella" or the "week after pill"). (*See* Defs.' Mem. in Supp. of Mot. to Dismiss at 7 ["FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices."] [Doc. No. 19]). Plan B and ella can prevent the implantation of a human embryo in the wall of the uterus and can cause the death of an embryo; therefore, they operate as abortifacients.

On August 1, 2011, HHS's Health Resources and Services Administration ("HRSA") announced that it was supporting "the IOM's recommendations on preventive services that address health needs specific to women and fill gaps in existing guidelines." HRSA entitled the recommendations, "Women's Preventive Services: Required Health Plan Coverage Guidelines." Among other things, HRSA's Guidelines include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." (*See* http://www.hrsa.gov/womensguidelines).

On August 3, 2011, HHS, along with the Department of Labor and the Department of the Treasury, published interim final regulations which, among other things, mandate that every "group health plan, or a health insurance issuer offering group or individual health insurance coverage health plans . . . provide benefits for and prohibit the imposition of cost-sharing: . . . . With respect to women, preventive care and screening provided for in comprehensive guidelines supported by HRSA . . . which will be commonly known as HRSA's Women's Preventive Services: Required Health Plan Coverage Guidelines." 76 Fed. Reg. 46621 (Aug. 3, 2011); 45 C.F.R. § 147.130.

The August 3, 2011, interim final regulations noted that "several commenters [to the July 19, 2010 interim final regulations] asserted that requiring group health plans sponsored by religious employers to cover contraceptive services that their faith deems contrary to its religious

tenets would impinge upon their religious freedom." Accordingly, "the Departments seek to provide for a religious accommodation that respects the unique relationship *between a house of worship* and its employees *in ministerial positions*. . . . [T]he Departments are amending the interim final rules to provide HRSA additional *discretion* to exempt certain religious employers from the Guidelines where contraceptive services are concerned." (emphasis added). 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011).

For purposes of this "discretionary" exemption, a "religious employer is one that: (1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii)." 76 Fed. Reg. 46621 (Aug. 3, 2011); 45 C.F.R. § 147.130. Plaintiff does not qualify as a "religious employer." (*See, e.g.*, Jones Decl. at ¶ 12 [testifying that Plaintiff does not qualify for the "temporary enforcement safe harbor provision"[2] and is subject to the contraception mandate]; *see also* ¶ 3 [testifying that Plaintiff provides its services "to Catholics, to non-Catholics, to people of all faiths, and to people of no faith"] [Doc. No. 20-1]).

Despite the announcement of a "compromise," Defendants reject considering a "broader exemption" from the challenged mandate because they believe that such an exemption "would lead to more employees having to pay out of pocket for contraceptive services, *thus making it*

[2] The "temporary enforcement safe harbor" provision is a self-imposed stay by the government that is not binding as a matter of law and that apparently continues to change over time. *See* 77 Fed. Reg. 16501, 16504 (Mar. 21, 2012). Indeed, it was recently revised on August 15, 2012, and that latest revision is available at http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf ("Guidance on the Temporary Enforcement Safe Harbor for Certain Employers"). As demonstrated in Plaintiff's response to Defendants' motion to dismiss and in the declaration of Ms. Danielle Jones, Plaintiff's Finance Director, Plaintiff does not qualify for this provision and, indeed, will not certify that it does. (*See* Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss at 6, n.6 [Doc. No. 20]; Jones Decl. at ¶¶ 9-13 [Doc. No. 20-1]). Consequently, Plaintiff will be forced to comply with Defendants' mandate when it renews its healthcare policy in January 2013. (Jones Decl. at ¶ 14 [Doc. No. 20-1]).

less likely that they would use contraceptives, which would undermine the benefits [of requiring the coverage]." According to Defendants, "Employers that do not primarily employ employees who share the religious tenets of the organization are more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives. Including these employers within the scope of the exemption *would subject their employees to the religious views of the employer*, limiting *access* to contraceptives, *thereby inhibiting the use of contraceptive services and the benefits of preventive care*." 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (emphasis added). Thus, as stated by Defendants, their ultimate goal is to increase the "use of contraceptive services" by compelling *access* to these services and to ensure that employees, including employees of religious organizations such as Plaintiff, are not "subject" to the employer's religious beliefs regarding such "contraceptive services." *Id*.

II. Priests for Life.

Plaintiff is a non-profit corporation. It was founded in 1991 to do one of the most important tasks in the Catholic Church today: to help spread the Gospel of Life to people throughout the world. Plaintiff spreads the Gospel of Life to Catholics, to non-Catholics, to people of all faiths, and to people of no faith. A deep devotion to the Catholic faith, however, is central to Plaintiff's mission. (Jones Decl. at ¶¶ 1-4 [Doc. No. 20-1]).

Plaintiff holds and actively professes religious beliefs that include traditional Christian teaching on the nature and purpose of human sexuality. In particular, in accordance with Pope Paul VI's 1968 encyclical *Humanae Vitae*, Plaintiff believes that human sexuality has two primary purposes: to "most closely unit[e] husband and wife" and "for the generation of new lives." Plaintiff believes and actively professes the Catholic Church teaching that "[t]o use this divine gift destroying, even if only partially, its meaning and purpose is to contradict the nature

both of man and of woman and of their most intimate relationship, and therefore it is to contradict also the plan of God and His Will." Therefore, Plaintiff believes and teaches that "any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation, whether as an end or as a means"—including contraception and sterilization—is a grave sin. Plaintiff also holds and actively professes religious beliefs that include traditional Christian teaching on the sanctity of life. It believes and teaches that each human being bears the image and likeness of God, and therefore all human life is sacred and precious from the moment of conception. Consequently, Plaintiff believes and teaches that abortion ends a human life and is a grave sin. (Jones Decl. at ¶¶ 5, 6 [Doc. No. 20-1]).

Further, Plaintiff subscribes to authoritative Catholic teaching about the proper nature and aims of healthcare and medical treatment. For example, Plaintiff believes, in accordance with Pope John Paul II's 1995 encyclical *Evangelium Vitae*, that "'[c]ausing death' can never be considered a form of medical treatment," but rather "runs completely counter to the health-care profession, which is meant to be an impassioned and unflinching affirmation of life." (Jones Decl. at ¶ 7 [Doc. No. 20-1]).

Based on the teaching of the Catholic Church, and its own sincerely held beliefs, Plaintiff does not believe that contraception, sterilization, or abortion are properly understood to constitute medicine, healthcare, or a means of providing for the well-being of persons. Indeed, Plaintiff believes these procedures involve gravely immoral practices. (Jones Decl. at ¶ 8 [Doc. No. 20-1]).

Plaintiff's healthcare policy must be renewed by January 1, 2013, and at that time it will be subject to the "preventive care" mandate under the Affordable Care Act, which will then force

Plaintiff to include coverage for contraception, sterilization, and abortifacients. (Jones Decl. at ¶ 13 [Doc. No. 20-1]).

Consequently, as of January 1, 2013, Plaintiff will be required by the federal government to provide contraceptive, sterilization, and abortifacient coverage in its healthcare plan contrary to its sincerely held religious beliefs. (Jones Decl. at ¶ 14 [Doc. No. 20-1]).

Because of the government's contraception mandate, whether in its current or proposed form, Plaintiff must now make business decisions that will affect its ability to continue the services it provides. As a non-profit organization, Plaintiff funds its operations almost entirely through tax-deductible donations, including planned giving. Plaintiff must make business decisions now based on what it expects to receive in donations in the future. This requires Plaintiff to look several years ahead to determine what its budget will be and thus what services it will be capable of providing. (Jones Decl. at ¶ 15 [Doc. No. 20-1]).

The contraception mandate with its limited employer exemption will force Plaintiff out of the market for healthcare services and thus adversely affect it as an organization. Many of Plaintiff's valued employees, without whom Plaintiff could not provide its much needed services, will be forced to leave Plaintiff and seek other employment that provides healthcare benefits. (Jones Decl. at ¶ 16 [Doc. No. 20-1]).

The "preventive care" requirement with its contraceptive services mandate is, therefore, causing Plaintiff to feel economic and moral pressure today as a result of the government imposing substantial burdens on its religious beliefs and practices. (Jones Decl. at ¶ 17 [Doc. No. 20-1]).

Plaintiff, a Catholic organization, is morally prohibited based on its sincerely held religious convictions from cooperating with evil. Plaintiff objects to being forced by the

government to purchase a healthcare plan that provides its employees with access to contraceptives, sterilization, and abortifacients, all of which are prohibited by its religious convictions. This is true whether the immoral services are paid for directly, indirectly, or even not at all by Plaintiff. Contraception, sterilization, and abortifacients are immoral regardless of their cost. And Plaintiff objects to the government forcing it into a moral and economic dilemma with regard to its relationship with its employees and its very survival as an effective, pro-life organization. In short, the harm caused to Plaintiff by the imposition of the government's contraception mandate is being felt now. (Jones Decl. at ¶ 18 [Doc. No. 20-1]).

In addition, if Plaintiff were forced out of the healthcare market, many of its employees would be forced to purchase a costly, individual insurance plan as a result of the "minimum coverage" provision of the Act. As a result, Plaintiff's Catholic employees will now be forced to purchase, and thus contribute to, "preventive care" contraception coverage because this mandate applies to individual plans.[3] (Jones Decl. at ¶ 19 [Doc. No. 20-1]).

In sum, the "preventive care" contraception mandate is causing a present economic injury to Plaintiff by forcing it to make a choice between providing its valuable employees with healthcare coverage, an important employee benefit, which violates Plaintiff's sincerely held religious beliefs, or dropping the coverage and losing valuable employees who will then be forced to find alternative employment that provides employer-sponsored healthcare to avoid the "minimum coverage" provision penalty. Many of these employees will need to know now whether they will have healthcare insurance come January 2013 so that they and Plaintiff can properly prepare and plan for that contingency. Indeed, the "preventive care" contraception

[3] Pursuant to the minimum coverage provision of the Affordable Care Act, many, if not all, of Plaintiff's employees will be subject to the "penalty" tax for not having healthcare coverage since they will no longer be eligible for the "employer-sponsored" healthcare plan exemption, *see* 26 U.S.C. § 5000A(f)(1)(B), once Plaintiff drops its healthcare coverage in order to follow its sincerely held religious beliefs. (*See* Jones Decl. at ¶¶ 16-20 [Doc. No. 20-1]).

mandate is presently forcing Plaintiff into a moral and economic dilemma that has and will adversely affect it as an organization. (Jones Dec. at ¶ 20 [Doc. No. 2-1]).

In sum, Defendants are forcing religious employers, including Plaintiff, out of the healthcare market because of the employers' sincerely held religious beliefs, which is both a direct harm in and of itself and an indirect harm in that it will put Plaintiff at a competitive disadvantage vis-à-vis employers offering healthcare plans in the employee marketplace. (Jones Decl. at ¶¶ 16-20 [Doc. No. 20-1]).

ARGUMENT

I. Standard for Issuing a Temporary Restraining Order / Preliminary Injunction.

The standards for issuing a temporary restraining order and a preliminary injunction are the same. *Landers v. Samuelson*, No. 12-CV-703(DLI)(LB), 2012 U.S. Dist. LEXIS 30922, at *5 (E.D.N.Y. Mar. 8, 2012). Plaintiff must show "(a) irreparable harm and (b) either: (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Id.* (citing *Moore v. Consol. Edison Co. of N.Y., Inc.*, 409 F.3d 506, 510 (2d Cir. 2005)); *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

Here, Plaintiff can satisfy each of these considerations, particularly in light of the following: (1) Plaintiff merely seeks to maintain the *status quo* pending a final resolution on the merits of its claims so as to avoid serious hardship, and (2) Defendants have argued, albeit

incorrectly, that Plaintiff lacks standing because it qualifies for the temporary enforcement safe harbor and thus the mandate cannot be enforced against it until at least 2014 and that, nonetheless, Defendants are working on revising the regulations to provide greater protection for religious organizations so that Plaintiff will suffer no harm. (*See, e.g.*, Defs.' Mem. in Supp. of Mot. to Dismiss at 13 ["In light of the forthcoming amendments, and the opportunity the rulemaking process provides for plaintiff to help shape those amendments, there is no reason to suspect that plaintiff will be required to sponsor a health plan that covers contraceptive services in contravention of its religious beliefs once the enforcement safe harbor expires."] [Doc. No. 19]; *see also* Defs.' Reply Mem. in Supp. of Mot. to Dismiss at 4 ["[N]o injury is imminent here because the safe harbor will likely protect plaintiff until defendants finalize new rules designed to accommodate the religious objections of organizations like plaintiff."] [Doc. No. 22]). Consequently, if we take Defendants at their word (*i.e.*, that they are serious about their stated concerns for religious organizations), then one must wonder why it is that they refused to consent to Plaintiff's request to enter into a joint, stipulated injunction that would protect Plaintiff's religious beliefs pending a final resolution of this case. Nonetheless, as demonstrated below, Plaintiff satisfies the standard for issuing a TRO / preliminary injunction in this case.

II. Plaintiff Satisfies the Standard for Issuing a TRO / Preliminary Injunction.

The standard for issuing a preliminary injunction set forth by the U.S. Supreme Court in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), is arguably the more onerous standard, which Plaintiff satisfies. Consequently, Plaintiff will use this standard in its analysis. *See, e.g., Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996) ("Where a moving party challenges government action taken in the public interest pursuant to a statutory or regulatory scheme, however, the moving party cannot resort to the 'fair ground for litigation' standard, but is

required to demonstrate irreparable harm and a likelihood of success on the merits.") (internal quotations omitted).

As demonstrated below, (1) Plaintiff is likely to succeed on the merits of its free exercise and Religious Freedom Restoration Act claims; (2) Plaintiff will be irreparably harmed without the injunction; (3) the balance of hardships weighs in favor of granting the injunction; and (4) the public interest favors granting the injunction and thus protecting Plaintiff's religious freedom.

A. Plaintiff Is Likely to Succeed on the Merits of Its Claims.

As demonstrated below, Plaintiff is likely to succeed on the merits of its claims arising under the Free Exercise Clause and the Religious Freedom Restoration Act.

1. Free Exercise Claim.

The Free Exercise Clause states that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. And this right to the free exercise of religion embraces two concepts: the freedom to believe and the freedom to act. *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940).

Under the First Amendment, the government may not impose special restrictions, prohibitions, or disabilities on the basis of religious beliefs. *See McDaniel v. Paty*, 435 U.S. 618 (1978). "The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *Id*. at 626. Indeed, "[t]he principle that government may not enact laws that suppress religious belief or practice is . . . well understood." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). In short, when the government burdens religious beliefs, the Free Exercise Clause is implicated.

a. Plaintiff's Sincerely Held Religious Beliefs.

"It cannot be gainsaid that the judiciary is singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs." *Patrick v. Lefevre*, 745 F.2d 153, 157 (2d Cir. 1984). Consequently, the court's limited competence in this area extends to determining "whether the beliefs professed by [Plaintiff] are sincerely held and whether they are, in [its] own scheme of things, religious." *United States v. Seeger*, 380 U.S. 163, 185 (1965); *see also Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 482 (2d Cir. 1985) (noting that courts must be vigilant to "avoid any test that might turn on the factfinder's own idea of what a religion should resemble") (internal quotations and citation omitted); *Jolly*, 76 F.3d at 476 ("Our scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature.").

Here, there can be no question that Plaintiff's beliefs regarding contraception and its objection to providing access to contraception in its healthcare plan are sincerely held, rooted in religion, and thus protected by the First Amendment. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 520 (finding that Santeria is a "religion" under the First Amendment and that the practice of animal sacrifice is protected by the Free Exercise Clause).

In *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713 (1981), the Supreme Court stated that "beliefs rooted in religion are protected by the Free Exercise Clause. . . ." The Court further confirmed that "[c]ourts are not arbiters of scriptural interpretation." *Id.* at 716. Thus, what matters for a free exercise claim is whether the record is clear that the person asserting the claim acted "for religious reasons." *Id.*

As in *Thomas*, the record in this case is undisputed: Plaintiff's objection to the contraception mandate is advanced "for religious reasons" and rooted in its sincerely held religious beliefs.

b. The Substantial Burden on Plaintiff's Religious Beliefs.

In *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), the Court held that the State's denial of unemployment benefits to an employee who refused to work on Saturdays because of her religious beliefs was an impermissible burden on her free exercise of religion because it "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."

In *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981), the Court held that the State's denial of unemployment compensation benefits because the employee voluntarily terminated his employment with a roll foundry that produced armaments, claiming that the production of armaments was contrary to his religious beliefs, placed a substantial burden on the employee's right to the free exercise of religion. By denying employment benefits because the employee refused, on religious grounds, to work in a plant that produced armaments, the State imposed a substantial burden on the employee's exercise of religion by "putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id*. at 717-18 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."); *see also Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that a Wisconsin law compelling school attendance beyond eighth grade impermissibly burdened the religious practices of the Amish).

Indeed, in *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988), the Court stated, "It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, *not just outright prohibitions*, are subject to scrutiny under the First Amendment." (emphasis added); *see also Jolly*, 76 F.3d at 477 (forcing the plaintiff to choose between submitting to a screening test for "latent" tuberculosis or adhering to his religious beliefs constitutes a substantial burden on the free exercise of religion).

Similar to *Sherbert*, *Thomas*, and *Yoder*, the government here is coercing Plaintiff to engage in conduct that violates its sincerely held religious beliefs. Thus, there can be no question that the burden in the form of a federal mandate that coerces behavior contrary to Plaintiff's sincerely held religious beliefs is a burden prohibited by the Free Exercise Clause.

c. *Smith* Does Not Preclude Finding a Constitutional Violation.

In 1990, the Supreme Court decided *Emp't Div. v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court was faced with the issue of whether the Free Exercise Clause could prohibit the application of Oregon drug laws to the ceremonial ingestion of peyote and thus permit the State to deny unemployment compensation for work-related misconduct based on the use of this drug. The Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and *neutral law* of *general applicability* on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id*. at 879 (quotations and citation omitted) (emphasis added). This was considered by Congress and others to be a departure from the Court's prior precedent. *See, e.g.*, 42 U.S.C. § 2000bb (enacting the Religious Freedom Restoration Act "to restore 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) and to guarantee its application in all cases where free exercise of religion is substantially burdened").

"The *Smith* Court, however, did not overrule its prior free exercise decisions, but rather distinguished them." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 363 (3rd Cir. 1999) (Alito, J.) (citing *Smith*, 494 U.S. at 881-84).

In 1993, the Court again addressed a free exercise claim in the case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The Court preliminarily found that Santeria is a "religion" under the First Amendment and that the practice of animal sacrifice is protected by the Free Exercise Clause. The Court ultimately held that the law at issue burdened this religious practice in violation of the First Amendment.

In *Lukumi*, the Court stated that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous scrutiny." *Id*. at 546. The Court reviewed several municipal ordinances regulating the slaughter of animals, one of which prescribed punishment for "whoever . . . unnecessarily . . . kills any animal"—a facially neutral ordinance. *Id*. at 537. Upon rejecting the government's argument that the law was permissible because it was facially neutral, the Court gave the following relevant explanation:

> We reject the contention advanced by the city . . . that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "*forbids subtle departures from neutrality*," . . . and "*covert suppression of particular religious beliefs*." . . . *Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality*. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.

Id. at 534 (internal citations omitted).

The Court also stated, "As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* at 537 (internal quotations and citation omitted).

In short, a law that targets religious conduct or beliefs, even if facially neutral, "is not neutral or not of general application [and] must undergo the most rigorous scrutiny." Moreover, when the government permits exemptions from a regulation, its refusal to extend an exemption for religious reasons must also survive strict scrutiny.

As stated by the Supreme Court:

> To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests. The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not 'water[ed] down' but really means what it says. A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.

Id. at 546 (internal quotations, punctuation, and citations omitted).

Here, the record shows that the contraception mandate was designed to target employers who refuse to provide contraceptive services to their employees based on their religious beliefs. According to Defendants, "Employers that do not primarily employ employees who share the religious tenets of the organization are more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives. Including these employers within the scope of the exemption *would subject their employees to the religious views of the employer*, limiting access to contraceptives, thereby inhibiting the use of contraceptive services and the benefits of preventive care." 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (emphasis added).

Moreover, Congress has permitted exemptions from the requirements of the Act, which necessarily include the contraception mandate, for certain religions—notably, not the Catholic religion because it does not oppose health insurance in general—and for certain individuals. *See* 26 U.S.C. § 5000A(d)(2)(a)(i) & (ii) (mandate to purchase insurance does not apply to members

of a "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds); 26 U.S.C. § 5000A(d)(3) & (4) (mandate to purchase insurance does not apply to "[i]ndividuals not lawfully present" and "[i]ncarcerated individuals"). Moreover, grandfathered healthcare plans are exempt from the contraception mandate. *See* 42 U.S.C. § 18011 (grandfathering of existing healthcare plans). And Defendants created a regulatory exemption to the contraception mandate for a narrow category of religions organizations. 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011); *see Fraternal Order of Police Newark Lodge No. 12*, 170 F.3d at 367 (Alito, J.) (holding that the police department's policy regarding the prohibition on the wearing of beards was unconstitutional under the Free Exercise Clause because the department made exceptions from its policy for secular reasons, such as medical reasons, but refused to exempt officers whose religious beliefs prohibited them from shaving their beards).

Consequently, because the contraception mandate is not a neutral law of general applicability, Defendants' enforcement of the mandate against Plaintiff must survive strict scrutiny, which it cannot. As noted above, a regulation that burdens religious beliefs and practices, such as the mandate at issue here, "will survive strict scrutiny only in rare cases"—and this is not one of them.

d. Defendants' Burden on Religion Does Not Survive Strict Scrutiny.

Having made the threshold showing of a substantial burden on Plaintiff's religious beliefs, Defendants must now demonstrate that the application of the burden to Plaintiff furthers a compelling state interest and is the least restrictive means of furthering that interest. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546.

As an initial matter, what is the governmental interest "of the highest order" that is advanced *by forcing Plaintiff* to provide access to contraception for its employees? Is it really a

"compelling interest" of the government to ensure that the employees of Priests for Life have access to free birth control pills or diaphragms? Nonetheless, even accepting, *arguendo*, that the interest is broadly construed as "public health" (or even "gender equality," as the government is prone to argue in cases such as this) and that this interest is compelling, the contraception mandate is not narrowly tailored to advance this interest in that it is both over-inclusive and under-inclusive in relation to the interest it purportedly serves.

The mandate is over-inclusive because the governmental interest could be addressed by stopping far short of forcing Plaintiff, a private religious employer, to provide very broad coverage for contraception services. Indeed, if providing contraception was an "interest of the highest order," the government could set up its own clinics to hand out free diaphragms or birth control pills, or whatever favored contraception method it prefers.

The mandate is also under-inclusive in that if providing contraceptive services was such a compelling interest, there would be no reason to exclude "grandfathered" plans from providing such coverage, and there would be no reason to provide any exceptions, including an exception for some religious organizations, but not others.

In sum, as the Supreme Court concluded in *Lukumi*:

> The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.

Church of the Lukumi Babalu Aye, Inc., 508 U.S. at 547.

Similarly here, the contraception mandate was "enacted contrary to these constitutional

principles" and is thus "void." Therefore, Plaintiff is entitled to an immediate injunction.

2. Religious Freedom Restoration Act Claim.

Under the Religious Freedom Restoration Act ("RFRA"), which was passed in 1993 in response to *Emp't Div. v. Smith*, 494 U.S. 872 (1990), the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ." 42 U.S.C. § 2000bb-1(a). This general prohibition is not without exception. The government may justify a substantial burden on the free exercise of religion if the challenged law: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id*. at § 2000bb-1(b). In other words, Congress passed RFRA "to restore the compelling interest test" to neutral laws of general applicability that substantially burden religion. *See* 42 U.S.C. § 2000bb(b).

Under RFRA, "exercise of religion" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4) (referencing 42 U.S.C. § 2000cc-5(7)(A)). As noted above, Plaintiff's sincerely held religious beliefs at issue in this case are protected by the First Amendment and thus fall within the protections afforded by RFRA. Consequently, the burden now shifts to Defendants to justify under strict scrutiny the burden imposed by the contraception mandate upon Plaintiff's religious beliefs.

Assuming, *arguendo*, that the application of the contraception mandate to Plaintiff and all other similarly situated persons and organizations affected by the mandate furthers a compelling governmental interest, that argument does not justify a substantial burden *on Plaintiff's free exercise of religion*. As the Supreme Court stated, "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged

law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430-31 (2006). Consequently, as noted above, any such argument is defeated by the existence of numerous exemptions to the contraception mandate already provided by the government. These exemptions undermine any compelling interest in applying the mandate to Plaintiff in this case. *Newland*, 2012 U.S. Dist. LEXIS 104835, at *20-*27 (holding that the government failed to meet its burden in a RFRA challenge to the contraception mandate). Consequently, it is impossible for Defendants to satisfy their burden here. *See also Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 547 ("[A]law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited."). Therefore, the court should issue the requested injunction.

B. Plaintiff Will Be Irreparably Harmed without the Injunction.

As the U.S. Supreme Court has long held, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 127 (2d Cir. 1998) ("As the district court correctly found that the facts presented constitute a violation of New York Magazine's First Amendment freedoms, New York Magazine established *a fortiori* both irreparable injury and a substantial likelihood of success on the merits."); *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*). Indeed, "[c]ourts have persuasively found that irreparable harm accompanies a substantial burden on an individual's rights to the free exercise of religion under RFRA." *Jolly*, 76 F.3d at 482 (2d Cir. 1996) (finding

irreparable harm based on the plaintiff's substantial likelihood of demonstrating a violation of his right to the free exercise of his religion under RFRA).

Here, absent injunctive relief, Plaintiff will be required to provide, contrary to its sincerely held religious beliefs, contraception, sterilization, abortifacients and related education and counseling as part of its employee healthcare plan as a result of the challenged mandate. Pursuant to the terms of this mandate, the contraception coverage must begin on the start date of the first plan year following the effective date of the regulation (August 1, 2012). In this case, that date is January 1, 2013. Thus, in addition to the irreparable harm resulting from the violation of Plaintiff's right to the free exercise of religion under both the First Amendment and RFRA and similar to the Colorado district court's finding in *Newland v. Sebelius*, "[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, [Plaintiff has] adequately established that [it] will suffer imminent irreparable harm absent injunctive relief." *Newland*, 2012 U.S. Dist. LEXIS 104835, at *14.

C. The Balance of Hardships Weighs in favor of Granting the Injunction.

In this case, the likelihood of harm to Plaintiff without the injunction is substantial because the injunction would maintain the *status quo* and protect Plaintiff from being forced by the federal government to engage in conduct that substantially burdens its right to the free exercise of religion. The deprivation of this fundamental right, even for minimal periods, constitutes irreparable injury. *See* sec. II. B., *supra*.

On the other hand, if Defendants are restrained from enforcing the contraception mandate *against Plaintiff*, they will suffer no harm because the exercise of constitutionally protected rights can never harm any of Defendants' legitimate interests. Moreover, the government's

creation of numerous exemptions from the contraception mandate undermines any claim *that forcing Plaintiff to comply* with this mandate will cause the government any harm whatsoever.

D. The Public Interest Favors Granting the Injunction.

The impact of the injunction on the public interest turns in large part on whether Plaintiff's constitutional rights are violated by the contraception mandate. As courts have noted, "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581, 587 (D.D.C. 1986) ("[T]the Court notes that it is in the public interest to uphold a constitutionally guaranteed right."); *see also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties").

Thus, because the contraception mandate violates Plaintiff's fundamental right to the free exercise of religion, it is in the public interest to grant the requested injunction.

CONCLUSION

For the foregoing reasons, Plaintiff hereby requests that the court grant its motion and issue the requested temporary restraining order / preliminary injunction, enjoining the enforcement of the contraception mandate pending resolution of the merits of this case and thereby maintaining the *status quo*.

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2012, a copy of the foregoing was served via email on opposing counsel, Michelle R. Bennett, Trial Attorney, U.S. Department of Justice, Michelle.Bennett@usdoj.gov pursuant to the individual motion practices of this court.

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