IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WHEATON COLLEGE,	)	
	)	
***Plaintiff*,**	)	
	)	
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,	)	**Case No. 1:12-cv-01169**
***Defendants*.**	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Today—August 1, 2012—the HHS mandate goes into effect, and a clock begins ticking for Wheaton College, the leading Evangelical Christian college in the United States. Over the next five months, Wheaton will negotiate new employee health insurance, begin open enrollment on November 1, and roll out new policies on January 1, 2013. During that time, Wheaton will have to decide whether to obey the HHS mandate—which would force it to cover abortion-inducing drugs for free—or whether to obey its foundational religious beliefs. Practically speaking, Wheaton's final decision must be made by the end of September, about two months from now.

The price of remaining faithful will be steep. Wheaton would have to terminate most or all of its employee health insurance, exposing itself to ruinous fines, penalties, and lawsuits. Wheaton's employees would lose coverage they and their families depend on. And yet the value of Wheaton's faith and integrity are incalculable. Wheaton faces an impossible choice.

This Court can put that choice off for now. Wheaton asks for a preliminary injunction so that the important issues presented by the HHS mandate can be decided without forcing Wheaton to choose between its faith and its survival. Defendants have willingly granted similar short-term relief to thousands of other religious objectors, through a one-year "safe harbor." Defendants have also exempted plans covering hundreds of millions of people from the mandate because they are "grandfathered." There is no valid reason to deny Wheaton the same preliminary relief.

Just last week, a federal district court in Colorado preliminarily enjoined the mandate as to another religious objector who fell outside the "safe harbor" and "grandfather" exceptions. *See Newland* v. *Sebelius*, No. 12-1123, slip op. at 17-18 (D. Colo. July 27, 2012) (order granting preliminary injunction) (Exh. A). Wheaton is in the same position, and deserves the same

remedy. Preliminary relief is warranted because the mandate violates the Religious Freedom Restoration Act and the First Amendment, and because Wheaton otherwise faces the imminent prospect of irreparable harm to its religious freedom, its integrity, and its employees' well-being.

FACTUAL BACKGROUND

I. MANDATE TIMELINE

A. Promulgation of the mandate and the "religious employer" exemption

Signed into law by President Obama on March 23, 2010, the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), institutes a number of reforms to our nation's health care and health insurance systems. Among other things, the ACA mandates that group health plans cover women's "preventive care and screenings" without cost-sharing. The ACA does not specify what "preventive care and screenings" include, but rather leaves that task to the Health Resources and Services Administration (HRSA), a division of Defendant Department of Health and Human Services (HHS).[1] 42 U.S.C § 300gg–13(a)(4); 75 Fed. Reg. 41726, 41728 (July 19, 2010).

On August 1, 2011, HRSA issued guidelines stating that preventive services would include "[a]ll Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity."[2] FDA-approved contraceptive methods include "emergency contraceptives," such as Plan B (commonly known

[1] Unless context indicates otherwise, all references to "HHS" or "Defendants" also include Defendants Department of Labor and Department of Treasury.

[2] Health Resources and Services Administration, *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Aug. 1, 2012).

as the "morning-after pill") and Ella (commonly known as the "week-after pill").[3] On the same day, HHS amended the regulations "to provide HRSA additional discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned." 76 Fed. Reg. 46621, 46623 (published Aug. 3, 2011). To qualify for this "religious employer" exemption, an organization must meet the following criteria:

> (1) The inculcation of religious values is the purpose of the organization;
>
> (2) The organization primarily employs persons who share the religious tenets of the organization;
>
> (3) The organization serves primarily persons who share the religious tenets of the organization;
>
> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

45 C.F.R. § 147.130(a)(1)(iv)(B)(1)-(4) (HHS); *see also* 26 C.F.R. § 54.9815-2713T (Treasury); 29 C.F.R. § 2590.715-2713 (Labor). Defendants finalized this exemption, "without change," in February 2012. 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012).

The mandate takes effect beginning with an organization's first plan year after August 1, 2012. *See* 42 U.S.C. § 300gg-13(b); 76 Fed. Reg. 46621, 46623.

B. The safe harbor

Controversy ensued over the mandate and the religious employer exemption.[4] In response, Secretary Sebelius announced in January 2012 that certain non-exempt religious objectors would

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[3] *See* FDA Birth Control Guide (Oct. 19, 2011), http://www.fda.gov/forconsumers/byaudience/forwomen/ucm118465.htm (last visited July 31, 2012) (describing various FDA-approved contraceptives, including the "emergency contraceptives" Plan B and Ella).

[4] Hundreds of thousands of public comments were filed in response to the mandate and the religious employer exemption. *See* 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011); 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012). Additionally, religious organizations that did not qualify for the exemption began to file

be granted an "additional year" before the mandate was enforced against them, in order to "allow these organizations more time and flexibility to adapt to this new rule." *See* January 20, 2012 Statement of HHS Secretary Kathleen Sebelius, available at http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited July 31, 2012). Accordingly, on February 10, 2012, H HS issued a bulletin describing a "Temporary Enforcement Safe Harbor" from the mandate.[5] The bulletin advises that Defendants will not enforce the mandate for one additional year against certain non-profit organizations who are religiously opposed to covering the mandated services but who did not qualify for the religious employer exemption. Under the safe harbor, the mandate would not apply until an

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federal lawsuits challenging the mandate in November 2011. To date some twenty-four lawsuits on behalf of over fifty religious organizations, businesses, and individuals have been filed. *See Belmont Abbey College* v. *Sebelius*, No. 11-1989 (D.D.C. Nov. 10, 2011 ; dismissed without prejudice July 18, 2012); *Colo. Christian Univ.* v. *Sebelius*, No. 11-3350 (D. Colo. Dec. 22, 2011); *Eternal Word Television Network, Inc.* v. *Sebelius*, No. 12-501 (N.D. Ala. Feb. 9, 2012); *Priests for Life* v. *Sebelius*, No. 12-753 (E.D.N.Y. Feb. 15, 2012); *La. Coll.* v. *Sebelius*, Case No. 12-463 (W.D. La. Feb. 18, 2012); *Ave Maria Univ.* v. *Sebelius*, Case No. 12-88 (M.D. Fla. Feb. 21, 2012); *Geneva Coll.* v. *Sebelius*, No. 12-207 (W.D. Pa. Feb. 21, 2012); *O'Brien* v. *HHS*, No. 12-476 (E.D. Mo. Mar. 15 2012); *Nebraska v. HHS*, No. 12-476 (D. Neb. Feb. 23, 2012; dismissed July 17, 2012); *Newland v. Sebelius* No. 12-1123 (D. Colo. April 30, 2012); *Legatus* v. *Sebelius*, No. 12-120 (E.D. Mich. May 6, 2012) ; *Roman Catholic Archbishop of Washington* v. *Sebelius*, No. 12-81 (D.D.C. May 21, 2012) ; *Roman Catholic Archdiocese of N.Y.* v. *Sebelius*, No. 12-254 (E.D.N.Y. May 21, 2012); *Trautman v. Sebelius*, No. 12-12 (W.D. Pa. May 21, 2012); *Reverend David A. Zubik, Bishop of the Roman Catholic Diocese of Pittsburgh et al.* v. *Sebelius*, W.D. Pa. May 21, 2012); *Roman Catholic Diocese of Fort Worth* v. *Sebelius*, No. 12-31 (N.D. Tex. May 21, 2012); *Catholic Diocese of Dallas v. Sebelius*, No. 12-158 (N.D. Tex. May 21, 2012); *Franciscan Univ. of Steubenville* v. *Sebelius*, No. 12-44 (S.D. Ohio May 21, 2012); *The Catholic Diocese of Biloxi, Inc. et al.* v. *Sebelius*, No. 12-15 (S.D. Miss. May 21, 2012); *University of Notre Dame* v. *Sebelius*, No. 12-25 (N. D. Ind. May 21, 2012); *Diocese of Fort Wayne-South Bend Inc.* v. *Sebelius*, No. 12-15 (N.D. Ind. May 21, 2012); *Conlon et al.* v. *Sebelius*, No. 12-393 (N.D. Ill. May 21, 2012); *Archdiocese of St. Louis* v. *Sebelius*, No. 12-92 (E.D. Mo. May 21, 2012).

[5] *See* Center for Consumer Information and Insurance Oversight and Centers for Medicare & Medicaid Services, Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, And Section 9815(a)(1) of the Internal Revenue Code 3, 6, available at http://cciio.cms.gov/resources/ files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited July 31, 2012) ("HHS Bulletin").

organization's first insurance plan year that begins after August 1, 2013 (as opposed to August 1, 2012 under the original rule). HHS Bulletin at 3. The safe harbor, however, is available only to non-profit organizations "whose plans have not covered contraceptive services for religious reasons at any point from. . . [February 10, 2012] onward," and is willing to sign a certification to that effect. *Id*.

The safe harbor did not alter the religious employer exemption, however. On that same afternoon, Defendants issued regulations adopting that exemption "as a final rule without change." 77 Fed. Reg. 8725, 8729 (published Feb. 15, 2012) (emphasis added).

C. The Advance Noticed of Proposed Rulemaking

On March 16, 2012, Defendants announced an "Advance Notice of Proposed Rulemaking" (ANPRM). *See* Press Release, U.S. Dep't of Health and Human Servs., Administration releases Advance Notice of Proposed Rulemaking on preventive services policy (Mar. 16, 2012), *available at* http://www.hhs.gov/news/press/2012pres/03/20120316g.html. The ANPRM does not alter the mandate or the religious employer exemption, but rather proposes the creation of an additional mandate that would require insurers to assume the financial and administrative burdens of providing the mandated services made available through the insurance plans of non-exempt religious organizations. ANPRM at 1, 10 (stating that proposed insurer mandate will seek "alternative ways" to address religious liberty concerns of "non-exempt, non-profit religious organizations with religious objections"). The ANPRM indicates Defendants' intention to accomplish this goal by August 1, 2013 (the end of the safe harbor period). At the same time, the ANPRM only solicits "questions and ideas to help shape these discussions." *Id*. at 11-12. Finally, the ANPRM emphasizes that the mandate will remain in full force and effect. *Id*. at 7-8.

II. WHEATON COLLEGE

Wheaton College is a Christian liberal arts college located in Wheaton, Illinois. Decl. of Pres. Philip G. Ryken ("Ryken Decl.") (Exh. B) ¶ 4. While not tied to any one church or denomination, Wheaton is affiliated with the Evangelical Christian tradition, although it attracts students from a wide variety of Christian traditions, including Catholics, Orthodox Christians, and members of at least fifty-five Protestant denominations. Ryken Decl. ¶ 4, 8. It was founded at the dawn of the Civil War by an abolitionist, Jonathan Blanchard, and has always valued the contributions of women, granting its first degree to a female graduate in 1862. Ryken Decl. ¶ 4.

Wheaton's motto is "For Christ and His Kingdom." Ryken Decl. ¶ 6. Wheaton's mission is "to help build the church and improve society worldwide by promoting the development of whole and effective Christians through excellence in programs of Christian higher education." Ryken Decl. ¶ 5. Today, Wheaton College is "a rigorous academic community that takes seriously the life of the mind." Ryken Decl. ¶ 7. "Faith is central to the educational mission of Wheaton College. The College aspires to live, work, serve, and worship together as an educational community centered around the Lord Jesus Christ." Ryken Decl. ¶ 9.

Wheaton holds and follows traditional Christian beliefs about the sanctity of life. Ryken Decl. ¶ 13. "Wheaton believes and teaches that each human being bears the image and likeness of God, and therefore that all human life is sacred and precious, from the moment of conception. Wheaton College therefore believes and teaches that abortion ends a human life and is a sin." Ryken Decl. ¶ 13. These beliefs are echoed in Wheaton's conviction that "Scripture calls Christians to uphold the God-given worth of human beings, as the unique image-bearers of God,

from conception to death." Ryken Decl. ¶ 11. Wheaton also affirms that "Scripture condemns the taking of innocent life." Ryken Decl. ¶ 12.

Consequently, "it is a violation of Wheaton's teachings for it to deliberately provide insurance coverage for, fund, sponsor, underwrite, or otherwise facilitate access to abortion-inducing drugs, abortion procedures, and related services." Ryken Decl. ¶ 14. Specifically, Wheaton has a sincere religious objection to covering the emergency contraceptive drugs popularly known as Plan B and Ella. Ryken Decl. ¶ 15, 17. Wheaton believes that those drugs "could prevent a human embryo—which it understands to include a fertilized egg before it implants in the uterus—from implanting in the wall of the uterus, causing the death of the embryo." Ryken Decl. ¶ 15. Wheaton also has a sincere religious objection to paying for counseling supporting these drugs, since such counseling is also contrary to its religious teachings. Ryken Decl. ¶ 40.

It is also part of Wheaton College's religious convictions to provide for the well-being and care of the employees who further its mission and make up an integral part of its community. Ryken Decl. ¶ 20, 34. Wheaton therefore provides generous health insurance and health services for its employees. Ryken Decl. ¶ 20. Most of Wheaton's 709 full-time employees rely upon Wheaton's health insurance, as do their families. Ryken Decl. ¶ 21. It is important to Wheaton that its insurance plans are consistent with its religious beliefs. Ryken Decl. ¶ 20, 38. Therefore it does not provide coverage for abortions or emergency contraceptives. Ryken Decl. ¶ 19.

In late 2011, Wheaton undertook a comprehensive review of its health insurance plans to ensure they were consistent with Wheaton's beliefs. Ryken Decl. ¶ 23. During that review, an employee discovered that emergency contraception had been included in its plans through an

oversight unknown to the College's leadership. Ryken Decl. ¶ 24. After that point, Wheaton worked diligently with its insurer and plan administrator to exclude emergency contraception from its plans. Ryken Decl. ¶¶ 25-28. In order to make that change, Wheaton had to create a new, self-funded prescription drug plan to supplement its HMOs. Ryken Decl. ¶¶ 26-28. That change, along with others, meant that its HMO plans are not eligible for grandfather status, and thus subject to all the requirements of the ACA. Ryken Decl. ¶ 31-32. Wheaton's HMO plans are by far the most popular choices for its employees. Ryken Decl. ¶ 33. Due to the changes, Wheaton's less popular, and more expensive, PPO plan may not be eligible for grandfather status in 2013. Ryken Decl. ¶ 32. Because Wheaton offers insurance plans that are not grandfathered, Wheaton must soon begin to comply with all aspects of the ACA, including the mandate.

Moreover, Wheaton is not eligible for the safe harbor. Ryken Decl. ¶ 45. It cannot make the required safe harbor certification because it currently provides coverage for prescription contraceptives, most forms of which are not prohibited by its religious teachings. Ryken Decl. ¶¶ 30, 45, 51. Additionally, due to the time involved in creating and implementing the insurance changes described above, Wheaton briefly and inadvertently provided coverage for emergency contraception after February 10, 2012. Ryken Decl. ¶¶ 29, 51. Nor does Wheaton qualify under the "religious employer" exemption from the mandate, since it is not a church or religious order, and since it provides a comprehensive liberal arts education, rather than existing solely to inculcate religious values. Ryken Decl. ¶ 42.

Because Wheaton is not eligible for the safe harbor, it will be subject to enforcement under the mandate—enforcement which includes fines, other regulatory penalties, and potential

lawsuits—with the beginning of its new plan year: January 1, 2013.[6] Ryken Decl. ¶ 46. On that date, "Wheaton will face an unconscionable choice: either violate the law, or violate its faith." Ryken Decl. ¶ 54. If Wheaton violates the law by ceasing to offer employee health insurance, or by offering insurance without emergency contraceptives, it will face the prospect of fines of $2,000 per employee per year, or roughly $1.35 million per year, every year. Ryken Decl. ¶ 55; *see* 26 U.S.C. § 4980H. In addition, Wheaton could also incur penalties of $100 per day per employee, as well as regulatory action and lawsuits, for offering insurance that fails to comply with the ACA. Ryken Decl. ¶ 55, 57; *see* 26 U.S.C. § 4980D; 29 U.S.C. § 1132.

These fines would be devastating for the small liberal arts college. Ryken Decl. ¶ 56. Even if Wheaton were to attempt to circumvent the mandate by shifting all employees to its PPO plan (assuming that plan could qualify for grandfather status in 2013, which is unclear), the College would still have to pay nearly $200,000 per year in increased costs, Ryken Decl. ¶ 59, and a large majority of Wheaton's employees would be forced off the plan that they chose and prefer. Ryken Decl. ¶ 58; *see also* Daniels Decl. ¶ 12 (detailing higher costs under PPO).

The fines and penalties are not Wheaton's only concern. If Wheaton is forced to make this unconscionable choice, it will also place its employees' health care in jeopardy. Ryken Decl. ¶¶ 51, 66-69. This is of grave concern to many of Wheaton's employees, and their families, who

[6] The fact that Wheaton does not qualify for the one-year safe harbor sharply distinguishes its situation from that of Belmont Abbey College. Judge Boasberg found that Belmont Abbey qualified for the safe harbor, and would therefore not be subject to the mandate until January 1, 2014. Thus, unlike Wheaton, Belmont Abbey could theoretically profit from Defendants' proposed "accommodation." For that reason, Judge Boasberg dismissed Belmont Abbey's lawsuit without prejudice as premature on standing and ripeness grounds. *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). Belmont Abbey has sought reconsideration of that dismissal. Regardless of its merits, however, Judge Boasberg's order underscores why Wheaton unquestionably has standing and ripeness to challenge the mandate now.

depend on the College's insurance plan. Ryken Decl. ¶¶ 67-69. Several employees have expressed fear that, if Wheaton is forced to terminate their insurance coverage, they will not be able to afford health care for themselves or their families. Ryken Decl. ¶¶ 67-69; Decl. of Provost Stanton L. Jones ("Jones Decl.") (Exh. C) ¶ 4; Decl. of Asst. Dir. of Human Resources Heidi Daniels ("Daniels Decl.") (Exh. D) ¶¶ 6-9, 11; Decl. of Linda Cotten ("Cotten Decl.") (Exh. E) ¶ 3; Decl. of Tony Dawson ("Dawson Decl.") ("Dawson Decl.") (Exh. F) ¶ 6. Some of them may have to seek expensive medical treatments before January 1 to be assured coverage. Ryken Decl. ¶ 67, 70; Jones Decl. ¶¶ 8-11 (may elect to have surgery for prostate cancer in 2012 against doctors' advice). Others face the specter of battling chronic conditions without access to affordable care. Ryken Decl. ¶ 67; Jones Decl. ¶¶ 5-12 (Parkinson's disease and prostate cancer); Daniels Decl. ¶ 8-11 (severe burns); Cotten Decl. ¶ 4 (pre-existing condition); Dawson Decl. ¶¶ 6-11 (ruptured vertebrae).

Wheaton must begin planning now for its upcoming insurance plan year. Ryken Decl. ¶ 62. The process to negotiate and confirm an insurance plan begins 3-4 months before the start of the new plan year. Ryken Decl. ¶ 63. Changes must be implemented in time for the November 1-15 open enrollment period. Ryken Decl. ¶ 65. Therefore any major changes—such as the termination of one or all plans—must be known to Wheaton by September 30, 2012 at the latest. Ryken Decl. ¶¶ 64-65.

"Wheaton needs immediate relief from the mandate in order to arrange for and continue providing employee health insurance." Ryken Decl. ¶ 66. If relief is delayed, Wheaton's employee insurance coverage might lapse. Ryken Decl. ¶ 66. If relief is denied, Wheaton will be forced to choose between its religious beliefs and the prospect of crippling fines, regulatory

penalties, and lawsuits, as well as potentially catastrophic disruptions to the health and well-being of its employees and their families. Ryken Decl. ¶ 66.

III. PROCEDURAL HISTORY

Recognizing it had no other options, Wheaton College filed its complaint on July 18, 2012, challenging the mandate on a variety of constitutional and statutory grounds. Dkt. [1]. It now files this motion seeking preliminary injunctive relief.

ARGUMENT

In considering whether to grant a preliminary injunction, the Court balances "(1) the movant's showing of a substantial likelihood of success on the merits, (2) irreparable harm to the movant, (3) substantial harm to the non-movant, and (4) public interest." *Mylan Pharm., Inc.* v. *Sebelius*, __ F. Supp.2d. __, 2012 WL 1388256 at *6 (D.D.C. Apr. 23, 2012) (quoting *Davis* v. *Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009)). As explained below, Wheaton meets these requirements and is therefore entitled to a preliminary injunction.

I. WHEATON IS LIKELY TO SUCCEED ON THE MERITS.

A. The mandate violates the Religious Freedom Restoration Act.

Following the Supreme Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), Congress passed RFRA in order "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)." 42 U.S.C. § 2000bb (b)(1); *see generally Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 431 (2006) (describing origin and intent of RFRA, 42 U.S.C. § 2000bb *et seq.*); *Mahoney* v. *District of Columbia*, 662 F. Supp.2d 74, 96 (D.D.C. 2009) (same). Under RFRA, the federal government may not "substantially burden" a person's exercise of

religion unless the government "'demonstrates that application of the burden to the person' represents the least restrictive means of advancing a compelling interest." *O Centro*, 546 U.S. at 423 (quoting 42 U.S.C. § 2000bb-1(b)); *see also Kaemmerling* v. *Lappin*, 553 F.3d 669, 677-79 (D.C. Cir. 2008) (discussing RFRA).[7] Once a plaintiff demonstrates a substantial burden on his religious exercise, RFRA then "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." *O Centro*, 546 U.S. at 430-31 (quoting 42 U.S.C. § 2000bb-1(b)).[8]

1. Wheaton's abstention from providing abortion-inducing drugs in employee coverage qualifies as "religious exercise" under RFRA.

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). A plaintiff's "claimed beliefs 'must be sincere and the practice[] at issue must be of a religious nature.'" *Kaemmerling*, 553 F.3d at 678 (quoting *Levitan* v. *Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002); *see also Mahoney*, 662 F. Supp.2d at 96 (same).

Both the Supreme Court and the D.C. Circuit have recognized that the "exercise of religion" encompasses a belief that one must avoid participation in certain acts. *See, e.g.*, *Smith*, 494 U.S. at 877 (explaining under the Free Exercise Clause that that "the 'exercise of religion' often

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[7] "[T]he portion [of RFRA] applicable to the federal government…survived the Supreme Court's decision striking down the statute as applied to the States." *Henderson* v. *Kennedy*, 265 F.3d 1072, 1073 (D.C. Cir. 2001) (discussing *City of Boerne* v. *Flores*, 521 U.S. 507 (1997)). 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) (2000).

[8] The respective burdens RFRA places on the parties are the same at the preliminary injunction stage as at trial. *See O Centro*, 546 U.S. at 429-30 (citing *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004)).

involves not only belief and profession but the performance of (*or abstention from*) physical acts"); *Kaemmerling*, 553 F.3d at 678 (reasoning that "religious exercise" under RFRA embraces "action *or forbearance*") (emphases added). Thus, a person exercises religion by avoiding work on certain days (*see Sherbert* v. *Verner*, 374 U.S. 398 (1963)), or by refraining from sending children over a certain age to school (*see Wisconsin* v. *Yoder*, 406 U.S. 205 (1972)). *See* 42 U.S.C. § 2000bb(b)(1) (incorporating *Sherbert* and *Yoder* in RFRA). Similarly, a person's religious convictions may compel her to refrain from facilitating prohibited conduct by others. *See, e.g.*, *Thomas* v. *Review Bd.*, 450 U.S. 707, 714-16 (1981) (recognizing religious exercise in refusing to "produc[e] or directly aid[] in the manufacture of items used in warfare").

As explained above, Wheaton's religious beliefs preclude it from providing drugs, or otherwise participating in the provision of drugs, that could cause an abortion. Doing so through the medium of employee insurance policies would violate Wheaton's faith. Wheaton cannot credibly maintain its religious identity and integrity—which are foundational to Wheaton's mission—while acquiescing in practices directly contrary to its faith. *See generally* Ryken Decl. ¶¶ 9-18. Accordingly, Wheaton's abstention from doing what the mandate requires easily qualifies as "religious exercise" within the meaning of RFRA.

2. The mandate substantially burdens Wheaton's religious exercise.

The government "substantially burdens" religious exercise when it puts "'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Kaemmerling*, 553 F.3d at 678 (quoting *Thomas*, 450 U.S. at 718); *Mahoney*, 662 F. Supp.2d at 96 (same).

The mandate directly orders Wheaton to provide employees with insurance coverage that Wheaton believes implicates the College and its faith community in facilitating abortion. 42

U.S.C. § 300gg-13 (requiring coverage of women's "preventive care," including abortifacient drugs); 26 U.S.C. § 4980H (requiring employers with at least 50 full-time employees to offer employees "minimum essential coverage"). Ryken Decl. ¶¶ 11-18, 38-52. If Wheaton wishes to adhere to its beliefs and avoid offering this coverage, the mandate and its accompanying penalties present the following choices. Wheaton could cease to offer employee insurance altogether, and face an annual assessment of about $1.35 million. 26 U.S.C. § 4980H(a), (c) (imposing and calculating "employer assessment"). Ryken Decl. ¶¶ 53-56. Or Wheaton could (in theory) continue to offer insurance lacking the mandated coverage, and face a penalty of $100 per day per employee, as well as the prospect of lawsuits by plan participants, plan beneficiaries and the Secretary of Labor. 26 U.S.C. § 4980D(a), (b) (imposing penalties for failure to meet group health plan requirements); 29 U.S.C. § 1132(a) (providing for civil enforcement actions by a plan participant, beneficiary, and the Secretary of Labor). Ryken Decl. ¶¶ 57. Even if Wheaton were able to continue offering one of its plans next year—which is unclear—that would involve a dramatic restructuring of its insurance offerings that would cause significant expense to Wheaton and hardship to its employees and their families. Ryken Decl. ¶¶ 58-60.

For Wheaton to keep its faith and its faith community intact, the mandate thus exacts the steep price of severe financial and regulatory penalties, along with severe constraints on Wheaton's ability to continue to offer employee health insurance. Moreover, Wheaton will have to recruit and retain employees while unable to offer them coverage, crippling its ability to compete with other employers who can offer coverage. The mandate also interferes with Wheaton's internal governance by forcing it to include abortion-inducing drugs, and related education and counseling as a term of its relationship with each and every employee. Ryken

Decl. ¶¶ 48-51. This prevents Wheaton from structuring its relationship with its own employees along the lines of Wheaton's religious beliefs, something which is foundationally important to Wheaton. Ryken Decl. ¶¶ 4-19. *Cf. Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 132 S. Ct. 694, 706 (2012) (forbidding government from "interfer[ing] with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs").

To call these burdens "substantial" is an understatement. The Supreme Court has struck down religious burdens far less dramatic. For instance, *Sherbert* found the potential loss of unemployment benefits for refusing Sabbath work placed "unmistakable" pressure on the plaintiff to abandon that observance. *Sherbert*, 374 U.S. at 404 (reasoning that the law "force[d] [plaintiff] 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," and that "the pressure on her to forego that practice is unmistakable"); *see also Thomas*, 450 U.S. at 717-18 (finding burden on religious exercise "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith. . . thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs"). *Sherbert* and *Thomas*, moreover, condemned even "indirect" pressure. *See Thomas*, 450 U.S. at 718 (explaining "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial"). With "direct" pressure, the Supreme Court has been even more exacting. For instance, *Yoder* struck down a *five dollar fine* on Amish parents for not sending their children to high school. *See, e.g.*, *Yoder*, 406 U.S. at 208 (observing that the parents were "fined the sum of $5 each"). The Court reasoned that "[t]he [law's] impact" on religious practice

was "not only severe, but inescapable, for the. . . law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218.

The pressure exerted on Wheaton in this case dwarfs the pressures condemned in *Sherbert*, *Thomas*, and *Yoder*. The mandate "affirmatively compels" Wheaton, under threat of severe consequences—fines, regulatory penalties, potential lawsuits, a prohibition on providing employee health benefits, internal personnel disruptions, competitive disadvantage—"to perform acts undeniably at odds with the fundamental tenets of their religious beliefs." *Yoder*, 406 U.S. at 218. Wheaton could avoid this steep price, of course, by abandoning its religious convictions about participating in activities it believes destructive of nascent human life. But it is black letter law that "[a] substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs[.]'" *Kaemmerling*, 553 F.3d at 678 (quoting *Thomas*, 450 U.S. at 718). The mandate does so here and therefore substantially burdens Wheaton's religious exercise.

Defendants themselves have shown they understand this kind of burden. For instance, the government's broader health care reform contained exemptions for certain claims of religious conscience—such as for members of a "recognized religious sect … conscientiously opposed to acceptance of" particular end-of-life benefits, *see* 26 U.S.C. § 5000A(d)(2)(A); 26 U.S.C. § 1402(g)(1), and for members of "health care sharing ministries" who "share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs," *see* 26 U.S.C. § 5000A(d)(2)(B)(ii)(II). In light of exemptions like these, Defendants

cannot claim that mandated insurance coverage cannot burden the conscience of those who must implement the mandated coverage.

Similarly, both the HHS Secretary and the President have publicly recognized that the mandate itself burdens religious believers. They have even acted to relieve those burdens on at least some religious objectors (thought not Wheaton). In her January 20 announcement previewing the one-year safe harbor, the Secretary stated that the extension "strikes the appropriate balance between respecting religious freedom and increasing access to important preventative services."[9] Likewise, in his February 10 press conference regarding the ANPRM, President Obama acknowledged that religious liberty is "at stake here" because some institutions "have a religious objection to directly providing insurance that covers contraceptive services."[10] The President explained that this religious liberty interest is why "we originally exempted all churches from this requirement." Finally, the basic premise of the Defendants' proposed rule-making in the ANPRM is to explore alternate insurance arrangements that would avoid burdening religious organizations' consciences. *See* 77 Fed. Reg. 16501, 16503 (March 21, 2012) (stating that ANPRM is intended "to develop alternative ways of providing contraceptive coverage without cost sharing in order to accommodate non-exempt, non-profit religious organizations with religious objections to such coverage"). These are candid acknowledgements that forcing religious objectors to cover objectionable services burdens their faith. The same is true for Wheaton.

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[9] The Secretary's statement regarding the one-year extension can be found at: http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited July 31, 2012).

[10] A transcript of the President's remarks is available at http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care (last visited July 31, 2012).

3. The mandate cannot satisfy strict scrutiny.

Because the mandate substantially burdens Wheaton's religious exercise, Defendants must "'demonstrate[] that application of the burden to [Wheaton]' represents the least restrictive means of advancing a compelling interest." *O Centro*, 546 U.S. at 423 (quoting 42 U.S.C. § 2000bb-1(b)); *see also, e.g.*, *Kaemmerling*, 553 F.3d at 677 (discussing strict scrutiny imposed by RFRA).[11] 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). The Supreme Court has explained that this test is "the most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 534. Defendants cannot meet it here.

a. Defendants cannot identify a compelling interest.

The compelling interest test demands the law at issue serve interests "of the highest order." *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 546 (1993). Determining whether an asserted interest clears that high hurdle "is not to be made in the abstract" but rather "in the circumstances of this case" by looking at the particular "aspect" of the interest as "addressed by the law at issue." *Cal. Democratic Party* v. *Jones*, 530 U.S. 567, 584 (2000); *see also Lukumi*, 508 U.S. at 546 (rejecting assertion that protecting public health was compelling interest "in the context of these ordinances"). "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" of First Amendment rights. *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945). 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

[11] The respective burdens RFRA places on the parties are the same at the preliminary injunction stage as at trial. *See O Centro*, 546 U.S. at 429-30 (citing *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004)).

direct and material way." *Turner Broad. Sys. Inc.* v. *FCC* ("*Turner I*"), 512 U.S. 624, 664 (1994); *Consol. Edison Co. of N.Y.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 543 (1980) ("Mere speculation of harm does not constitute a compelling state interest.").

Defendants' asserted interest is to promote the availability and use of contraceptive drugs and sterilization methods, a measure Defendants believe will promote women's health and equality. *See, e.g.,* 77 Fed. Reg. 8725, 8727-28 (Feb. 15, 2012) (describing goals of women's preventive services mandate). But whatever the strength of that interest in the abstract, Defendants cannot demonstrate—in the concrete context of the mandate—that their interest in achieving these goals is "compelling." 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. To the contrary, "a law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* The present case provides a textbook example of precisely such a failure on Defendants' part.

Defendants' own policies in the ACA and in the mandate itself undermine the notion that their asserted interest in increasing access to contraceptive coverage is "compelling." In numerous instances, Defendants have chosen not to require coverage of the very same drugs and services in the policies of literally millions of organizations. In particular:

- Members of certain objecting religious groups need not carry insurance at all and therefore need not cover contraception. *See*, *e.g.*, 26 U.S.C. § 5000A(d)(2)(a)(i) and (ii) (individual mandate does not apply to "recognized religious sect or division" that objects to public or private insurance funds); *id.* § 5000A(d)(2)(b)(ii) (individual mandate does not apply to members of certain "health care sharing ministries").

- Millions of "grandfathered" plans need not cover contraceptives, a concession admittedly designed to "make[] good on President Obama's promise that Americans

who like their health plan can keep it." *See* HHS Press Release, June 14, 2010, available at http://www.hhs.gov/news/press/2010pres/06/20100614e.html (last visited July 31, 2012).

- Small employers (*i.e.*, those with fewer than 50 employees) need not offer insurance at all (and hence no contraceptive coverage) to their more than 20 million employees. 26 U.S.C. § 4980H(c)(2); *see* http://www.census.gov/econ/smallbus.html (last visited July 31, 2012).

- Churches, church auxiliaries, and religious orders enjoy a blanket exemption from the mandate. 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012).

- Certain religiously affiliated non-profits were recently given an additional year before the mandate would be enforced against them. *See* HHS Bulletin.

Defendants have chosen to allow these gaping holes in their contraceptive net for reasons ranging from commercial convenience to political expediency.[12] Several of the exemptions, moreover, were expressly granted to relieve burdens on *religious* belief (i.e., the "religious employer" exemption from the mandate, and the broader religious exemptions from the ACA insurance requirements). That wide-ranging scheme of exemptions, as Judge Kane correctly found only last week, "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 *O Centro* is directly on point. In that RFRA case, the government asserted a compelling interest in uniformly applying federal narcotics laws to justify refusing to exempt a small church's religious use of a dangerous narcotic (*hoasca*, which the church used in a tea). But the Court unanimously rejected the argument: the narcotics laws *themselves* authorized exemptions and the government had *already* granted one for a different

[12] Defendants estimate that 133 million American will maintain their coverage under grandfathered plans. Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans, June 14, 2010 (*available at* http://www.healthcare.gov/news/factsheets/2010/06/ keeping-the-health-plan-you-have-grandfathered.html) (last visited July 31, 2012).

hallucinogen (peyote) used by a larger religious group (Native Americans). *O Centro*, 546 U.S. at 432-35. Given that analogous exemption for Native American peyote use, the Court 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.

O Centro controls the outcome here. Defendants' interest in increasing contraceptive access through the mandate cannot qualify as "compelling" where they have allowed millions of insurance policies to avoid the mandate and thus avoid covering the same contraceptive drugs. Indeed, *O Centro* found that *one* exemption to the narcotics laws for a *different* drug undermined the government's supposedly "compelling" interest in uniformity. Here, Defendants have crafted *numerous* exemptions, applicable a whole range of secular and religious organizations, for the *same* drugs and services. Moreover, just as in *O Centro*, several of those exemptions (i.e., the "religious employer" exemption from the mandate, and the broader religious exemptions from the ACA insurance requirements) were granted to relieve precisely the same kind of religious burden that Wheaton claims. In light of *O Centro*, Defendants cannot claim a "compelling" interest in refusing to exempt a religious objector like Wheaton from the mandate, when they have exempted so many other organizations. Put another way, given that Congress and HHS have already recognized numerous exemptions—both religious and secular—from the mandate, "RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required" for a claimant like Wheaton, whose faith is burdened by the mandate in ways every bit as severe as the millions of organizations who have already been exempted. *O Centro*, 546 U.S. at 434.

Second, another reason why the asserted interest cannot be compelling is that the problem Defendants target is so tiny. Defendants simply cannot demonstrate a crisis of contraceptive access; indeed, their own conduct undercuts the notion that there is any such crisis and thus a "compelling" need to remedy it. In public statements, Defendants themselves have confirmed that the mandated drugs and services are already widely available. For example, in her January 20, 2012 press release Defendant Sebelius explained that:

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

January 20, 2012 S tatement of HHS Secretary Kathleen Sebelius, available at http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited July 31, 2012).

In light of these admissions, Defendants cannot credibly claim an interest "of the highest order" in marginally increasing access to contraceptive services—much less in doing so by conscripting Wheaton's participation against its own conscience. The government simply has not identified "an 'actual problem' in need of solving." *Brown* v. *Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2738 (2011). Moreover, because the government "bears the risk of uncertainty" under strict scrutiny, "*ambiguous proof* will not suffice." *Id.* at 2739 (emphasis added). Indeed, the proof here quite *un*ambiguously refutes Defendants' position. Defendants' themselves say that contraceptives are widely available and widely used. Thus they cannot meet their burden of showing that Wheaton's refusal to facilitate employee access to contraceptive services creates any problem whatsoever, much less a "grave" abuse that rises to the level of a compelling

interest. As the Supreme Court recently confirmed, "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

Finally, the strength of Defendants' interest in applying the mandate to Wheaton is greatly diluted given that Defendants have already granted temporary "safe harbor" relief to thousands of other religious objectors and, further, have promised during that one-year period to "effectively exempt" those organizations from the mandate. *See* 77 Fed. Reg. 16501, 16503 (March 21, 2012) (stating that the promised "accommodation … would effectively exempt the religious organization from the requirement to cover contraceptive services"). Admittedly, Wheaton does not qualify for the safe harbor, because it has no conscientious objection to most contraceptives and because of the timing of recent changes to conform its policies to Wheaton's beliefs. Thus Wheaton's upcoming plan could not benefit from any "accommodation" sketched in the ANPRM, even assuming an accommodation is ever finalized and would *actually* relieve the burden on Wheaton's beliefs. *But see* Ryken Decl. ¶ 18 (explaining that Wheaton's beliefs would still be violated by providing access to abortion-causing drugs "even if those items were paid for by an insurer or a plan administrator and not by Wheaton College"). But the basic point remains: Defendants can scarcely claim a compelling interest in applying the mandate to Wheaton for the upcoming plan year, where Wheaton's religious conscience is burdened by the mandate in ways identical to organizations that fall under the safe harbor and whom Defendants have said they will "effectively exempt" from the mandate through the promised accommodation.

In sum, as Judge Kane concluded in the *Newland* case just last week: "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." *Newland*, slip op. at 14-15.

b. Alternatively, the mandate does not further Defendants' stated interests.

Under strict scrutiny, Defendants must also prove that the mandate "will in fact alleviate [the identified] harms in a direct and material way." *Turner I*, 512 U.S. at 664. Defendants cannot carry that burden here for a simple reason: the mandate will not result in religious organizations like Wheaton providing the required coverage but, instead, will simply force them to stop offering insurance entirely—not just for contraception, but for anything else. *See* Ryken Decl. ¶ 46. Thus Defendants will actually *harm* its stated interest in increasing women's access to preventive services, because women working at Wheaton and other religious institutions will lose employer-sponsored healthcare coverage altogether.

c. Alternatively, Defendants cannot show the mandate is the least restrictive means of furthering their interests.

Even assuming Defendants have shown a compelling interest, the mandate still fails strict scrutiny because it is not remotely the least restrictive means of achieving Defendants' goal of enhancing contraception coverage. *See, e.g., Kaemmerling v. Lappin*, 553 F.3d 669, 684 (D.C. Cir. 2008) (explaining that "[a] statute or regulation is the least restrictive means if 'no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights'") (quoting *Sherbert*, 374 U.S. at 407).

First, Defendants have a host of obvious alternatives for furthering its interest in expanding contraceptive access. Any of these alternatives would avoid any need to conscript religious objectors into providing these drugs and services against their consciences. To name only a few, Defendants could:

- Directly provide the drugs and services at issue.
- Directly provide insurance coverage for the drugs and services.
- Give individuals subsidies, reimbursements, tax credits or tax deductions to allay the costs of the drugs and services.
- Empower actors who do not have religious objections—for instance, physicians, pharmaceutical companies, or the interest groups who champion free access—to deliver the drugs and services themselves.
- Empower the same actors to sponsor speech and education about the drugs and services.
- Use its own considerable resources to inform the public that these drugs and services are available in a wide array of publicly-funded venues.

This last alternative is particularly salient since, in her announcement of the mandate, Secretary Sebelius stated that the relevant services are already "available at sites such as community health centers, public clinics, and hospitals with income-based support." January 20, 2012 Sebelius Statement, available at http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited July 31, 2012).

This array of less-restrictive alternatives is real, not hypothetical. On its own website, Defendant HHS announces that it plans to spend over $300 m illion in 2012 to provide contraceptives directly through Title X funding.[13] Moreover, the federal government, on its own and in partnership with state governments, has already constructed an extensive funding network specifically designed to increase contraceptive access, education, and use. A recent Guttmacher Institute fact sheet summarizes:

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[13] *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 July 31, 2012) (announcing that "[t]he President's Budget for Fiscal Year (FY) 2012 requests approximately $327 million for the Title X Family Planning Program").

- Public expenditures for family planning services totaled $2.37 billion in FY 2010.
- Medicaid accounted for 75% of total expenditures, state appropriations for 12% and Title X for 10%. Other sources, such as the maternal and child health block grant, the social services block grant and Temporary Assistance for Needy Families, together accounted for 3% of total funding.
- The joint federal-state Medicaid program spent $1.8 billion for family planning services in FY 2010. The program reimburses providers for contraceptive and related services delivered to enrolled individuals. The federal government pays 90% of the cost of these services, and the states pay the remaining 10%.
- Title X of the Public Health Service Act, the only federal program devoted specifically to supporting family planning services, contributed $228 million in FY 2010. It subsidizes services for women and men who do not meet the narrow eligibility requirements for Medicaid, maintains the national network of family planning centers and sets the standards for the provision of family planning services.
- Even among Title X–supported centers, Medicaid was the largest national source of financial support in 2010. Medicaid contributed 37% of all revenue reported by these centers, and Title X provided 22%. (The remaining 41% came from state and local governments, other federal programs, private insurance and fees paid by clients.
- States spent $294 million of their own funds for family planning services in FY 2010 (in addition to the funding they contributed to Medicaid and block-grant programs through matching requirements).
- When inflation is taken into account, public funding for family planning client services increased 31% from FY 1980 to FY 2010.[14]

[14] *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 July 31, 2012); *see also, e.g.,* Rachel Benson Gold *et al.*, *Next Steps for America's Family Planning Program: Leveraging the Potential of Medicaid and Title I in an Evolving Health Care System* (Guttmacher Inst., Feb. 2009) (available at http://www.guttmacher.org/pubs/Next Steps.pdf) (last visited July 31, 2012) (detailing provision of billions in Title XIX / Medicaid and Title X funds for providing family planning services); Adam Sonfield and Rachel Benson Gold, *Medicaid Family Planning Expansions: Lessons Learned and Implications for the Future* (Guttmacher Inst. Dec. 2011) (available at http://www.guttmacher.org/pubs/Medicaid-Expansions.pdf) (last visited July 31, 2012) (detailing expansion of Medicaid and Title X programs in providing family planning services); Susan A. Cohen, *The Numbers Tell the Story: The Reach and Impact of Title X* (Guttmacher Inst. Spring 2011) (available at http://www.guttmacher.org/pubs/gpr/14/2/gpr140220.html) (last visited July 31, 2012) (reporting on role of Title X in supporting family planning services for young and low-income women).

Nothing prevents Defendants from using such pre-existing sources to further its interest in increasing women's access to, and use of, contraceptives. As Judge Kane aptly concluded in his *Newland* ruling last week:

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

Newland, slip op. at 17.

Crucially, any combination of these more direct approaches would further Defendants' goals without coercing Wheaton to violate its faith. And these alternatives would be far more effective with regard to employees of religious institutions since, as discussed above, the mandate will force objectors like Wheaton to provide no insurance at all rather than violate their faith. Strict scrutiny means that Defendants *must* employ these obvious less restrictive alternatives, instead of burdening the rights of religious objectors. *See, e.g., United States* v. *Playboy Ent'mt Group, Inc.*, 529 U.S. 803, 813 (2000) (explaining that, if a less restrictive alternative would serve the government's purpose, "the legislature *must use* that alternative") (emphasis added).

Second, there is no evidence 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); *Hayes* v. *N. State Law Enforcement Officers Assn*, 10 F.3d 207, 217 (4th Cir. 1993) (concluding that without evidence that other alternatives were "considered," the court "simply cannot hold that the City's promotion policy was narrowly tailored"); *Benning* v. *Georgia*, __ F. Supp. 2d __, 2012 WL 113724, at *10 (M.D.

Ga. Jan. 13, 2012) (standard not met where defendants "failed to seriously consider any possible alternatives"). If Defendants cannot show they even investigated less restrictive alternatives—especially in light of the fact that they were made aware through numerous public comments of religious employers' objections to the mandate—their rule cannot survive strict scrutiny.

Third, Defendants' failure to satisfy narrow tailoring becomes even clearer when the least restrictive means test is applied, as RFRA demands, "to the person"—or, in other words, to "the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430-31 (citing 42 U.S.C. § 2000bb). In other words, Defendants must justify their choice of means—not merely with regard to the general run of employers—but instead with specific regard to a religious employer like Wheaton whose faith is violated by the mandate. Defendants cannot possibly meet this "more focused inquiry required by RFRA." *O Centro*, 546 U.S. at 432. It is hard to imagine a means of furthering Defendants' interests *more* restrictive of religious liberty than those adopted here—*i.e.*, an employer insurance mandate backed by fines and other regulatory penalties. Any one of the alternatives described above would be far less restrictive of religious liberty. But, instead of exploring any of them, Defendants simply chose to draft religious objectors like Wheaton into providing emergency contraceptive coverage through their own employee policies. Strict scrutiny demands far more from the government.

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In sum, Wheaton is likely to prevail on its 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)); *see also, e.g., Kaemmerling*, 553 F.3d at 677 (discussing *Smith*). 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").[15]

1. The mandate is not neutral.

The mandate is not neutral on its face because it explicitly discriminates among religious organizations on a religious basis. It thus fails the most basic requirement of facial neutrality. *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"). Indeed, the mandate is more patent violation of neutrality than the ordinances unanimously struck down in *Lukumi.* That case involved ostensibly neutral animal cruelty laws structured to target religiously-motivated practices only. By contrast, on its face the religious employer exemption to the mandate 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).

[15] 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; *see also id.* (noting that "[n]eutrality and general applicability are interrelated"); *id.* at 557 (Scalia, J., concurring) (observing that the concepts "substantially overlap"). Still, each merits separate analysis, and "strict scrutiny will be triggered" if the law at issue "fails to meet *either* requirement." *Rader* v. *Johnston*, 924 F. Supp. 1540, 1551 (D. Neb. 1996) (emphasis supplied) (citing *Lukumi*, 508 U.S. at 531-33, 544-46).

The religious employer exemption protects the consciences only of *certain* religious bodies, which it defines with reference to their internal *religious* characteristics. Namely, it exempts only those 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. *See* 45 C.F.R. § 147.130(a)(iv)(B)(1)-(4). These criteria openly do 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 who serve persons regardless of their faith. Nor is there any secular rationale for preferring groups that "inculcate religious values" to those who engage in outreach such as feeding the hungry, caring for the sick, or (as Wheaton does) providing a liberal arts education. Whatever policy considerations informed these criteria, they practice religious "discriminat[ion] on [their] face" and therefore trigger strict scrutiny. *Lukumi*, 508 U.S. at 533; *cf. Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1337 (D.C. Cir. 2001) (rejecting "substantial religious character" test for NLRB jurisdiction as contrary to both the Free Exercise and Establishment Clauses because it would effectively exempt only "religious institutions with hard-nosed proselytizing, … that limit their enrollment to members of their religion") (relying on *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979)).[16]

[16] It bears noting that the Affordable Care Act itself also violates this requirement of facial neutrality by exempting members of certain religious groups, but not others, from its coverage requirements. *See* 26 U.S.C. § 5000A(d)(2)(A); 26 U.S.C. § 1402(g)(1) (for members of religions opposed to insurance); 26 U.S.C. § 5000A(d)(2)(B)(ii)(II) (for members of any religious "health care sharing ministry"). Like the religious employer exemption from the mandate, these broader exemptions expressly privilege the consciences of certain religious groups while leaving the consciences of others (like Wheaton) unprotected. This is another reason why the mandate's burden is not neutral or generally applicable.

2. The mandate is not generally applicable.

The mandate is also subject to strict scrutiny under the Free Exercise Clause because it is not generally applicable.

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; *see also Mahoney* v. *District of Columbia*, 662 F. Supp.2d 74, 95 (D.D.C. 2009) (explaining that "[t]he principle of general applicability prevents the government from pursuing legitimate interests in a manner that has the practical effect of imposing burdens primarily upon conduct motivated by religious belief") (citing *Lukumi*, 508 U.S. at 543; *Am. Family Assn, Inc.* v. *F.C.C.*, 365 F.3d 1156, 1171 (D.C. Cir. 2004)). 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.[17]

[17] The lower courts have consistently followed this rule. For example, in *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, the Third Circuit held that a police department's no-beard policy was not generally applicable because it allowed a medical exemption but refused religious exemptions. "[T]he medical exemption raises concern because it indicates that the [police department] has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.). *See also Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 210–11, 214 (3d Cir. 2004) (Alito, J.) (rule against religious bear-keeping violated Free Exercise Clause due to categorical exemptions for zoos and circuses); *Canyon Ferry Road Baptist Church of East Helena, Inc.* v. *Unsworth*, 556 F.3d 1021, 1035 (9th Cir. 2009) (Noonan, J., concurring) (campaign finance requirements were not generally applicable where they included categorical exemptions for newspapers and media, but not for churches); *Rader* v. *Johnston*, 924 F.Supp. 1540, 1551-53 (D. Neb. 1996) (rule requiring freshmen to live

Under those standards, the mandate is not generally applicable. While the purpose of the mandate is to "ensur[e] that women with health insurance coverage will have access to [a] full range of . . . preventive services, including all FDA-approved forms of contraception," Jan. 20, 2012 HHS Press Release, numerous plans and organizations are categorically exempted by the Affordable Care Act from providing the mandated preventive services, for instance:

- Nearly two hundred million "grandfathered" health plans, 75 Fed. Reg. 34538, 34540, 34550 (June 17, 2010)[18];
- Businesses employing fewer than 50 persons (whose employees account for over 20 million Americans), 26 U.S.C. § 4980H(c)(2)(A) [19];
- Self-funded student plans (which cover more than 200,000 students in the United States), 76 Fed. Reg. 7767, 7769;
- Religious groups who conscientiously object to insurance, as well as "health care sharing ministries," 26 U.S.C. § 5000A(d)(2)(A); 26 U.S.C. § 1402(g)(1); 26 U.S.C. § 5000A(d)(2)(B)(ii)(II);
- Other categories of individuals, including "individuals not lawfully present" in the United States, individuals who are "incarcerated," "individuals who cannot afford coverage," "taxpayers with income below [a certain] filing threshold," "members of Indian tribes," and any individual "who for any month is determined by the Secretary of Health and Human Services . . . to have suffered a hardship" impairing his ability to obtain coverage. 26 U.S.C. §§ 5000A(d)(3)-(4), (e)(1)-(5).

These categorical exemptions reveal that 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 Wheaton. *See, e.g.,*

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on campus was not generally applicable where it included categorical exemptions for students with certain secular objections, but not religious objections); *Mitchell Cnty.* v. *Zimmerman*, 810 N.W.2d 1, 16 (Iowa 2012) (categorical exemptions for secular conduct allowed Mennonite farmers to use steel-wheeled tractors on county roads).

[18] 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. *See* http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (last visited July 31, 2012).

[19] *See* http://www.census.gov/econ/smallbus.html (last visited July 31, 2012).

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.

Furthermore, both the ACA and the mandate grant individualized exemptions on a case-by-case basis—another hallmark of a law that is not generally applicable.

For instance, Defendants have issued thousands of discretionary waivers from the ACA to employers.[20] These employers—and the millions of persons they employ—are not subject to the ACA's minimum coverage provisions and, by definition, are also not subject to the mandate. These widespread individualized exemptions deprive the mandate of general applicability. *Cf. Ward* v. *Polite*, 667 F.3d 727, 740 (6th Cir. 2012) ("At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.").

Moreover, with respect to the mandate specifically, the law provides that HRSA "*may* establish exemptions" for "group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services." 45 C.F.R. § 147.130 (emphasis added). This built-in discretion means that the granting of any religious exemption from the mandate is subject to the discretion of government officials. Although HRSA has stated that it will allow all entities who meet the four "religious employer" criteria to enjoy the current

[20] *See generally* http://cciio.cms.gov/resources/files/approved_applications_for_waiver.html (last visited July 31, 2012); http://www.healthcare.gov/news/factsheets/2011/06/annuallimit06172011a.html (last visited July 31, 2012).

exemption, 77 F ed. Reg. 8725, 8726 (Feb. 15, 2012) (citing HRSA Guidelines at http:// www.hrsa.gov/womensguidelines), it nonetheless retains discretion to revise or revoke this policy approach at any time.

In both cases, Defendants have granted themselves broad discretion to create exemptions based on an "individualized … assessment of the reasons for the relevant conduct," a feature that deprives the mandate of general applicability and subjects it to strict scrutiny. *Lukumi*, 508 U.S. at 537 (quoting *Employment Div.* v. *Smith*, 494 U.S. 872, 884 (1990)); *accord: Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 207-12 (3d Cir. 2004) (Alito, J.).

* * *

In sum, this array of exemptions results in hundreds of millions of Americans escaping the mandate, many for purely secular reasons and others for a subset of religious reasons. The mandate therefore cannot qualify as a neutral and generally applicable law for purposes of the Free Exercise Clause. Defendants must clear the high bar of strict scrutiny to justify their decision not to exempt other religious objectors, like Wheaton, from the mandate. As discussed elsewhere at length, they cannot do so. Consequently, Wheaton is likely to prevail on its claim under the Free Exercise Clause.

C. The mandate violates the Free Speech Clause.

In addition to unconstitutionally forcing Wheaton to *act* in violation of its rights under the Religion Clauses and RFRA, the Mandate also forces Wheaton to *speak* in violation of its rights under the Free Speech Clause of the First Amendment.

1. The First Amendment forbids the government from forcing private speakers to speak government-dictated messages with which they disagree.

The Supreme Court has explained that the "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977) (citing *W.V. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 637 (1943)). Accordingly, the Court has emphasized that the First Amendment protects not only the right of a speaker to choose what to say, but also the right of the speaker "to decide what not to say." *Hurley* v. *Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (internal quotation marks and citations omitted). The First Amendment in this way "presume[s] that speakers, not the government, know best both what they want to say and how to say it." *Riley* v. *Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988). Therefore, "the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Id*. at 791.

The Court has made clear that strict scrutiny applies to any government efforts to force speakers to speak a government-dictated message. While "[t]here is certainly some difference between compelled speech and compelled silence, … in the context of protected speech, the difference is without constitutional significance …." *Id.* at 796. Thus, "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys. Inc.* v. *FCC* ("*Turner I*"), 512 U.S. 624, 642 (1994).

The Court has also explained that these principles are triggered not merely when the government forces a person to *say* particular words, but also when the government forces a speaker to *fund* speech with which the speaker disagrees. *See, e.g, Abood* v. *Detroit Bd. of Ed.*, 431 U.S. 209, 234-35 (1977) (finding that forced contributions for union political speech violate the First Amendment "notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State"); *United States* v. *United Foods*, 533 U.S. 405, 411 (2001) (finding that forced contributions for advertising related to unbranded mushrooms violates First Amendment).

2. The mandate violates the Free Speech Clause because it forces Wheaton to engage in government-dictated speech with which it disagrees.

The mandate violates these principles because it forces Wheaton to pay for and sponsor speech about contraception, sterilization, and drugs that cause abortions. In particular, the mandate requires Wheaton to pay for "patient education and counseling for all women with reproductive capacity" about these products. [21]

As set forth above, Wheaton has religious objections to participating in education and counseling about abortifacient drugs. Wheaton believes and teaches that use of these products is impermissible. Paying for and providing counseling and education about using these products thus directly contradicts Wheaton's own message against using them.

It is of course possible and permissible for the government to believe that it is good for people to receive this education and counseling. But the government has no authority to force Wheaton to provide the counseling or pay for it. Wheaton's opposition to abortion-inducing

[21] Health Resources and Services Administration, *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011) , *available at* http://www.hrsa.gov/womensguidelines/ (last visited July 31, 2012).

drugs may be a minority view, but "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W.V. State Board of Education*, 319 U.S. at 642.[22]

For these reasons, forcing Wheaton to provide counseling and education about these products and services triggers strict scrutiny. *Turner I*, 512 U.S. at 642. For the reasons set forth above, the Mandate fails strict scrutiny.

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

Granting preliminary injunctive relief is necessary to prevent Wheaton from suffering harm that is irreparable and imminent. *See, e.g., CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) (noting that '[t]he basis of injunctive relief in the federal courts has always been irreparable harm'") (quoting *Sampson* v. *Murray,* 415 U.S. 61, 88 (1974)); *Wisconsin Gas Co.* v. *F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985) (explaining that "[t]he injury complained of [must be] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm").

[22] Nor can the government attempt to write off Wheaton's disagreement with the forced speech as minor. As the Supreme Court has explained, the First Amendment protection against compelled speech applies even to disputes that "could be seen as minor." *See United States v. United Foods*, 533 U.S. 405, 411 (2001) ("Here the disagreement could be seen as minor: Respondent wants to convey the message that its brand of mushrooms is superior to those grown by other producers. It objects to being charged for a message which seems to be favored by a majority of producers. The message is that mushrooms are worth consuming whether or not they are branded. First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom. As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny."). Wheaton's deeply held religious beliefs and speech about human life and abortion are at least as worthy of First Amendment protection as speech about unbranded mushrooms.

Application of the mandate to Wheaton will violate its rights under the First Amendment and RFRA. It is settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976); *accord: Nat'l Treasuries Employees Union* v. *United States*, 927 F.2d 1253, 1254 (D.C. Cir. 1991) (Thomas, J.). Deprivation of rights secured by RFRA—which affords even greater protection to religious freedom than the Free Exercise Clause—also constitutes 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"); *Jolly* v. *Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (explaining under RFRA that "although the plaintiff's free exercise claim is statutory rather than constitutional, the denial of the plaintiff's right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily"); *W. Presbyterian Church v. Bd. of Zoning Adjustment of Dist. of Columbia*, 849 F. Supp. 77, 79 (D.D.C. 1994) (granting a preliminary injunction against a zoning ordinance prohibiting a church's feeding of the homeless based on likely violations of the First Amendment and RFRA). Judge Kane reached the same conclusion last week in the *Newland* case. *See 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).

Finally, these irreparable harms will fall on Wheaton at a definite time in the immediate future. *Cf. Wisconsin Gas Co.*, 758 F.2d at 674 (explaining that an injury merely "feared" to occur at an "indefinite time" will not suffice for preliminary relief). Wheaton does not qualify for the one-year safe harbor. Wheaton therefore faces the certain prospect of violating the mandate in less than five months' time—by January 1, 2013—along with the accompanying

employer fines and regulatory penalties. And, as explained above, the disruptions occasioned by this impending deadline will actually begin much sooner, as Wheaton begins to negotiate its 2013 policies in preparation for the beginning of open enrollment on November 1, 2012. *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").

III. THE BALANCE OF EQUITIES TIPS IN WHEATON'S FAVOR.

"In considering whether the balance of equities favors granting a preliminary injunction, courts consider whether an injunction would 'substantially injure other interested parties.'" *Mylan Pharm.*, __ F. Supp.2d __, 2012 WL 1388256, at *15 (quoting *Chaplaincy of Full Gospel Churches* v. *England,* 454 F.3d 290, 297 (D.C. Cir. 2006)). Here, the balance of equities overwhelmingly favors Wheaton.

Granting preliminary injunctive relief will merely prevent Defendants from enforcing the mandate against one religious institution. This will simply preserve the *status quo* between the parties, counseling in favor of granting preliminary relief. *Cf. Sherley v. Sebelius*, 644 F.3d 388 (D.C. Cir. 2011) (reasoning that balance of equities tilted against plaintiff where preliminary injunction would "upend the *status quo*"). Defendants have already exempted a number of churches and church-related entities from the mandate, and have additionally delayed enforcement of the mandate against a broader array of religious organizations until August 2013. Preventing Defendants from enforcing the mandate against one other similarly-situated entity would therefore not "substantially injure" Defendants' interests.

Balanced against this *de minimis* injury to Defendants is the real and immediate threat to Wheaton's religious liberty and to the integrity of its faith community. Moreover, Wheaton faces the imminent prospect of either completely dropping or significantly restructuring its employee health insurance—a massive undertaking which will profoundly impact Wheaton's 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 Wheaton's First Amendment and RFRA rights. The public can have no interest in enforcement of a regulation against a religious college that coerces it to violate its 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 Espirita Beneficiente Uniao do Vegetal* v. *Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), aff'd and remanded, *O Centro*, 546 U.S. 418). 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

Wheaton asks the Court to enter a preliminary injunction against the HHS mandate in accordance with its accompanying motion and proposed order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the Court's ECF system on August 1, 2012, and was thereby electronically served on counsel for Defendants.

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