**No. 12-1380**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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WILLIAM NEWLAND, et al.,
*Plaintiffs-Appellees,*

v.

KATHLEEN SEBELIUS, et al.,
*Defendants-Appellants*.

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Appeal from the United States District Court for the District of Colorado, No. 1:12-cv-1123, Hon. John L. Kane, Presiding

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# AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

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## IDENTITY AND INTEREST OF THE AMICUS CURIAE

Amicus curiae, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to defending constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and state courts in numerous cases involving constitutional issues. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). The ACLJ has also participated as amicus curiae in numerous cases involving constitutional issues before the Supreme Court and lower federal courts. *E.g.*, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Van Orden v. Perry*, 545 U.S. 677 (2005).

The ACLJ has been active in litigation concerning the regulations at issue here, which requires many employers, under pain of penalty, to include in their employee health benefit plans coverage for all contraceptives methods, including abortion-inducing drugs, sterilization procedures, and related patient education and counseling ("the Mandate").

In particular, the ACLJ represents the plaintiffs in *O'Brien v. United States Department of Health & Human Services*, No. 12-3357 (8th Cir.), *Korte v. United States Department of Health & Human Services,* No. 12-3841 (7th Cir.), *American Pulverizer Co. v. United States Department of Health & Human Services*, No. 12-cv-3459 (W.D. Mo.), *Gilardi v. United States Department of Health & Human Services,* No. 1:13-CV-104 (D.D.C.), and *Lindsay v. United States Department of Health & Human Services*, No. 1:13-CV-1210 (N.D. Ill.), all of which are actions brought by for-profit businesses and their owners challenging the Mandate.

The ACLJ also has filed amicus curiae briefs in *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir.), and *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir.), supporting the for-profit businesses and their owners challenging the Mandate, and the ACLJ has filed amicus curiae briefs in thirteen other Mandate cases supporting the nonprofit plaintiffs. *E.g.*, *Wheaton College v. Sebelius*, Nos. 12-5273, 12-5291 (D.C. Cir.).

In addition, more than 126,000 supporters of the ACLJ have signed a petition opposing the Mandate.

As such, the ACLJ has expertise in the issues raised in this case and has an interest that may be affected by the outcome of this action, primarily because this Court's decision will be persuasive authority in *O'Brien*, *Korte*, *American Pulverizer*, *Gilardi,* and *Lindsay*.

## RULE 29 STATEMENTS REGARDING CONSENT TO FILE, AUTHORSHIP, AND FINANCIAL CONTRIBUTIONS

The parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae and its counsel made such a monetary contribution. Fed. R. App. P. 29.

## INTRODUCTION

Federal regulations enacted pursuant to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (Mar. 23, 2010) ("the Affordable Care Act") require many employers, under pain of penalty, to include in their employee health benefit plans coverage for contraceptives methods, including abortion-inducing drugs, sterilization procedures, and related patient education and counseling ("the Mandate").

There are more than forty-five ongoing federal lawsuits brought by both for-profit and non-profit employers seeking a religious exemption from the Mandate. *See* Becket Fund for Religious Liberty, *HHS Mandate Information Central*, http://www.becketfund.org/hhsinformationcentral/ (last visited Feb. 22, 2013). At present, for-profit plaintiffs are protected by injunctions preventing application of the Mandate to them in eleven cases,[1]/ while injunctive relief has been denied in three cases.[2]/

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[1]/ *Annex Medical, Inc. v. Sebelius*, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013) (granting injunction pending appeal); *Grote v. Sebelius*, 2013 U.S. App. LEXIS 2112 (7th Cir. Jan. 30, 2013) (same); *Korte v. U.S. Dep't of Health & Human Servs.*, 2012 U.S. App. LEXIS 26734 (7th Cir. Dec. 28, 2012) (same); *O'Brien v. U.S. Dep't of Health & Human Servs.*, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012) (same); *Triune Health Grp. v. U.S. Dep't of Health & Human Servs.*, No. 1:12-cv-06756, slip op. (N.D. Ill. Jan. 3, 2013) (granting preliminary injunction) (copy attached); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, 2012 U.S. Dist. LEXIS 182307 (W.D. Mo. Dec. 20, 2012) (same); *Tyndale House Publ'rs v. Sebelius*, 2012 U.S. Dist. LEXIS 163965 (D.D.C. Nov. 16, 2012) (same); *Legatus v. Sebelius*, 2012 U.S. Dist. LEXIS 156144 (E.D. Mich. Oct. 31, 2012) (same); *Newland v. Sebelius*, 2012 U.S. Dist. LEXIS 104835 (D. Colo. July 27, 2012) (same); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 2012 U.S. Dist. LEXIS 182942 (E.D. Mo. Dec. 31, 2012) (granting temporary restraining order); *Monaghan v. Sebelius*, 2012 U.S. Dist. LEXIS 182857 (E.D. Mich. Dec. 30, 2012) (same).

[2]/ *Hobby Lobby Stores v. Sebelius*, 2012 U.S. Dist. LEXIS 164843 (W.D. Okla. Nov. 19, 2012) (denying preliminary injunction), *appeal docketed*, 2012 U.S.

*(Text of footnote continues on following page.)*

The Mandate runs counter to both the Constitution and longstanding American tradition. This Nation has a long and proud tradition of accommodating the religious beliefs and practices of all its citizens, not dividing them into "approved" and "disapproved" camps at the discretion of government functionaries. *See Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952) (noting that government follows "the best of our traditions" when it "respects the religious nature of our people and accommodates the public service to their spiritual needs").

The Founding Fathers made it clear that the freedoms of religion and conscience occupy the highest rung of civil liberty protections. For example, soon after the Louisiana Territory was acquired by the United States in 1803, the French Ursuline Sisters of New Orleans wrote to

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App. LEXIS 26741 (10th Cir. Dec. 20, 2012) (denying injunction pending appeal), *and* 2012 U.S. LEXIS 9594 (Dec. 26, 2012) (Sotomayor, J., in chambers) (same); *Autocam Corp. v. Sebelius*, 2012 U.S. Dist. LEXIS 184093 (W.D. Mich. Dec. 24, 2012) (denying preliminary injunction), *appeal docketed*, 2012 U.S. App. LEXIS 26736 (6th Cir. Dec. 28, 2012) (denying injunction pending appeal); *Conestoga Wood Specialties Corp. v. Sebelius*, 2012 U.S. Dist. LEXIS 4449 (E.D. Pa. Jan. 11, 2013) (denying preliminary injunction after granting TRO), *appeal docketed*, 2013 U.S. App. LEXIS 2706 (3d Cir. Feb. 7, 2013) (denying injunction pending appeal).

President Thomas Jefferson seeking assurances that "[t]he spirit of justice which characterizes the United States of America" would allow them to continue their spiritual and corporal works of mercy.[3]/ Thomas Jefferson replied that "[t]he principles of the Constitution and government of the United States are a sure guarantee [that your religious institution] will be preserved to you sacred and inviolate, and that your institution will be permitted to govern itself according to it's [sic] own voluntary rules, without interference from the civil authority. . . ." Jefferson concluded his letter by assuring the sisters that their religious institution would receive "all the protection which my office can give it."[4]/

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[3]/ John Tracy Ellis, *Documents of American Catholic History* 184-85 (1962); RJ&L Religious Liberty Archive, *Letter from Sister Marie Theresa Farjon de St. Xavier to Thomas Jefferson*, http://www.churchstatelaw.com/historical materials/images/Sr._Marie_Therese_letter_1804.pdf (last visited Feb. 22, 2013).

[4]/ John Tracy Ellis, *Documents of American Catholic History* 185 (1962); RJ&L Religious Liberty Archive, *Letter from Thomas Jefferson to Sister Marie Theresa Farjon de St. Xavier*, http://www.churchstatelaw.com/ historicalmaterials/images/thomas_jefferson_letter_1804.pdf (last visited Feb. 22, 2013).

Six years later, in 1809, Jefferson wrote to the Society of the Methodist Episcopal Church at New London, Connecticut, and stated that "[n]o provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority."[5]/

Moreover, in a 1789 letter to the United Baptists in Virginia, President George Washington stated that he would fight against any efforts by the government to threaten religious liberties:

> If I could have entertained the slightest apprehension that the Constitution framed in the Convention, where I had the honor to preside, might possibly endanger the religious rights of any ecclesiastical Society, certainly I would never have placed my signature to it; and if I could now conceive that the general Government might ever be so administered as to render the liberty of conscience insecure, I beg you will be persuaded that no one would be more zealous than myself to establish effectual barriers against the horrors of spiritual tyranny, and every species of religious persecution.[6]/

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[5]/ Writings of Thomas Jefferson: Replies to Public Addresses: To the Society of the Methodist Episcopal Church at New London, Conn., on Feb. 4, 1809 (Monticello ed. 1904) vol. XVI, pp. 331-32.

[6]/ *The Founding Fathers & the Debate Over Religion in Revolutionary America: A History in Documents* 137–38 (Matthew L. Harris & Thomas S. Kidd, eds., Oxford U. Press 2012).

Before Jefferson and Washington made these statements—in fact, even before the Declaration of Independence was drafted in 1776—the Continental Congress passed a resolution in 1775 exempting individuals with pacifist religious convictions from military conscription:

> As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.[7]/

Thus, even when this country was in dire need of men to take up arms to fight for independence, our forefathers knew that the freedom of conscience is inviolable and must be honored. They understood that to conscript men into military service against their conscience would have undermined the very cause of liberty to which they pledged their lives, property, and sacred honor.

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[7]/ Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harvard L. Rev. 1409, 1469 (1990).

The Mandate imposes a substantial burden on individuals and organizations, including the Plaintiffs here, who firmly believe that compliance with the Mandate would cause them to violate their sincerely-held religious beliefs. In particular, based on their Catholic faith, Plaintiffs oppose the Mandate's requirement that they include coverage in their employee health plan for all contraceptive methods, including abortion-inducing drugs, sterilization procedures, and related education and counseling. DCT Doc. 19, Am. Verified Compl. at ¶¶ 2-3, 5, 27-32. The Catholic Church's longstanding moral opposition to contraception, sterilization, and abortion does not stem from a tangential, minor point of doctrine; it is a core principle of the Catholic Church that these things run contrary to fundamental religious beliefs.[8]/ Plaintiffs' position on these issues is not something that can be carved out from their religious belief system.

[8]/ *E.g.*, *Catechism of the Catholic Church*, Nos. 2270-75, 2370, 2399 (2d ed. 1997).

Plaintiffs simply ask to be permitted to run their business without having to violate their sincerely-held religious beliefs. They seek the same protection of conscience provided to other religious groups and individuals from the time of the Continental Congress. This same protection of conscience was codified in 1993 in the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.* ("RFRA"). Plaintiffs' claim under RFRA is the focus of this brief.

## SUMMARY OF THE ARGUMENT

The district court properly granted Plaintiffs' motion for a preliminary injunction. The Mandate substantially burdens Plaintiffs' religious exercise because it pressures them to violate their religious beliefs or pay significant annual penalties to stay true to their beliefs. Because the Mandate imposes a substantial burden on Plaintiffs, Defendants must establish that the Mandate furthers a compelling governmental interest, as applied to Plaintiffs, and is the least restrictive means of achieving that interest. Defendants, however, cannot satisfy that high standard of proof. This Court, accordingly, should affirm the decision of the district court.

## ARGUMENT

### I. The Mandate Substantially Burdens Plaintiffs' Religious Exercise.

Defendants are incorrect in their claim that the Mandate does not substantially burden Plaintiffs' religious exercise rights under RFRA, and this Court should affirm the district court's grant of a preliminary injunction.

#### A. Hercules is protected by RFRA.

Defendants argue that because Plaintiff Hercules Industries, Inc., ("Hercules") is a secular, for-profit entity, as opposed to a religious, non-profit organization, it cannot be a person that exercises religion under RFRA. Defs.' Br. at 14–18. Notably, Defendants ignore much of the language of RFRA itself, pointing elsewhere to support their position, *e.g.*, Title VII and the National Labor Relations Act, and case law interpreting those statutes. *Id*. RFRA's text, however, defeats their position.

RFRA states that "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). Neither here, nor anywhere else in

RFRA, are its terms limited to individuals and religious or non-profit organizations. A corporation is a "person" under RFRA, *see* 1 U.S.C. § 1, and "religious exercise" under RFRA "includes *any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A), *incorporated by* 42 U.S.C. § 2000bb-2(4) (emphasis added). Defendants ask this Court to rewrite RFRA to apply only to the exercise of a *religious person*; but RFRA clearly protects *any religious exercise* of a person, whether natural or organizational, and whether primarily religious or primarily secular.

Defendants state that when Congress passed RFRA in 1993, it did so against the "backdrop" of laws, such as Title VII, that grant religious employers certain prerogatives. Defs.' Br. at 18. But this fact *undermines* Defendants' position. Congress, well aware of this "backdrop," declined to include language in RFRA limiting it to religious or non-profit entities alone. Defendants' attempt to import language into RFRA from other statutory schemes runs counter to the maxim that a legislature's exclusion of language in a statute or statutory section is presumed to be intentional.

*See, e.g.*, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186 (1988) (courts "generally presume[] that Congress is knowledgeable about existing law pertinent to legislation it enacts"); *Elwell v. Oklahoma ex rel. Bd. of Regents of Univ. of Oklahoma*, 693 F.3d 1303, 1309 (10th Cir. 2012) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

In fact, RFRA itself provides that it "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; *see United States v. Ali*, 682 F.3d 705, 709 (8th Cir. 2012) (RFRA "*amended all federal laws* . . . to include a statutory exemption from any requirement that substantially burdens a person's exercise of religion unless that requirement is the least restrictive means to achieve a compelling government interest." (citations omitted) (emphasis added)); *see also Werner v. McCotter*, 49 F.3d 1476, 1479 (10th Cir. 1995) (noting that the RFRA's language is "broad" and that "the Act is to be applied retroactively"). In

short, and in this context, Title VII and the National Labor Relations Act must be read through the prism of RFRA, not the other way around.

The same holds true with respect to the Free Exercise Clause. Although, as Defendants note, Defs.' Br. at 15, the Free Exercise Clause "gives special solicitude to the rights of religious organizations," *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 706 (2012), that does not mean that the Free Exercise Clause (or RFRA, for that matter) *only* protects religious organizations. Although, for example, "speech on public issues . . . is entitled to special protection" under the First Amendment, *Connick v. Myers*, 461 U.S. 138, 145 (1983), this does not mean the First Amendment *only* protects speech on public issues.[9]/

No case, including *Hosanna-Tabor*, provides that a for-profit corporation cannot, as a matter of law, exercise religion. Corporations, whether for-profit or non-profit, can, and often do, engage in a plethora of

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[9]/ Similarly, the Fourteenth Amendment was adopted "with *special solicitude* for the equal protection" rights of African-Americans. *Nixon v. Condon*, 286 U.S. 73, 89 (1932) (emphasis added). But this hardly means that the Fourteenth Amendment is limited to the equal protection rights of African-Americans *alone*, as volumes of decisional law demonstrate.

quintessentially religious acts, such as tithing, donating money to charities, and conducting themselves in accordance with the moral or ethical principles or teachings of a religious faith. Hercules, for example, which is run by the Newland Plaintiffs pursuant to their Catholic faith, averages about $60,000 a year in charitable donations. DCT Doc. 19, Am. Verified Compl. at ¶¶ 28–29, 34–35. Any suggestion that the charitable giving by Hercules is anything but a religious act, would be untenable.

Moreover, there is no doubt that a business would have a *free speech* right to display a sign outside its headquarters stating "Respect the Sabbath." *See Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010) (recognizing free speech right of corporations); *Pac. Gas & Elec. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16 (1986) (same). It would make little sense to say that the same business would not have a *free exercise* right to follow this teaching and seek an exemption from a law requiring that it remain open for business on its Sabbath day.[10]/

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[10]/ *Braunfeld v. Brown*, 366 U.S. 599 (1961), is not to the contrary. That case involved Jewish merchants who brought a free exercise claim seeking

*(Text of footnote continues on following page.)*

In sum, the focus of RFRA, in addition to the Free Exercise Clause, is on *the religious exercise at issue*, not the corporate nature or for-profit status of the person engaged in the religious exercise. Hercules need not be an exclusively religious organization to assert that its religious exercise has been substantially burdened. Defendants' attempt to carve out a for-profit business exception under RFRA and the Free Exercise Clause fails.

**B. The Newland Plaintiffs are protected by RFRA.**

Defendants attempt to foreclose any RFRA claim by the Newland Plaintiffs by drawing hard and fast lines between a group health plan and its issuer, and between a business and its management that arranges for a

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to engage in business activities on Sundays when a law required businesses to be closed on that day. Importantly, the law at issue there did not require the claimants to engage in an activity prohibited by their religion, nor did it prohibit an activity mandated by their religion. The Jewish merchants simply argued that their being forced to close on Sundays gave non-Jewish merchants an economic advantage since Jewish merchants would be closed both on Saturday (because of their religion) and Sunday (because of the law). *Id.* at 608. Had the law required the merchants to work on their Sabbath, there can be little doubt the case would have turned out differently. Even still, while the Supreme Court ultimately ruled against the merchants, the Court nonetheless held that the Sunday closing law burdened their religious exercise. *Id.* at 603.

health plan. Defs.' Br. at 18–20. Defendants take these distinctions too far. While a group health plan might technically be a separate legal entity, such a plan does not will itself into existence. It can only be created through a business that arranges for the plan with its carrier. And a business does not make such decisions except through human agency, *i.e.*, through its managers, officers, and owners pursuant to the policies of the business established by these same individuals. Though a person under the law, a corporation is not a self-thinking or self-willing automaton, but thinks and acts only by and through individuals.

Here, Plaintiffs William Newland, Paul Newland, James Newland, and Christine Ketterhagen are the owners of Hercules and, together with Plaintiff Andrew Newland, manage the company pursuant to their Catholic beliefs. DCT Doc. 19, Am. Verified Compl. at ¶¶ 11, 27–28. Defendants provide no relevant support for the proposition that a business cannot be operated according to the ethics, morals, values, or religious tenets of its owners or management. The Supreme Court's decisions in *Braunfeld* and *United States v. Lee*, 455 U.S. 252 (1982), illustrate that a law

can substantially burden the religious beliefs of one engaged in commercial activity and that one does not consent to any and all violations of his religious freedom by entering the marketplace.[11]/ As the United States Court of Appeals for the Fourth Circuit has observed in a different context: "Free religious exercise would mean little if restricted to places of worship or days of observance, only to disappear the next morning at work." *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 319 (4th Cir. 2008).

This is exactly the point of the two cases by the United States Court of Appeals for the Ninth Circuit, which hold that a corporation has standing to assert the free exercise rights of its owners. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d

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[11]/ Defendants cite *Lee* for its conclusory observation that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes that are binding on others in that activity." Defs.' Br. at 21 (quoting *Lee*, 455 U.S. at 261). This statement, however, relates to the Court's holding that the tax survived strict scrutiny, *not* the issue of whether a substantial burden was present; the Court concluded that the tax did, in fact, substantially burden the employer's religious exercise. *See Lee*, 455 U.S. at 258.

610, 620 n.15 (9th Cir. 1988).[12]/ When a law or regulation forces an individual to operate his company in a way that violates his religious beliefs, his religious exercise is clearly implicated. *See Monaghan v. Sebelius*, 2012 U.S. Dist. LEXIS 182857, at *9 (E.D. Mich. Dec. 30, 2012) (noting that a corporation cannot "act (or sin) on its own"). While many owners and officers choose not to run their businesses in accordance with a set of religious beliefs, there can be no doubt that some do, such as the owners in *Stormans* and *Townley* and the owners currently challenging the Mandate.

In sum, the religious exercise rights of the Newland Plaintiffs under RFRA are directly implicated by the Mandate. As the United States Court of Appeals for the Seventh Circuit correctly recognized in granting an injunction pending appeal to *both* a business *and* its owners:

> That the Kortes operate their business in the corporate form is not dispositive of their claim. The contraception mandate applies to K &

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[12]/ Defendants' attempt to distinguish *Stormans* and *Townley* fails. Defs.' Br. at 22–23. Both cases held that a business has standing to assert the free exercise rights of its owners. Thus, because there can be no standing without injury, Defendants' position that the religious exercise of an owner or officer of an incorporated business cannot be injured at all is patently wrong.

> L Contractors as an employer of more than 50 employees, and the Kortes *would have to violate their religious beliefs to operate their company in compliance with it*.

*Korte v. U.S. Dep't of Health & Human Servs.*, 2012 U.S. App. LEXIS 26734, at *9 (7th Cir. Dec. 28, 2012) (internal citation omitted) (emphasis added). The same holds true with respect to the Newland Plaintiffs and Hercules.

**C. The issue is what the Mandate requires of Plaintiffs.**

Relying on this Court's denial of an injunction on appeal in *Hobby Lobby*, Defendants erroneously maintain that the Mandate only minimally burdens the Plaintiffs because the decision of whether to use the mandated services is made by independent third parties. Defs.' Br. at 23–25. What is principally at issue in this case, however, is Plaintiffs' objection to being forced to directly fund, arrange for, and facilitate *coverage* of the mandated services, not their *use* by third parties. The Seventh Circuit correctly stated in *Korte* that this Court's *Hobby Lobby* order "misunderstands the substance of the claim":

> The religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services.

2012 U.S. App. LEXIS 26734, at *10 (emphasis in original); *see also Tyndale House Publ'rs v. Sebelius*, 2012 U.S. Dist. LEXIS 163965, at *44 (D.D.C. Nov. 16, 2012) ("*Because it is the coverage*, not just the use, *of the contraceptives at issue to which the plaintiffs object*, it is irrelevant that the use of the contraceptives depends on the independent decisions of third parties.") (emphasis added).

The Mandate requires that Plaintiffs arrange, pay for, and provide health insurance that covers all contraceptive methods, including abortion-inducing drugs, sterilization procedures, and related education and counseling, with the threat of substantial financial penalties for non-compliance. But it is Plaintiffs' religious belief that they cannot arrange, pay for, or provide the above-referenced goods and services, consistent with their religious beliefs and principles. DCT Doc. 19, Am. Verified Compl. at ¶¶ 27–32. There cannot be a religious conflict more direct and immediate than this. *See*, *e.g.*, *Ali*, 682 F.3d at 711 (finding a substantial burden on religious exercise where the RFRA claimant refused to take an action pursuant to her religious beliefs in the face of exacting penalties);

*Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010) (interpreting the "substantial burden" test in RLUIPA, 42 U.S.C. § 2000cc-1(a), to mean "when a government . . . places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief . . . .") .

Even if the burden is characterized as indirect, which it is not, this hardly leads to a finding that Plaintiffs are not substantially burdened. The religious claimants in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Board*, 450 U.S. 707 (1981), were not forced by law to work on the Sabbath and produce armaments, and yet the Supreme Court found that their religious exercise was nonetheless substantially burdened through the denial of unemployment benefits, which *indirectly* pressured them to violate their religious beliefs. "While the compulsion may be *indirect*, the infringement upon free exercise is nonetheless *substantial*." *Thomas*, 450 U.S. at 718 (emphasis added); *see also Braunfeld*, 366 U.S. at 607 (a rule may be "constitutionally invalid even though the burden may be characterized as being only *indirect*" (emphasis added)).

Here, however, the burden imposed by the Mandate is far greater than in *Sherbert* or *Thomas*; it directly and affirmatively compels Plaintiffs to undertake actions in direct violation of their religious beliefs. The Mandate is therefore akin to a law requiring Adell Sherbert to work on her Sabbath, or Eddie Thomas to help manufacture arms, backed by the threat of ruinous penalties for non-compliance.[13]/

The substantial burden that the Mandate imposes on Plaintiffs is thus not alleviated by an employee's independent decision to make use of the mandated services. Indeed, forcing Plaintiffs to pay for a health plan that includes contraceptive services is tantamount to forcing Plaintiffs to hand out coupons to employees for free contraception paid for by Plaintiffs themselves. There is nothing circuitous, attenuated, or indirect about this

[13]/ In fact, under the rationale of Defendants, Eddie Thomas's religious exercise would not have been substantially burdened because that burden would have been attenuated by multiple independent decisions concerning where the manufactured armaments would be shipped and how they would be used by unknown individuals at some indefinite point in the future. *Thomas* eschewed this line of logic and recognized that compelling even indirect facilitation of conduct to which one morally objects may substantially burden one's religious exercise.

subsidization. But, as previously explained, whether it is characterized as a direct or indirect burden, the Mandate nonetheless imposes a substantial burden upon Plaintiffs' religious exercise.

In sum, because the Mandate requires Plaintiffs to do precisely what their religious beliefs forbid, *i.e.*, pay for a health plan that includes contraceptive services, sterilization, and counseling for the same, or incur substantial financial penalties, the Mandate imposes a substantial burden on Plaintiffs' religious exercise.

## II. Applying The Mandate To Plaintiffs Does Not Withstand Strict Scrutiny.

Because the Mandate substantially burdens the religious exercise rights of Plaintiffs, the burden shifts to Defendants to satisfy strict scrutiny. RFRA's strict scrutiny test requires "the most rigorous of scrutiny," *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993), and "is the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Defendants cannot meet that burden.

When the Supreme Court applied strict scrutiny in both *Sherbert* and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), it "looked beyond broadly

formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). It is therefore not enough for the government to describe a compelling interest in the abstract or in a categorical fashion; the government must demonstrate that the interest "would be adversely affected by granting an exemption" to the religious claimant. *Id.*

**A. The government cannot demonstrate a compelling need to apply the Mandate to Plaintiffs.**

Just two years ago, the Supreme Court described a compelling interest as a "high degree of necessity," noting that "[t]he State must specifically identify an 'actual problem' in need of solving, and the curtailment of [the asserted right] must be actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738, 2741 (2011) (citations omitted). The "[m]ere speculation of harm does not constitute a compelling state interest." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 543 (1980).

While recognizing "the general interest in promoting public health and safety," the Court has held that "invocation of such general interests, standing alone, is not enough." *O Centro*, 546 U.S. at 438. The government must demonstrate "some substantial threat to public safety, peace, or order" (or an equally compelling interest) that would be posed by exempting the claimant. *Yoder*, 406 U.S. at 230. In this context, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Sherbert*, 374 U.S. at 406. Also, "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (internal quotation marks omitted).

Here, Defendants have proffered two governmental interests in support of the Mandate: health and gender equality. 77 Fed. Reg. 8725, 8729. What radically undermines the government's claim that the Mandate is needed to address a compelling harm to its asserted interests, however, is the massive number of employees, tens of millions in fact, whose employers are not subject to the Mandate and whose health and equality interests are

left untouched by the Mandate. *See Newland v. Sebelius*, 2012 U.S. Dist. LEXIS 104835, at *23 (D. Colo. July 27, 2012); *Tyndale House Publ'rs*, 2012 U.S. Dist. LEXIS 163965, at *57–61.

For example, Defendants cannot sufficiently explain how their asserted interests can be of the highest order in this context when the Mandate does not apply to plans grandfathered under the Affordable Care Act. Grandfathered plans have a right to permanently maintain their grandfathered status (and thus to permanently ignore the Mandate). *See, e.g.*, 42 U.S.C. § 18011 ("Preservation of *right to maintain* existing coverage" (emphasis added)); 45 C.F.R. § 147.140 (same); Cong. Research Serv., RL 7-5700, *Private Health Insurance Provisions in PPACA* (May 4, 2012) ("Enrollees could continue and renew enrollment in a grandfathered plan *indefinitely*." (emphasis added)).[14]/

The district court here found, based on government estimates, that "*191 million* Americans belong to plans which may be grandfathered under the

[14]/ Even if Defendants are correct that "a majority of plans will lose their grandfathered status by 2013," Defs.' Br. at 27, that would still leave tens of millions of individuals enrolled in grandfathered plans.

[Affordable Care Act]," *Newland*, 2012 U.S. Dist. LEXIS 104835, at *4 (emphasis added), and the government has estimated that "*98 million* individuals will be enrolled in grandfathered group health plans in 2013." 75 Fed. Reg. 41726, 41732 (emphasis added). This broad exemption from the Mandate leaves appreciable damage to the government's asserted interests untouched and indicates the lack of any compelling need to apply the Mandate to Plaintiffs in violation of their consciences. *See Newland*, 2012 U.S. Dist. LEXIS 104835, at *23 ("[T]his massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs."); *Tyndale House Publ'rs*, 2012 U.S. Dist. LEXIS 163965, at *61 ("[C]onsidering the myriad of exemptions . . . the defendants have not shown a compelling interest in requiring the plaintiffs to provide the specific contraceptives to which they object."); *Am. Pulverizer*, 2012 U.S. Dist. LEXIS 182307, at *14 (explaining that the significant exemptions to the Mandate "undermine any compelling interest in applying the preventative coverage mandate to Plaintiffs").

In addition, although grandfathered plans have a right to indefinitely ignore the Mandate, they must comply with other provisions of the Affordable Care Act.[15]/ The *government's decision* to impose the Affordable Care Act's prohibition on excessive waiting periods on grandfathered plans, for example, but not require them to comply with the Mandate, indicates that the *government itself* does not think the Mandate is necessary to protect interests of the highest order. *See Lukumi*, 508 U.S. at 547.

Defendants also cannot explain how there is a compelling need to apply the Mandate to Plaintiffs when employers with fewer than fifty full-time employees (employing millions of individuals)[16]/ can avoid the Mandate entirely by not providing insurance. With respect to the interests offered in support of the Mandate, there is no principled difference between an

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[15]/ For a summary of which Affordable Care Act provisions apply to grandfathered health plans, see *Application of the New Health Reform Provisions of Part A of Title XXVII of the PHS Act to Grandfathered Plans*, http://www.dol.gov/ebsa/pdf/grandfatherregtable.pdf (last visited Feb. 22, 2013).

[16]/ More than twenty million individuals are employed by firms with fewer than twenty employees. U.S. Census Bureau, *Statistics about Business Size (including Small Business) from the U.S. Census Bureau*, http://www.census.gov/ econ/smallbus.html (last visited Feb. 22, 2013).

employer with fifty or more full-time employees that is subject to the Mandate, such as Hercules, and an employer with forty-nine full-time employees that can avoid the Mandate without penalty by not providing an employee health plan. This further illustrates that the Mandate is not a necessary means of protecting any compelling governmental interest. *See O Centro*, 546 U.S. at 432-37 (granting relief under RFRA to a church to allow its approximately 130 members to use a Schedule I drug in their religious ceremonies because the government allowed hundreds of thousands of Native Americans to use a different Schedule I drug in their religious ceremonies).

Furthermore, the government has failed to meet its burden to demonstrate a "high degree of necessity" for the Mandate, that there is "an 'actual problem' in need of solving," and that substantially burdening Plaintiffs' religious exercise is "actually necessary to the solution." *Brown*, 131 S. Ct. at 2738, 2741. For example, according to a recent study, cost is not a prohibitive factor to contraceptive access. Among women currently not using birth control, only 2.3% said it was due to birth control being "too

expensive," and among women currently using birth control, only 1.3% said they chose their particular method of birth control because it was "affordable."[17]/

Even if one assumed *arguendo* that cost was a prohibitive factor to contraceptive access, there is no evidence that substantially burdening Plaintiffs' religious exercise by enforcing the Mandate is *actually necessary* (*i.e.*, that none of the various less restrictive alternatives discussed in the next section of this brief would be sufficient). *See Brown*, 131 S. Ct. at 2738; *cf. Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) ("The Government simply has not provided sufficient justification here. If the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try.").

In sum, Defendants cannot demonstrate a compelling need to require Plaintiffs to comply with the Mandate while employers of millions of

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[17]/ Contraception in America, *Unmet Needs Survey, Executive Summary* 14 (Fig. 10), 16 (Fig. 12) (2012), http://www.contraceptioninamerica.com/downloads/Executive_Summary.pdf. (last visited Feb. 22, 2013).

individuals nationwide are exempt from the Mandate. Although health and equality are important interests in the abstract, exempting Plaintiffs from the Mandate poses no compelling threat to those interests in actuality.

**B. The Mandate is not the least restrictive means of achieving any compelling governmental interest.**

The existence of a compelling interest in the abstract does not give the government *carte blanche* to promote that interest through any regulation of its choosing particularly where, as here, a fundamental right is substantially burdened. *See, e.g., United States v. Robel*, 389 U.S. 258, 263 (1967) (noting that compelling interests "cannot be invoked as a talismanic incantation to support any [law]"). Even where, for example, an interest as compelling as the protection of children is the object of government action, "the constitutional limits on governmental action apply." *Brown*, 131 S. Ct. at 2741. If the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983).

Assuming *arguendo* that the interests proffered by Defendants were compelling in this context, the Mandate is not the least restrictive means of furthering those interests. Defendants could directly further their interest in providing free access to contraceptive services in a myriad of ways without violating Plaintiffs' consciences. Indeed, of the various ways the government could achieve its interests, it has chosen perhaps the *most burdensome* means for non-exempt employers with religious objections to contraceptive services, such as Plaintiffs.

For example, the government could (1) offer tax deductions or credits for the purchase of contraceptive services, (2) expand eligibility for already existing federal programs that provide free contraception, (3) allow citizens who pay to use contraceptives to submit receipts to the government for reimbursement, or (4) provide incentives for pharmaceutical companies that manufacture contraceptives to provide such products to pharmacies, doctor's offices, and health clinics free of charge. Each of these options would directly further Defendants' proffered interests without

substantially burdening Plaintiffs' religious exercise, and Defendants cannot prove that *all* of these options would be insufficient or unworkable.

To illustrate, the federal government already provides low-income individuals with free access to contraception through Title X and Medicaid funding. It could raise the income cap to make free contraception available to more Americans.[18]/ *Newland*, 2012 U.S. Dist. LEXIS 104835, at *26-27 ("'[T]he government already provides free contraception to women.' . . . Defendants have failed to adduce facts establishing that government provision of contraception services will necessarily entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women."); *see Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 800 (1988) (explaining that a more narrowly tailored approach to requiring fundraisers to disclose financial details during a

[18]/ In 2010, public expenditures for family planning services totaled $2.37 billion, and Title X of the Public Health Service Act, devoted specifically to supporting family planning services, contributed $228 million during this same year. Guttmacher Institute, *Facts on Publicly Funded Contraceptive Services in the United States* (May 2012), http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited Feb. 22, 2013).

solicitation would be for the State "itself [to] publish the detailed financial disclosure forms it requires professional fundraisers to file").

Even if Defendants claim these options would not be as effective as the Mandate, "a court should not assume a plausible, less restrictive alternative would be ineffective." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 824 (2000). If a less restrictive alternative would serve the government's purposes, "the legislature *must* use that alternative." *Id.* at 813 (emphasis added).

In sum, Plaintiffs have shown a substantial likelihood of success on the merits on their RFRA claim, and Defendants cannot satisfy strict scrutiny. The district court, therefore, properly granted Plaintiffs' motion for a preliminary injunction.

## CONCLUSION

For the reasons stated above, amicus curiae respectfully requests that this Court affirm the decision of the district court granting Plaintiffs' motion for a preliminary injunction.

Respectfully submitted on this 25th day of February, 2013,

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## CERTIFICATE OF COMPLIANCE WITH RULE 32

In reliance on the word court feature of the word processing system used to prepare this brief, Microsoft Word 2007, this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,875 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), which is no more than one-half the maximum length of 14,000 words authorized by Fed. R. App. P. 29(d) and 32(a)(7)(B)(i).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in Palatino Linotype 14-point font, a proportionally spaced typeface.

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## CERTIFICATE OF SERVICE

I certify that on February 25, 2013, I caused the foregoing brief and attachment to be served electronically via this Court's electronic filing system on the following counsel of record who are registered in the system:

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I also certify that on February 25, 2013, I caused seven paper copies of the foregoing brief and attachment to be sent by Federal Express, next business day delivery, to the Clerk of Court, United States Court of Appeals for the Tenth Circuit, 1823 Stout Street, Denver, Colorado 80257.

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# ATTACHMENT

# United States District Court, Northern District of Illinois

| Name of Assigned Judge or Magistrate Judge | Amy J. St. Eve | Sitting Judge if Other than Assigned Judge | |
|---|---|---|---|
| **CASE NUMBER** | 12 C 6756 | **DATE** | 1/3/2013 |
| **CASE TITLE** | Triune Health Group, Inc vs. United States Dept of Health & Human Services et al | | |

**DOCKET ENTRY TEXT**

The Court grants Plaintiffs' motion for a preliminary injunction [36].

■[ For further details see text below.]

Notices mailed by Judicial staff.

## STATEMENT

Before the Court is Plaintiffs' motion for a preliminary injunction. (R. 36, Inj. Mot.) Plaintiffs filed a memorandum of law supporting both their motion for preliminary injunction and in opposition to Defendants' motion to dismiss. (R. 37, Inj. Mem.) The Court addresses only the preliminary injunction at this time. For the following reasons, the Court grants Plaintiffs' motion.

## BACKGROUND

"Plaintiffs[] Christopher and Mary Anne Yep are ardent and faithful adherents of the Roman Catholic religion." (R. 21, Amend. Compl. ¶ 2.) The Yeps own and control Plaintiff Triune Health Group, Inc., a for-profit corporation. (*Id.* ¶¶ 3, 12.) Triune is a corporation that specializes in facilitating the re-entry of injured workers into the workforce. (*Id.* ¶ 19.)

The 2010 Patient Protection and Affordable Care Act ("the PPACA") included regulations mandating that employers include in their group health benefit plans coverage for preventative care for women that Plaintiffs deem "wholly at odds with their religious and moral values and sincere religious beliefs and sacred commitments." (*Id.* ¶ 5); *see also* 42 U.S.C. § 300gg-13(a)(4). Plaintiffs specifically believe that abortion, contraception (including abortifacients), and sterilization are "gravely wrong and sinful." (*Id.* ¶ 33.) "Plaintiffs believe that providing their employees with coverage for drugs and services that facilitate such immoral practices constitutes cooperation with evil that violates the laws of God." (*Id.* ¶ 34.) Under the PPACA's mandate, however, Triune would be required to provide a group health plan covering the full range of Food and Drug Administration approved contraceptive methods, sterilization procedures, and to provide education and counseling with respect to these matters for all women with reproductive capacity. (*Id.* ¶ 40); *see also* 42 U.S.C. § 300gg-13(a)(4); 45 C.F.R. § 147.130.

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The PPACA provides exemptions for religious employers and exempts some organizations through a "grandfathering" provision, however, Triune does not qualify for any exemption. (*Id*. ¶¶ 43-45.) Triune's health plan was due for renewal on January 1, 2013. (*Id*. ¶ 47.) According to Plaintiffs, they, therefore, must "either choose to comply with the federal mandate's requirements in violation of their religious beliefs, or pay ruinous fines that would have a crippling impact on their business and force them to shut down." (*Id*. ¶ 53.) As a result, Plaintiffs allege that the PPACA's mandate violates the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq* ("RFRA"), the First and Fifth Amendments of the United States Constitution, and the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*.

Triune's current group health plan includes coverage for contraceptives, sterilization, and abortion. (Inj. Mem. at 9.) According to Plaintiffs, this coverage is an error and contrary to what Plaintiffs want based on their religious beliefs. (*Id*.) Plaintiffs have been unable to find a group healthcare policy that comports with both the PPACA and their religious beliefs. (*Id*. at 9-10.) Plaintiffs, therefore, seek an injunction from the PPACA's mandate so that they may purchase an insurance policy that excludes coverage for drugs and services to which they object based on their religious convictions. (Amend. Compl. ¶ 48.)

## LEGAL STANDARD

"To obtain a preliminary injunction, the moving party must demonstrate a reasonable likelihood of success on the merits, no adequate remedy at law, and irreparable harm absent the injunction." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dept. Health*, 699 F.3d 962, 972 (7th Cir. 2012) (citing *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006); *Joelner v. Village of Washington Park, Ill.*, 378 F.3d 613, 619 (7th Cir. 2004)). "If the moving party makes this threshold showing, the court 'weighs the factors against one another, assessing whether the balance of harms favors the moving party or whether the harm to the nonmoving party or the public is sufficiently weighty that the injunction should be denied.'" *Alvarez*, 679 F.3d at 589 (quoting *Ezell v. City of Chi*., 651 F.3d 684, 694 (7th Cir. 2011)).

## ANALYSIS

The Seventh Circuit recently granted a preliminary injunction pending appeal in favor of a for-profit employer challenging the PPACA's preventative care mandate on the same grounds as presented here. *See Korte et al. v. Sebelius et al*., No. 12-3841 (7th Cir. Dec. 28, 2012). The plaintiffs in *Korte*, as here, challenge the PPACA under the RFRA, the First and Fifth Amendments, and the Administrative Procedure Act. Similar to Triune and the Yeps, the plaintiffs in *Korte* discovered this summer that the company's health insurance plan covered women's health services that contradict the owners' deeply-held religious beliefs, and therefore sought an injunction from the application of the PPACA in order to enroll in a conscience-compliant plan on January 1, 2013. The Seventh Circuit concluded that the *Korte* plaintiffs established a reasonable likelihood of success on the merits and irreparable harm, with the balance of harms tipping in their favor. In light of this binding precedent, the Court grants Triune's motion for a preliminary injunction.