UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF VERMONT

ALAN LYLE HOWE, Jr. ***Plaintiff*** v. SYLVIA BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury; KATHERINE ARCHULETA, in her official capacity as Director of the Office of Personnel Management; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY; and OFFICE OF PERSONNEL MANAGEMENT; VERMONT HEALTH CONNECT; DEPARTMENT OF VERMONT HEALTH ACCESS; and MARK LARSON, in his official capacity as Commissioner of Vermont Health Access, ***Defendants***	Civil Action No. 2:15-cv-6 MOTION FOR PRELIMINARY INJUNCTION ORAL ARGUMENT REQUESTED

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65 and L. Cv. R. 7, Plaintiff Alan Lyle Howe, Jr., by and through counsel, hereby move this Court to enter a preliminary injunction, and state as follows:

1. Howe requests a preliminary injunction against Defendants, ordering them not to apply or enforce against him 45 C.F.R. § 156.280(e)(ii)(3) and 42 U.S.C. § 18023(b)(1)(B)(i)(II) ("the abortion surcharge mandate"), which require Howe to directly pay for others' elective abortions; 42 U.S.C. 5000A(b)(1) ("the individual mandate"), which imposes fines on Howe because he is unable to obtain a plan through Vermont Health Connect without violating his religious convictions against paying for others' abortions, and from otherwise enforcing the Affordable Care Act ("ACA") and Access Health Connecticut so as to withhold benefits from and punish Howe because of his religious beliefs against enabling and paying for others' elective abortions.

2. In support of this motion, Howe submits an accompanying memorandum of law.

3. Howe respectfully requests a decision on this motion prior to February 15, 2015. The enrollment period for Vermont Health Connect terminates on February 15, 2015. Thus, a decision prior to that date is necessary to permit Defendants to implement any order from this Court and to permit Howe the time to make necessary health insurance decisions before the enrollment period for the 2015 year concludes.

4. If injunctive relief is not afforded in advance of February 15, 2015 Howe will be forced to choose between (a) following his conscience, foregoing health insurance in violation of his religious convictions, and suffering substantial financial penalties; and (b) directly paying for the destruction of human life in transgression of his sincerely held religious beliefs. Foregoing health insurance in order to avoid directly funding elective abortions in violation of his religious beliefs could have serious health and financial consequences for Howe.

5. As set forth in the accompanying memorandum of law, Howe is very likely to succeed on the merits of his claims under the Religious Freedom Restoration Act, 42 U.S.C. §

2000bb *et seq*. (RFRA), Chapter I, Article III of the Vermont Constitution, and the First Amendment to the U.S. Constitution. Requiring Howe to pay a separate fee used exclusively for others' elective abortions as a condition of obtaining a health insurance plan and the subsidies for such a plan to which the ACA entitles him and imposing substantial fines on him if he refuses to purchase such a plan substantially burdens his ability to exercise his religious beliefs. No compelling interest justifies these burdens on Howe's religious exercise, and other, less restrictive means of pursuing any legitimate interests are available to Defendants.

6. Without injunctive relief, Howe and the public interest will be irreparably harmed. Defendants will suffer no measurable injury if the injunction is granted, and thus the balancing of harms plainly favors Howe.

7. As factual support for this motion, Howe rests upon the Verified Complaint.

8. Howe has attempted to consult with presumed counsel for Defendants but has not received a response to these requests at the time of filing this motion. The Complaint was served via certified mail on all Defendants on January 16, 2015. On January 14, 2015 counsel for Howe emailed Jacek Pruski, an attorney with the U.S. Department of Justice who previously represented the federal defendants in *Bracy v. Burwell*, a similar case (resolved and no longer pending) in Connecticut to advise him of the filing of the complaint, the expected filing of a preliminary injunction motion, and requesting consultation concerning the preliminary injunction motion. Attorney Pruski asked to be kept in the loop as the complaints were served. Counsel for Howe asked Pruski to advise him of any other attorneys within the U.S. Department of Justice who should be consulted concerning the expected motion and, on January 15 said that he was looking into it but it could be 1-2 days before he had a response. On January 16, counsel for Howe provided a courtesy copy of the complaint via email to Pruski (for the federal defendants)

and followed up with an email on January 19, 2015 requesting the federal defendants' position concerning the motion for preliminary injunction. On January 16, 2015 Counsel for Howe also emailed a courtesy copy of the complaint to Susanne Young, Deputy Attorney General (for the state defendants) and advised her of the expected filing of a preliminary injunction motion and requested the state defendants' position. As of the time of this filing no response has been received. A copy of this motion and the accompanying memorandum of law is being sent, via email, to Attorney Pruski for federal defendants at Jacek.Pruski@usdoj.gov and Attorney Young for state defendants at susanne.young@state.vt.us

Respectfully submitted this 20th day of January, 2015.

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Lyle Howe's prior health care coverage was cancelled due to requirements of the Affordable Care Act.[1] ¶ 23 As instructed, he enrolled in a health insurance plan through Vermont Health Connect (VHC), satisfying the mandate of the Affordable Care Act (ACA). ¶ 24 But he has now learned that, because of Defendants' actions, his and every plan through VHC requires payment of an undisclosed fee used solely to pay for others' elective abortions. ¶¶ 32-39 Howe is a Christian, believes in the sanctity of human life and refuses to pay for its destruction. ¶ 19 Without relief from this court prior to February 15, 2015, Howe will be denied federal healthcare benefits to which he is entitled, will be subject to substantial fines, and will be uninsured – all due to his religious convictions against paying expressly for others' elective abortions. ¶¶ 46,68

Defendants are violating the Religious Freedom Restoration Act, the First Amendment to the U.S. Constitution, and Chapter I, Article III of the Vermont Constitution. Defendants have no valid interest, let alone a compelling one, in penalizing Howe and/or denying him access to federal health insurance benefits because of the exercise of his religious beliefs. That the ACA requires Defendants to provide a health insurance plan through VHC by 2017 that would not require him to pay a separate abortion surcharge is cold comfort in the interim, and demonstrates the lack of any compelling interest in punishing Howe now. Injunctive relief is needed.

ARGUMENT

A plaintiff seeking a temporary injunction must demonstrate 1) irreparable harm, and 2) either a) a likelihood of success on the merits or b) "sufficiently serious questions going to the merits" and hardship, on balance, to the plaintiff. *Able v. United States*, 44 F.3d 128, 130 (2d Cir. 1995). The Court must also consider the public interest. *Time Warner Cable of New York City v. Bloomberg L.P.*, 118 F.3d 917, 929 (2d Cir. 1997). "The 'serious questions' standard permits a

[1] The Verified Complaint serves as evidentiary support for this motion.

district court to grant a preliminary injunction in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunction." *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund, Ltd.*, 598 F.3d 30, 35 (2nd Cir. 2010). Howe prevails under either standard.

I. HOWE IS LIKELY TO SUCCEED ON THE MERITS.

A. Defendants Are Forbidden From Penalizing Howe for His Religious Beliefs.

RFRA subjects government burdens on religious exercise to "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)."[2] 42 U.S.C. § 2000bb(b)(1); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 431 (2006); *Jolly v. Coughlin*, 76 F.3d 468, 475 (2d Cir. 1996) (same). RFRA requires the Court to (1) "identify the religious belief in th[e] case," (2) "determine whether th[e] belief is sincere," and (3) "turn to the question of whether the government places substantial pressure on the religious believer." *Hobby Lobby Stores, Inc. v. Burwell*, 723 F.3d 1114, 1140 (10th Cir. 2013). The government then bears the burden of demonstrating that the challenged action meets strict scrutiny. *Id.*; 42 U.S.C § 2000bb-1.

1. Howe's Refusal to Pay for Others' Abortions is "Religious Exercise."

RFRA broadly defines "religious exercise" to "include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4). Refraining from morally objectionable activity is necessarily part of the exercise of religion. *See, e.g., Employment Division v. Smith*, 494 U.S. 872, 877 (1990) ("the exercise of religion' often

[2] Chapter I Article III of the Vermont Constitution has been interpreted to protect religious liberty to the same extent as RFRA. *Hunt v. Hunt*, 162 Vt. 423, 436 (we hold that Chapter I, Article 3 of the Vermont Constitution protects religious liberty to the same extent that the Religious Freedom Restoration Act restricts governmental interference with free exercise under the United States Constitution.")

involves not only belief and profession but the performance of (*or abstention from*) physical acts.") (italics added). Thus, a person exercises religion by *avoiding* work on certain days (*see Sherbert*, 374 U.S. at 399), or by refraining from sending children over a certain age to school (*see Yoder*, 406 U.S. at 208). Similarly, a person's religious convictions may compel her to refrain from facilitating others' objectionable conduct. *See, e.g., Thomas v. Review Bd.*, 450 U.S. 707, 714-16 (1981) (refusal to "produc[e] or directly aid[] in the manufacture of items used in warfare" is religious exercise). Howe's faith-grounded refusal to expressly pay for the taking of unborn life through a separate abortion payment is religious exercise.

2. The Government is Substantially Burdening Howe's Religious Exercise.

The government imposes a substantial burden on religious exercise where it exerts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 718. *See also The Roman Catholic Archdiocese of New York v. Sebelius*, 987 F.Supp. 2d 232, 2013, *10 (E.D.N.Y. Dec. 16, 2013) (A substantial burden results from government action that (1) compels a person to do something inconsistent with his religious beliefs; (2) forbids a person from doing something his religion motivates him to do; or (3) puts substantial pressure on a person to do something inconsistent with his beliefs or refrain from doing something motivated by them). The Supreme Court has recently held that where a plaintiff "sincerely believe[s] that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, … it is not for us to say that their religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2779 (2014).

Howe's existing health insurance coverage is being terminated due to the ACA. VC, ¶ 23. As a result, Howe faces burdensome fines, at least 2% of his income in 2015, increasing to 2.5% annually thereafter. VC, ¶ 46. The substantial subsidies to which he is entitled under the ACA in

order to afford a health insurance plan are unquestionably valuable benefits. Howe can obtain no other affordable coverage in Vermont off the exchange as all other available plans would be unaffordable for him. VC, ¶¶ 43-45. Howe would be ineligible for an affordability exemption, however, because there are *exchange* plans that *would* be affordable for him, VC, ¶ 45, but which require an abortion payment. *See* "How to Apply for An Exemption," at https://www.healthcare.gov/fees-exemptions/apply-for-exemption/ (last visited January 16, 2015) (applicants must show the lowest-priced bronze marketplace plan available).

The penalties imposed by the individual mandate further diminish his capacity to afford any far more costly off-exchange plan. Even if he could obtain insurance coverage off the exchange Howe would continue to be denied the benefits to which he is entitled under the ACA. In *Sherbert* the Supreme Court held that the government had "'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,'" 374 U.S. at 404, quoted in *Jolly*, 76 F.3d 468, 475 (2d Cir. 1996). Sherbert was denied unemployment compensation benefits because she turned down an available job where it would have required her to work Sundays in violation of her faith. The Court held that "the pressure to forego that practice [abstaining from Sunday work] is unmistakable." *Sherbert*, 374 U.S. at 404.

The Supreme Court has long rejected the argument that denials of government benefits were not sufficient burdens: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id. See also Thomas*, 450 U.S. at 717-18 (finding sufficient 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"), *and see Clingman v. Beaver*, 544 U.S. 581, 587 (2005) (plurality) (denial of public "benefits and privileges" due to exercise of constitutional rights is a "severe burden" subject to strict scrutiny). "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas*, 450 U.S. at 718.

Not only is Howe, like Sherbert, being denied government entitlements because he refuses to abandon a precept of his faith and pay an abortion surcharge that would facilitate abortions, he also faces punishing fines of hundreds of dollars and would still remain without health insurance after suffering *those* burdens. In *Yoder*, 406 U.S. at 208, the Supreme Court held that a $5 dollar fine on Amish parents who held a religious objection to public education for their older children violated the First Amendment. "The [law's] impact" on religious practice was "not only severe, but inescapable, for the … law affirmatively compels them, under threat of criminal sanction [the $5 fine], to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218. On top of this impact, the ACA itself caused the cancellation of Howe's existing plan to put him into this quandary in the first place. The significant fines as well as the denial of substantial benefits to which Howe is entitled due to his exercise of his religious beliefs are unquestionably substantial burdens.

3. The Government Cannot Satisfy Strict Scrutiny.

RFRA, with the "strict scrutiny test it adopted," *O Centro Espirita*, 546 U.S. at 430, imposes "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). 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 Espirita*, 546 U.S. at 423 (quoting 42 U.S.C. § 2000bb-1(b)). RFRA requires that the

compelling interest test be satisfied not with general interests, but rather with respect to "the particular claimant." *O Centro Espirita,* 546 U.S. at 430-31.

Defendants cannot propose an interest "in the abstract," but must show a compelling interest "in the circumstances of this case," 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); *O Centro Espirita,* 546 U.S. at 430–32 (RFRA's test must be satisfied "through application of the challenged law 'to the person'—the particular claimant"). A compelling interest is an interest of "the highest order," *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993). The government must "specifically identify an 'actual problem' in need of solving" and show coercing Howe is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n,* 131 S. Ct. 2729, 2738 (2011). If Defendants' "evidence is not compelling," they fail their burden. *Id.* at 2739. To be compelling, the government's evidence must show not merely a correlation but a "caus[al]" nexus between their Mandate and the grave interest it supposedly serves. *Id.* The government "bears the risk of uncertainty . . . ambiguous proof will not suffice." *Id.*

a. The Government has no compelling interest.

Defendants can assert no interest in expanding abortion access through compelled payments from Howe. The ACA forbids taxpayer subsidies from being used to pay for elective abortions. 42 U.S.C. § 18023(b)(2). No provision of the Act may be interpreted to require that abortion – whether elective or otherwise – must be covered by any plan. 42 U.S.C. § 18023(b). The ACA also authorizes states to exclude elective abortion from *every* insurance plan on the state exchange – whether operated by the state or federal government. 42 U.S.C. § 18023(a). Half of the states have done so. "Health Reform and Abortion Coverage in the Insurance Exchanges," http://www.ncsl.org/research/health/health-reform-and-abortion-coverage.aspx (last

visited 1/11/2015). Thus, unlike *Hobby Lobby* and related cases where the government claims to be expanding access, Defendants can assert no intent to compel insurance coverage of abortion.

The ACA also provides a number of exemptions for religious and other reasons from the fines Defendants would impose on Howe for his failure to obtain minimum essential coverage due to his religious convictions against facilitating abortions. The ACA exempts from these penalties members of a "recognized religious sect or division" that conscientiously objects to health insurance coverage. 26 U.S.C. §§ 5000A(d)(2)(a)(i) and (ii). Exemptions from this "shared responsibility payment" must be approved by the exchange. 42 U.S.C. § 18031(d)(4)(H). Howe's religious objection is too specific to qualify. He does not object to participating in a health insurance plan altogether and, to the contrary, believes that he *should* steward his resources to provide for his health insurance coverage. VC, ¶ 21. He objects only to facilitating abortion through such a plan. Defendants also exempt from these penalties participants in "health care sharing ministries," certain low income individuals or families, members of Indian tribes, those with shorter gaps in coverage, and persons who are certified by the exchange to have a "hardship." 26 U.S.C. §§ 5000A(e)(1-5) and 5000A(d)(2)(b)(ii). These "hardships" are granted for myriad specified reasons, but they may also be granted, on individual application, where one's "insurance plan was cancelled and you believe other Marketplace plans are unaffordable" or even where "you experienced another hardship in obtaining health insurance." https://www.healthcare.gov/fees-exemptions/exemptions-from-the-fee/ (last visited 1/11/2015). Millions may qualify for these exemptions, including many at the discretion of the exchanges.

"[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 520. The exemptions to the Mandate "fatally undermine[] the Government's broader contention

that [its law] will be 'necessarily . . . undercut'" if Howe is exempted. *O Centro Espirita*, 546 U.S. at 434. Given the frequency of exemptions from the individual mandate, any interest in prescribing or facilitating payment for abortion coverage cannot possibly be so serious to justify coercing Howe to violate his religious beliefs by compelling him to pay this abortion payment as part of any premium. *See O Centro Espirita*, 546 U.S. at 434 ("Nothing about the unique political status of the [exempted peoples] makes their members immune from the health risks the Government asserts"). Howe cannot be denied a religious exemption on the premise that Defendants can pick and choose between religious – and other - objectors. Where a law does "not preclude exceptions altogether; RFRA makes clear that it is the obligation of the courts to consider" whether such an exemption should be made. *See O Centro Espirita,* 546 U.S. at 434.

Nor is this a case like *United States v. Lee,* 455 U.S. 252 (1982), where the government could assert an interest in uniform application of the income tax system. As discussed above, Defendants' implementation of the individual mandate and the solicitation and inclusion of plans for the exchanges is anything but uniform. While *Lee* gave some leeway to "statutory schemes which are binding on others in that activity," 455 U.S. at 261, the breadth of available exemptions here demonstrates that this mandate is unlike that in *Lee*. Further, the ACA expressly permits each state to entirely exclude plans including elective abortion. 42 U.S.C. §§ 18023(a-b). Defendant Archuleta, the Director of the Office of Personnel Management, is empowered to contract for the inclusion of the multistate plan (with its abortion-free option) on any exchange. 42 U.S.C. § 18054(e). The ACA did not have to compel cancellation of Howe's plan and has been anything but "uniform" in providing some people with exemptions from cancellations. Moreover, the Defendants remain free to contract for other plans that do not include elective abortion or to otherwise remedy Howe's lack of choice of a new plan that respects his conscience

if they choose to do so.[3] Thus, unlike *Lee* where Defendants could claim no exemptions were possible and had no statutorily granted authority to eliminate the burden plaintiff claimed, 455 U.S. at 260-61, Defendants here remain free to alleviate the burden on Howe's religious exercise.

Moreover, in *O Centro Espirita* the Supreme Court explicitly cabined *Lee* to its context of a tax that was nearly universal, and the court did not allow the government to claim "that a general interest in uniformity [of drug laws] justified a substantial burden on religious exercise." *Id.* at 435. The Supreme Court had no difficulty dismissing of the claim that the uniform application of drug laws was itself a compelling interest under RFRA.

> The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rule[s] of general applicability."

546 U.S. at 436. *See also The Roman Catholic Archdiocese of New York*, 2013 WL 6579764, *16 ("[A] general interest in uniformity is not enough to show a compelling interest.").

b. <u>The Defendants Cannot Show That Punishing Howe is the Least Restrictive Means of Serving Its Interests.</u>

"[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, [the Government] may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Johnson v. City of Cincinnati*, 310 F.3d 484, 503 (6th Cir. 2002) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 343 (1971)). Strict scrutiny requires a "serious, good faith consideration of workable . . . alternatives that will achieve" the alleged interests. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). "[W]ithout some affirmative evidence that there is no less severe alternative," the Mandate cannot survive RFRA's requirements. *Johnson*, 310 F.3d at 505. Indeed, the failure to comply with this prong of

[3] Defendants might also order existing insurers on the exchange not to collect the abortion surcharge from Howe or at least exempt Howe and those like him from the individual mandate as they have exempted many others.

RFRA led to the Supreme Court enjoining the Mandate at issue in *Hobby Lobby*, 134 S. Ct. at 2780 ("HHS has not showed that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion . . . .").

Defendants fail the least restrictive means test because the government could simply require full disclosure of abortion coverage and allow those desiring abortions to pay for that coverage on their plan themselves instead of coercing other objecting policy holders or taxpayers. The Defendants could also ensure that viable insurance policies are included on each exchange that gives Howe a choice to comply with the ACA without sacrificing his religious convictions. Since all exchanges must include the multi-state plan and its option without elective abortion by 2017, this would merely require OPM to prioritize the exchanges without a plan that would not require payment of an abortion premium payment. Or, given their obligation to comply with RFRA, Defendants could allow a religious exemption from the abortion premium mandated by 45 C.F.R. § 156.280(e)(ii)(3) and 42 U.S.C. § 18023(b)(1)(B)(i)(II) in states like Vermont where all plans include elective abortion, requiring insurers not to collect the surcharge from objecting individuals. Or at a minimum, Defendants could at least exempt individuals like Howe from the individual mandate's fines, as the ACA does for some religious objectors and millions of others with financial and other "hardships," where the only plans available to them would require them to act in violation of their religious convictions.

Thus the Court's RFRA inquiry could end here: the Mandate is not the least restrictive means of furthering Defendants' interest. Other options may be more difficult to enact as a political matter. But political difficulty does not exonerate the burdens on Howe's religious beliefs, nor satisfy RFRA's strict scrutiny. RFRA requires government to use "the least restrictive means," not the least restrictive means the government wants to select. In *Riley v.*

National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988), the Supreme Court required alternative means instead of fundamental rights violations. There, North Carolina sought to curb fraud by requiring professional fundraisers to disclose during solicitations how much of the donation would go to them. 487 U.S. at 786. The Supreme Court held that the state's interest could be achieved by publishing the same disclosures itself, and by prosecuting fraud – even if these alternatives would be costly, less effective, and require restructuring the government scheme. *Id.* at 799–800. Here RFRA similarly requires full consideration of ways the government can satisfy any interests while eliminating or lessening the burden on religious exercise. Defendants burden on Howe's religious exercise fails strict scrutiny.

B. The Defendants' Actions Violate the Free Exercise Clause.

In addition to violating RFRA, the mandate that Howe pay an abortion premium or suffer fines and denial of government benefits violates the Free Exercise Clause because it is not "neutral and generally applicable." *Lukumi*, 508 U.S. 20 at 545 (citing *Smith*, 494 U.S. at 880 The mandate is therefore subject to strict scrutiny, *Lukumi*, 508 U.S. at 546, which as discussed above, it cannot meet.[4] The abortion premium mandate is comprised by the ACA's individual mandate, the Defendants' choice of plans for the exchange, and Defendants' requirement that all plans including elective abortion coverage must charge the abortion premium. In Vermont these act together to impose a substantial burden on Howe and others like him.

The individual mandate is not neutral on its face because it explicitly discriminates among religious adherents. *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"). The individual mandate's

[4] 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").

religious exemption protects the consciences only of *certain* religious adherents. The ACA exempts from these penalties the members of a "recognized religious sect or division" that conscientiously objects to health insurance coverage in toto. 26 U.S.C. §§ 5000A(d)(2)(a)(i) and (ii). The "Application for Exemption from the Shared Responsibility Payment for Members of Recognized Religious Sects or Divisions," states it is available to a "member of an approved religious sect or division" and asks the applicant to "[t]ell us about your religious sect or division," and "[w]hen did you become a member of this religious sect or division?" See https://marketplace.cms.gov/applications-and-forms/religious-sect-exemption.pdf (last visited January 14, 2015). Defendants will eliminate the individual mandate's burden on these persons' free exercise. But because Howe is not a member of the Amish denomination and his religious objection is more specific – objecting only to paying the separate abortion payment included in his premium, not to the premium altogether – he cannot claim this religious exemption.

This mandate distinguishes between religious groups for exemptions or benefits without any discernible secular reason. *Lukumi*, 508 U.S. at 533. There is no secular purpose in limiting conscience protection to religious believers that object to paying any insurance premium while denying it to those whose objection is a more narrow, but no less sincere, objection to only paying the abortion surcharge included in the premium. The ACA thus practices religious "discriminat[ion] on its face" triggering strict scrutiny. *Lukumi*, 508 U.S. at 533.

The mandate is also subject to strict scrutiny 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. As explained above, the individual mandate exempts millions on a variety of grounds, but does not exempt Howe from even the mandated separate abortion payment due to his religious objections. In *Fraternal Order*

of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999), now Justice Alito writing for 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.

In addition to exemptions for income ("individuals who cannot afford coverage." 26 U.S.C. §§ 5000A(e)(1)), certain religious groups, and other grounds described above, the ACA also permits a "hardship" exemption that is virtually unlimited and at the discretion of Defendants. The hardship exemption, 26 U.S.C. § 5000A(e)(5), is available to:

> Any applicable individual who for any month is determined by the Secretary of Health and Human Services … to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

The ACA, 42 U.S.C. § 18031(d)(4)(H), provides no further guidance and merely assigns the responsibility of determining whether the "hardship" or any other exemption applies to the exchange. Thus, in addition to other exemptions that Defendants may grant from the individual mandate, they also have unfettered discretion to exempt anyone from the individual mandate where Defendants believe that the individual "suffered a hardship with respect to the capability to obtain coverage." 26 U.S.C. § 5000A(e)(5). While federal defendants have provided some categories of hardships that will suffice, their unlimited authority is confirmed by the continued availability of a hardship exemption where "You experienced another hardship in obtaining health insurance." *See* https://marketplace.cms.gov/applications-and-forms/hardship-exemption.pdf (last visited January 14, 2015). This built-in discretion permits Defendants to deny hardships based on religious exercise while retaining broad discretion to create exemptions for others based on an "individualized … assessment of the reasons for the relevant conduct."

This alone deprives the mandate of general applicability and subjects it to strict scrutiny. *Lukumi*, 508U.S. at 537 (quoting *Smith*, 494 U.S. at 884). Likewise, Defendants have near *carte blanche* to solicit and contract with insurance plans for the exchange despite the burden on religious exercise that those choices have for individuals like Howe where, in Vermont and a handful of other states, these choices by Defendants leave them with no choice but to violate their conscience or suffer government imposed consequences.

II. HOWE WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF INJUNCTIVE RELIEF.

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) Deprivation of rights secured by RFRA—which affords even greater protection to religious freedom than the Free Exercise Clause—also constitutes irreparable harm. *Jolly*, 76 F.3d at 482 (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"). Furthermore, Howe is currently being harmed by Defendants' actions because he must surrender his religious convictions in order to obtain the substantial benefits to which the ACA otherwise entitles him Without an injunction from this Court prior to February 15, 2015 Howe may be forced to remain without health insurance for 2015, placing his physical and economic health at great risk.

III. THE BALANCE OF EQUITIES HEAVILY FAVORS HOWE.

The balance of equities also tips heavily in favor of Howe. Howe faces the prospect of going without health insurance. His religious exercise is burdened, he is denied the subsidies to which the ACA entitles him, and he faces significant fines. Defendants may relieve these burdens entirely by contracting for either a multi-state plan or another insurance plan excluding

elective abortion to be offered on VHC. Defendants and the insurers are already required to calculate and segregate, although not reveal to the person seeking insurance or even the insured, the precise amount of the premium paid for others' abortions. If they cannot do what has been done in forty-six other states and simply place an option without an abortion premium on the exchange that permits Howe and those like him to receive coverage they could simply order that this known part of the premium on an existing plan not be charged to Howe.

IV. AN INJUNCTION IS IN THE PUBLIC INTEREST.

A preliminary injunction will serve the public interest by protecting Howe's First Amendment and RFRA rights. *New York Progress and Protection PAC v. Walsh*, 733 F.3d 483, 488 (2nd Cir. 2013) ("[S]ecuring First Amendment rights is in the public interest."). The public can have no interest in enforcement of government mandates compelling citizens to pay for elective abortions in violation of their rights under RFRA and the First Amendment. "There is a strong public interest in the free exercise of religion even where that interest may conflict with [another statutory scheme]" (*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 Espirita*, 546 U.S. 418).

CONCLUSION

For the reasons set forth above, Howe asks that this Court enter a preliminary injunction prohibiting Defendants from enforcing against him the abortion premium mandate in 45 C.F.R. § 156.280(e)(ii)(3) and 42 U.S.C. § 18023(b)(1)(B)(i)(II), imposing fines on him pursuant to 42 U.S.C. 5000A(b)(1), and otherwise forcing him to pay the abortion premium in violation of his religious conscience or suffer penalties and the denial of valuable benefits to which he is entitled.

Respectfully submitted,

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