UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF RHODE ISLAND

JOHN DOE, an individual resident of Rhode Island,

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; HEALTH SOURCE RHODE ISLAND; and ANYA RADER WALLACK, in her official capacity as Director of Health Source Rhode Island,

Defendants

Civil Action No. 1:15-cv-00022

MOTION FOR PRELIMINARY INJUNCTION

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65 and LR Cv. 7, Plaintiff John Doe, by and through counsel, hereby moves this Court to enter a preliminary injunction, and states as follows:

1. Doe 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 Doe to directly pay for others' elective abortions; 42 U.S.C. 5000A(b)(1) ("the individual mandate"), which imposes fines on Doe because he is unable to obtain a plan through Health Source Rhode Island without violating his religious convictions against paying expressly for others' abortions, and from otherwise enforcing the Affordable Care Act ("ACA") and Health Source Rhode Island so as to withhold benefits from and punish Doe because of his religious beliefs against enabling and paying for others' elective abortions.

2. Doe respectfully requests a decision on this motion prior to February 15, 2015. The enrollment period for Health Source Rhode Island 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 Doe the time to make necessary health insurance decisions before the enrollment period for the 2015 year concludes.

3. If injunctive relief is not afforded in advance of February 15, 2015 Doe 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 Doe.

4. As set forth in the accompanying memorandum of law, Doe 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), the Rhode Island Religious Freedom Restoration Act, R.I. Gen. Laws

42-80.1-2 (RIRFRA), and the First Amendment to the U.S. Constitution. Requiring Doe 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 Doe's religious exercise, and other, less restrictive means of pursuing any legitimate interests are available to Defendants.

5. Without injunctive relief, Doe 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 Doe.

6. As factual support for this motion, Doe rests upon the Verified Complaint. As legal support, Doe submits the attached Memorandum of Law.

Respectfully submitted this 21st day of January, 2015.

***Attorneys for Plaintiff*:**

/s/ Joe Larisa___________________

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*Admission *pro hac vice* pending
** *Pro hac vice* application to follow

Certificate of Service

I hereby certify that on January 22, 2014, I electronically filed the foregoing motion and the memorandum in support of this motion with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record registered to receive electronic filings. I have also served the foregoing by First Class U.S. Mail on the following:

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UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF RHODE ISLAND

JOHN DOE, an individual resident of Rhode Island, ***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; HEALTH SOURCE RHODE ISLAND; and ANYA RADER WALLACK, in her official capacity as Director of Health Source Rhode Island, ***Defendants***	Civil Action No. 1:15-cv-00022 MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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FACTUAL BACKGROUND AND INTRODUCTION

Plaintiff Doe is an HIV-positive man whose prior health care coverage was terminated due to requirements of the Affordable Care Act. VC ¶¶ 20, 22. As instructed by his prior plan when his coverage was terminated, Doe sought a health insurance plan through Health Source Rhode Island (HSRI) in order to satisfy the mandate of the Affordable Care Act (ACA) and steward his resources to protect his health. VC ¶ 24. However, Doe then learned that every plan available via HSRI requires him to pay an undisclosed fee that must be segregated and used solely to pay for others' elective abortions. VC ¶¶ 26-27. Defendants required this segregated abortion premium to be charged for every plan he could purchase through HSRI. VC ¶¶ 30, 32-37. However, Defendants do not permit its disclosure prior to enrollment; thus Doe and any other purchaser is prohibited from seeing this abortion premium in his or her bill and, even if they somehow discover it, cannot be informed of its amount. VC ¶¶ 31, 38. Mr. Doe is a devout Catholic, believes in the sanctity of human life, and refuses to pay for its destruction. VC ¶ 17. Without relief from this Court prior to February 15, 2015, Doe will be denied federal healthcare benefits to which he is entitled, will be subject to substantial fines, and will be facing HIV uninsured – all due to his sincere religious convictions against paying for others' elective abortions. VC ¶¶ 44, 68.

Defendants are violating the Federal and Rhode Island Religious Freedom Restoration Acts and the First Amendment to the U.S. Constitution. Defendants have no valid, let alone a compelling interest, in penalizing Doe and/or denying him access to federal health insurance benefits because of the exercise of his sincere religious beliefs. The ACA requires that Defendants provide a health insurance plan through HSRI by 2017 that would not require Doe to pay a separate abortion premium. However, this is a cold comfort in the interim, and further

demonstrates the lack of any compelling interest in punishing Doe now. Doe faces imminent and ongoing harm. Immediate injunctive relief is needed now.

ARGUMENT

"The purpose of a preliminary injunction is to preserve the status quo ... to prevent further injury ... thus enhancing the court's ability, if it ultimately finds for the movant, to minimize the harmful effects of the defendant's wrongful conduct." *CMM Cable Rep. v. Ocean Coast Properties, Inc.,* 48 F.3d 620 (1st Cir.1995). "In assessing whether to grant or to deny a preliminary injunction, a district court must address four considerations: "(1) the plaintiff's likelihood of success on the merits; (2) the potential for irreparable harm in the absence of an injunction; (3) whether issuing an injunction will burden the defendants less than denying an injunction would burden the plaintiffs; and (4) the effect, if any, on the public interest." *Thayer v. City of Worcester*, 755 F.3d 60, 66-67 (1st Cir. 2014), *citing Gonzalez–Droz v. Gonzalez–Colon,* 573 F.3d 75, 79 (1st Cir.2009). The First Circuit has "recognized the first two factors, likelihood of success and of irreparable harm, as 'the most important' in the calculus." *Bruns v. Mayhew,* 750 F.3d 61, 65 (1st Cir. 2014), quoting *González–Droz,* 573 F.3d at 79. The Court should issue an injunction because Doe is very likely to prevail on the merits, and faces serious harm without this Court's intervention. In addition Defendants will not be burdened by an injunction, and the public interest favors protecting Doe's religious freedom.

I. DOE IS LIKELY TO SUCCEED ON THE MERITS.

A. The Federal and Rhode Island RFRAs Prohibit Penalizing Doe for His Religious Beliefs.

Congress enacted The Religious Freedom Restoration Act to subject 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)." 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.*); *Triplett v. Comm'r, New Hampshire Dep't of Corr*, 1996 WL 934511 (D.N.H. Feb. 27, 1996) (unpublished) ("RFRA 'requires courts to apply the law as set forth in [*Sherbert* and *Yoder*].") (quotations omitted).

The initial inquiry under 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). If there is such substantial pressure, the government then bears the burden of demonstrating that the challenged action meets strict scrutiny. *Id.*; 42 U.S.C § 2000bb-1.

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)). Once a plaintiff demonstrates a substantial burden on his religious exercise, RFRA requires that the compelling interest test be satisfied not generically by citing any general interests, but rather with respect to "the particular claimant." *O Centro Espirita,* 546 U.S. at 430-31.[1]

The Rhode Island RFRA is nearly identical to the federal RFRA and, with respect to the Rhode Island Defendants, is at least as protective of Plaintiff Doe's religious freedom as is its federal counterpart.[2] R.I. Gen. Laws 42-80.1-2, *et seq*. (prohibiting any "governmental authority"

[1] The government's burden to satisfy strict scrutiny under RFRA is 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)).

[2] While references to "RFRA" herein apply specifically to the Federal RFRA, the arguments apply also to the Rhode Island RFRA.

from "restrict[ing]" an individual's religious liberty unless by a "rule of general applicability," not intentionally discriminating against or between religions, and where "the governmental authority proves that application of the restriction to the person is essential to further a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest.")

1. <u>Doe's Refusal to Pay for Others' Abortions is "Religious Exercise."</u>

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).

Refraining from morally objectionable activity is a necessary part of the exercise of religion. *See, e.g., Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (explaining that under the Free Exercise Clause – and thus the test for violations of religious exercise that RFRA restored – "'the exercise of religion' often 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 Wisconsin v. Yoder,* 406 U.S. 205, 208 (1972)). *See* 42 U.S.C. § 2000bb(b)(1) (incorporating analyses in *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 that it is an exercise of religion to refuse to "produc[e] or directly aid[] in the manufacture of items used in warfare").

Doe's religious beliefs require him to respect human life in the womb, preventing him from performing or having abortions, as well as using his resources to pay for others' abortions.

Enabling the destruction of human life by paying for others to do so would violate Doe's faith. Doe would not "merely" be enrolling in a health care plan that covered elective abortion. Nor would he simply be paying a premium for a variety of insured services, as he does when he pays taxes, such that traceability of his premiums to others' abortions might be uncertain. Rather, Doe's insurer would have to calculate the actuarial value of abortion coverage and charge that specific monthly amount to Doe. Doe would have to pay this – albeit undisclosed to him – amount every month in order to obtain a qualifying health plan through HSRI. This amount, known only to the insurer and included by the insurer in their overall premium, would then be segregated out by the insurer and placed in a separate account that would be used exclusively to pay for others' elective abortions. 45 C.F.R. § 156.280(e). Thus, in order to obtain coverage on HSRI and to receive the subsidies to which he is entitled under the ACA, and to avoid substantial penalties under the ACA's individual mandate, Doe must consent to pay every month a specific amount for others' elective abortions.

Doe's religious convictions prevent him from enabling the destruction of innocent human life through abortion. VC, ¶ 17. Doe speaks out in defense of human life by sharing his personal experience and subsequent regret of an abortion of his own unborn child with women and men entering abortion clinics in Rhode Island. VC, ¶ 18. To pay this abortion premium used exclusively to pay for others' abortions would violate Doe's religious convictions. VC, ¶ 28. Indeed, the ACA seems to recognize as much, ostensibly not permitting taxpayer subsidies to be used for abortions on exchange plans because this would violate those taxpayers' (including Doe's) conscience. Federal law also commonly recognizes the burden that would be thrust upon many Americans through participation in abortion, and therefore provides protections for individual conscience. 42 U.S.C. § 300a-7(b-e) (Prohibiting discrimination against individuals

because of their refusal to perform or assist in abortions); 42 U.S.C. § 238n (Coats-Snowe Amendment to Public Health Service Act. Prohibiting discrimination against individuals because of their refusal to perform or be trained in abortions); Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat 786 (Weldon Amendment. Prohibiting discrimination against any health care entity because it does not provide coverage for abortion.) Doe's refusal to pay the mandated abortion surcharge and thereby directly enable others' abortions qualifies as "religious exercise" within the meaning of RFRA.

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

The burden the Defendants are imposing on Doe's religious beliefs is substantial. 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) (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 noted in a similar context that where a RFRA plaintiff "sincerely believe[s] that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and 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). See also *Hobby Lobby*, 134 S.Ct. at 2777 (focus must be on burdened religious belief itself and not substituting the court's view for when the burden is "attenuated.")

Doe's existing health insurance coverage is being terminated due to requirements of the ACA, enforced by Defendants. VC, ¶¶ 20, 22. As a result, Doe faces substantial and burdensome fines of at least 2% of his income in 2015, increasing to 2.5% annually thereafter. VC, ¶44. The substantial subsidies to which he is entitled under the ACA in order to afford a health insurance plan are evidence that the government defendants recognize this to be true.

Doe can obtain no other affordable coverage in Rhode Island off the exchange as all other available plans would be unaffordable for him. VC, ¶¶ 41-42. Doe would be ineligible for a hardship exemption, however, because there are exchange plans that would be affordable for him, VC, ¶¶ 42-43, but which require an abortion surcharge. *See* "Application for Exemption from the Shared Responsibility Payment for Individuals who are Unable to afford Coverage and are in Certain States with a State Based Marketplace," at https://marketplace.cms.gov/applications-and-forms/affordability-sbm-exemption.pdf (last visited January 11, 2015) (Section 3 requires applicants for hardship exemption to show the lowest-priced marketplace plan available to them). Hence, Doe could afford a plan (and so cannot claim financial hardship) but it would cost him his conscience. *See The Roman Catholic Archdiocese of New York,* 987 F.Supp. 2d 232, 250 (2013) (rejecting Government's argument in the HHS contraceptive/abortifacient mandate context that burden was too attenuated, stating "this argument rests on a misunderstanding (or mischaracterization) of plaintiffs' religious objection. Plaintiffs' religious objection is not only to the use of contraceptives, but also to being required to participate in a scheme to provide such services.") .

As a result, Doe would be subject to substantial penalties, further decreasing any possibility he might have of purchasing far more expensive coverage outside HSRI. This would then leave Doe punished by substantial fines for failing to purchase minimum essential coverage,

unable to claim the hardship exemption because of the availability of marketplace plans that would require him to pay an abortion surcharge, and still without any health insurance in violation of his conviction to responsibly steward his resources for that purpose. See VC, ¶ 19.

In addition to Doe's inability to either find insurance coverage off the exchange that satisfied the individual mandate or to claim a hardship exemption, he would continue to be denied the substantial subsidies 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 v. Coughlin,* 76 F.3d 468, 475, 477 (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.

Speaking over fifty years ago, the Supreme Court 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) (Thomas, J.) (denial of public "benefits and privileges" due to exercise of constitutional rights would be a "severe burden" subject to strict scrutiny). As these cases demonstrate, "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."

Thomas, 450 U.S. at 718. *See also, The Roman Catholic Archdiocese of New York,* 987 F. Supp. 2d 232, 250 ("There is no way that a court can, or should, determine that a coerced violation of conscience is of insufficient quantum to merit constitutional protection.")

The burden on Doe is even greater. Not only is he, 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, but he, unlike Sherbert, also faces punishing fines of hundreds of dollars and would still remain without health insurance after suffering those burdens. In *Wisconsin v. Yoder,* 406 U.S. 205, 208 (1972) 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 Doe'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 Doe is entitled due to his exercise of his religious beliefs are unquestionably substantial burdens on the Doe's religious exercise.

3. The Government Cannot Satisfy Strict Scrutiny.

Defendants cannot establish that their coercion of Doe is "in furtherance of a compelling governmental interest." 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). 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), and is

implicated only by "the gravest abuses, endangering paramount interests." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Defendants cannot propose such a generalized interest "in the abstract," but must show a compelling interest "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); *O Centro Espirita*, 546 U.S. at 430–32 (RFRA's test can only be satisfied "through application of the challenged law 'to the person'—the particular claimant"); *see also Lukumi,* 508 U.S. at 546 (rejecting the assertion that protecting public health was a compelling interest "in the context of these ordinances"), *and see Jones,* 76 F.3d at 478 (under RFRA the government "bear[s] the burden of demonstrating that the decision to continue *the plaintiff's* confinement to keeplock furthers a compelling state interest."). The government must "specifically identify an 'actual problem' in need of solving" and show that coercing Doe 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. <u>The Government has no compelling interest.</u>

No interest, let alone a compelling one, is served by Defendants' coercion of Doe. Defendants cannot assert any interest in expanding abortion access through compelled surcharges from Doe for all HSRI plans. First, any notion of a compelling interest in a compelled surcharge is belied by the fact that the ACA itself requires a multistate plan, including an option without such a surcharge, by 2017. Further, there is no compelling interest in mandating abortion

coverage as the ACA itself forbids any taxpayer subsidies from being used to pay for elective abortions. 42 U.S.C. § 18023(b)(2). It also states that no provision of the Act should 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). Approximately half of the states have done so. "Health Reform and Abortion Coverage in the Insurance Exchanges," available at http://www.ncsl.org/research/health/health-reform-and-abortion-coverage.aspx (last visited 1/11/2015) (compiling state laws opting out of abortion coverage on their exchanges).

Rhode Island likewise has no state law mandating elective abortion coverage by insurers. Thus, unlike the HHS "contraceptive mandate" context where the Federal Defendants claim to be expanding access to contraceptives – including some drugs that can end embryonic human life – Defendants cannot make that claim here where neither the federal nor state governments have any avowed intent to compel insurance coverage of abortion.

The ACA also provides a number of exemptions for religious and other reasons, none of which would apply to Doe, from the fines Defendants would impose on Doe for his failure to obtain minimum essential coverage due to his religious convictions against facilitating abortions. The ACA exempts from these penalties the 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).[3] Exemptions from this "shared responsibility payment" must be approved by the exchange. 42 U.S.C. § 18031(d)(4)(H). Doe does not qualify for this exemption because his religious objection is too specific. He does not object to participating in a health insurance plan altogether

[3] Participants in a "health care sharing ministry" are also exempt. § 5000A(d)(2)(b)(ii).

and, to the contrary, believes that he *should* steward his resources to provide for his health insurance coverage. VC, ¶ 19. He objects only to facilitating abortion through such a plan.

The Defendants also exempt from these penalties 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). These "hardships" are granted for myriad reasons, including homelessness, domestic violence, natural disasters and bankruptcy. But they may also be granted, on individual application, where an individual'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). Several million Americans may qualify for these exemptions, including many at the complete discretion of the exchanges. However, Doe cannot claim any exemption from these penalties.

Whatever the government's interest, the substantial exemptions provided from the mandate demonstrate that the interest cannot be compelling. "[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. Defendants cannot claim a "grave" or "paramount" interest to impose the Mandate on Doe or other religious objectors while allowing the identical "appreciable damage" for so many others. No compelling interest exists when the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Id*. at 546–47. The exemptions to the Mandate "fatally undermine[] the Government's broader contention that [its law] will be 'necessarily . . . undercut'" if Doe is exempted too. *O Centro Espirita*, 546 U.S. at 434.

Defendants' exemptions thus can have nothing to do with a determination that those persons uniquely do not "need" elective abortion coverage or that those who choose elective abortion coverage do not need the exempted individuals to help pay for those abortions, since the ACA would permit states to exclude elective abortion coverage from every plan in the nation and the ACA prohibits taxpayer funds from paying for them. Hence any interest in prescribing or facilitating payment for abortion coverage cannot possibly be "paramount" or "grave" enough to justify coercing Doe to violate his religious beliefs. *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"). Under RFRA, Doe cannot be denied a religious exemption on the premise that Defendants can pick and choose between religious – and other - objectors. *See O Centro Espirita*, 546 U.S. at 434 (since the law does "not preclude exceptions altogether; RFRA makes clear that it is the obligation of the courts to consider" other exemptions).

Nor is this a case like *Lee* where the government could assert an interest in uniform application of the income tax system. *United States v. Lee,* 455 U.S. 252 (1982). Defendants' implementation of the individual mandate and the solicitation and inclusion of plans for the exchanges is anything but uniform. As discussed above, the federal government has created numerous exemptions from the mandate, including a limited religious exemption and a "hardship" exemption. It is the responsibility of HSRI to evaluate and approve most of these exemptions. 42 U.S.C. § 18031(d)(4)(H). A law permitting millions of exemptions, including through the virtually unlimited "hardship" exemption, is not uniform. While *Lee* gave some leeway to "statutory schemes which are binding on others in that activity," 455 U.S. at 261, the individual mandate is not "binding on others in th[e] activity" of declining health insurance. The

income tax in *Lee* contained only a small exemption for some Amish, a model of consistency compared to the Defendants' implementation of the ACA.

Nor is there any uniform policy on the inclusion of elective abortion in insurance plans on the exchanges. The ACA doesn't mandate abortion coverage, but rather 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, has freedom to contract for the inclusion of the multistate plan in any exchange so long as the benchmark number of exchanges is met for each year. 42 U.S.C. § 18054(e). The ACA did not have to compel cancellation of Doe's plan and has been anything but "uniform" in providing some people with exemptions from cancellations. But even so, Defendants remain free to contract for other plans that do not include elective abortion or to otherwise remedy Doe's lack of choice of a new plan that respects his conscience if they choose to do so. And Rhode Island law does not mandate or prohibit abortion coverage by insurance plans.

Thus, this is not a case like *Lee* where plaintiffs sought relief from a uniform program of taxation and Defendants had no statutorily granted authority to eliminate the burden plaintiff claimed. 455 U.S. at 260-61. Here, Defendants remain free to alleviate the burden on Doe's religious exercise by including a multi-state or other health insurance option without elective abortion coverage on HSRI that would permit Doe to purchase a qualified health program on the exchange[4] – allowing him to avoid the individual mandate penalties and receive the subsidies to which he is entitled under the ACA. What the ACA requires them to do by 2017, RFRA and the RIRFRA require them to do immediately – or otherwise accommodate Doe and those like him.

[4] This is not intended to limit the potential ways in which Defendants could alleviate or reduce the burden on Doe's religious exercise. Defendants might also simply order existing insurers on the exchange not to collect the abortion surcharge from Doe or at least exempt Doe and those like him from the individual mandate as they have exempted so many others.

Moreover, the Supreme Court has also been particularly skeptical of arguments that bureaucratic uniformity is a sufficient interest to overcome RFRA claims. *O Centro Espirita* 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 the claim that the uniform application of drug laws was itself a sufficient interest to outweigh the substantial burden on religious exercise.

> 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, 987 F. Supp. 2d 232 (*2013), ("The Supreme Court has made clear that a general interest in uniformity is not enough to show a compelling interest."). *Lee*'s universal tax is not comparable to the individual mandate and its exceptions or the case-by-case contract authority granted to Defendant Archuleta and HSRI in selecting and soliciting exchange plans.

The law upheld in *Lee* was a tax to raise government funding. *Lee* ruled that if exemptions were allowed "[t]he tax system could not function." 455 U.S. at 260. But the United States and the State of Rhode Island have functioned for over 200 years without a mandate compelling Doe or anyone else to pay for others' elective abortions through their health insurance programs. Under the existing ACA, many exchanges in states currently operate without imposing the abortion surcharge at all, much less imposing it in all plans. In fact in Rhode Island itself, as of 2017, the ACA will require that there be an exchange plan available that does not cover elective abortions and therefore does not include the abortion surcharge for

which Doe is currently being penalized because he objects to its payment. The government therefore cannot take the position that allowing Doe a no-abortion-surcharge option now would contradict some kind of interest in requiring that all exchange plan participants pay abortion surcharges. There is simply nothing inherent about the ACA or exchanges that requires abortion surcharges for all plans and participants.

Moreover, Defendants' management of the exchange and implementation of the ACA and its mandates are not a "government program," as discussed in *Lee*, the operation of which would be contradicted by a RFRA exemption. It is not a program for funding government at all—Defendants' abortion premium would direct Doe's money not to the government but to elective abortions of other private citizens. This mandate is private, not governmental, and is not needed to sustain government revenue. The very point of the segregation of funds here is that the government has decided *not* to subsidize elective abortions from taxpayer funds—but instead to conscript all others, including those with a religious objection, to do it for other citizens.

Lee also does not apply the test applicable under RFRA. *Lee* was a precursor to *Smith*, which expanded on *Lee* to adopt the standard that RFRA affirmatively rejected. RFRA specifies that it is codifying its test "as set forth in *Sherbert*, 374 U.S. 398 and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb. RFRA omits *Lee* from this list. *Lee* itself never says it is requiring a "compelling interest" or "least restrictive means." But *Sherbert* and *Yoder did* apply RFRA's test. *Sherbert* involved a plaintiff's bid for financial gain, despite the government's generally applicable law. As scholars note:

> The standard thus incorporated [by RFRA] is a highly protective one. . . . The cases incorporated by Congress explain "compelling" with superlatives: "paramount," "gravest," and "highest." Even these interests are sufficient only if they are "not otherwise served," if "no alternative forms of regulation would combat such abuses". . . .

Douglas Laycock and Oliver S. Thomas, "Interpreting the Religious Freedom Restoration Act," 73 TEX. L. REV. 209, 224 (1994). The Supreme Court itself recognized that RFRA's compelling interest test added to and made more strict the scrutiny that preexisted *Employment Division v. Smith*. *Hobby Lobby*, 134 S.Ct. at 2761 n.3 ("RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions."). Defendants cannot identify any "paramount" interest under the strict scrutiny test that must be pursued by means of mandating that Doe violate his religious convictions.

b. The Government cannot show that punishing Doe for his refusal to violate his religious beliefs is the least restrictive means of furthering any interests.

In addition to being unable to show a compelling interest, the government could not possibly show that requiring Doe to pay for others' abortions in order to obtain health insurance coverage for himself, claim the benefits to which he is entitled and avoid the government's fines is "the least restrictive means of furthering" it under 42 U.S.C. 2000bb-1. The government has chosen not to subsidize abortions, ostensibly to avoid violating the conscience of taxpayers who object. But it has shifted that burden from taxpayers generally to Doe himself (and others like him) specifically. Approximately half the states have elected, pursuant to the ACA, to exclude elective abortion coverage from all insurance plans, requiring those who wish to obtain elective abortions to pay for them themselves rather than force taxpayers or other plan participants to fund their abortions in violation of their religious convictions. The availability of this option, which the ACA permits in every state and is the reality in half, shows that the government fails RFRA's least restrictive means requirement.

Further, even if Defendants desire to continue requiring all participants in plans that include elective abortion (whether or not they have a choice) to pay the abortion surcharge, Defendants could alleviate the burden on Doe's religious exercise, and that of many others like him, by simply contracting for the multi-state or another plan to be offered on HSRI that would not require Doe to pay a surcharge for abortions he does not want and objects to facilitating because of his faith. Forty-six exchanges have already done so. http://gao.gov/assets/670/665800.pdf (Page 3) (last visited January 7, 2015) (Four states, including Rhode Island, only offer plans that include elective abortion). The ability of Defendants to simply contract for such a plan is a less restrictive means of satisfying any interests that might be asserted.

Defendants bear the burden to show both of these elements—compelling interest and least restrictive means—including at the preliminary injunction stage. *O Centro Espirita*, 546 U.S. at 428–30. "[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 RFRA led to the Supreme Court enjoining application of the HHS Mandate 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 invite those desiring abortions to pay for that coverage on their plan themselves instead of coercing taxpayers or other objecting policy holders. The Defendants could also ensure that viable insurance policies are included on each exchange that gives Doe 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, 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 Rhode Island 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 Doe from the individual mandate's fines, as the ACA does for some religious objectors and millions of others, where the only plans available to them would require them to act in violation of their religious convictions. There is no essential need to coerce Doe to pay for others' elective abortions.

Thus the Court's RFRA inquiry could end here: the Mandate is not the least restrictive means of furthering Defendants' interest. The availability of many alternative methods fatally undermines Defendants' burden under RFRA.

The government cannot propose a watered-down least restrictive means test. 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. In this instance, 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. Applying strict scrutiny, the Supreme Court declared that the state's interest could be achieved by publishing the same disclosures itself online, and by prosecuting fraud. *Id.* at 799–800. Although these alternatives would be costly, less directly effective, and a restructuring of the governmental scheme, strict scrutiny demanded they be prioritized. *See id.*

Here RFRA similarly requires full consideration of other ways the government can satisfy any interests while eliminating or lessening the burden on religious exercise. "The lesson" of RFRA's pedigree of caselaw "is that the government must show something more compelling than saving money." Laycock at 224.

The Mandate substantially burdens Doe's religious exercise and Defendants fail strict scrutiny. Doe is very likely to succeed on his federal and state RFRA claims.

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

In addition to violating RFRA, the mandate that Doe 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.[5]

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[5] 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 abortion premium mandate on Doe is comprised of the ACA's individual mandate, the mandate that all plans including elective abortion coverage must charge the abortion premium, and Defendants' decisions about which plans to make available. The individual mandate which would penalize Doe for not obtaining coverage is not neutral on its face because it explicitly discriminates among religious adherents 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 individual mandate is a 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 individual 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).

The exemption protects the consciences only of *certain* religious bodies. The ACA exempts from these penalties the 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). The "Application for Exemption from the Shared Responsibility Payment for Members of Recognized Religious Sects or Divisions," available at https://marketplace.cms.gov/applications-and-forms/religious-sect-exemption.pdf (last visited January 14, 2015), states that 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?" It is available to certain Amish groups whose religious beliefs would be burdened by

"acceptance of the benefits of any private or public insurance…." *Id.* For those persons, the Defendants will eliminate the burden of the individual mandate. However, because Doe is Catholic, not Amish, and his religious objection is more specific – objecting only to facilitating abortion through his premiums, not to participation in insurance altogether – he cannot claim this religious exemption.

This mandate openly does what *Lukumi* says a neutral law cannot do: distinguish between religious groups for exemptions or benefits without any discernible secular reason. *Lukumi*, 508 U.S. at 533. There is no conceivable secular purpose in limiting conscience protection to religious believers that object to all insurance instead of those whose objection is a more narrow, but no less sincere, objection to only paying the abortion surcharge. The ACA thus practices religious "discriminat[ion] on its face" and therefore triggers strict scrutiny. *Lukumi*, 508 U.S. at 533.

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. As explained above, the individual mandate exempts millions of Americans on a variety of grounds, including mere assertion of a "hardship," but does not exempt Doe from even the abortion surcharge 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." *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); *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).

In addition to exemptions for income, 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 ACA hardship exemption from the individual mandate is not limited to ability to pay. It is in addition to numerous other exemptions, including one for "individuals who cannot afford coverage." 26 U.S.C. §§ 5000A(e)(1) (exempting those whose required payment would exceed 8% of their income). The hardship exemption states:

> Any applicable individual who for any month is determined by the Secretary of Health and Human Services under [42 U.S.C. § 18031(d)(4)(H)] to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

26 U.S.C. § 5000A(e)(5). 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 means that while Doe's religious convictions do not qualify for an exemption, Defendants have broad discretion to create exemptions for others 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 *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 Doe. Despite the federal penalties and subsidies at stake, the ACA permits each exchange to choose whether to exclude or permit abortion on exchange plans. 42 U.S.C. § 18023(a)(1). Defendant Archuleta, the Director of the Office of Personnel Management, has freedom to contract for the inclusion of the multistate plan, necessarily including its option without elective abortion coverage and the abortion surcharge, in any exchange so long as the benchmark number of exchanges is met for each year. 42 U.S.C. § 18054(e). HSRI is also free to contract for other plans that do not include elective abortion if it chooses to do so. These choices by Defendants to solicit and contract for plans on the exchange – and specifically the failure to make available an option that would not impose an abortion surcharge on participants whose religious exercise would foreseeably be burdened − is within Defendants' unfettered control. Numerous states have excluded abortion coverage from their exchanges altogether and many other exchanges have managed to contract for plans that exclude elective abortion. Defendants likewise have the unfettered authority to do so here. The failure to do so in Rhode Island, knowing the penalties

and denial of subsidies that Doe and others like him would face is a continuing decision that is subject to strict scrutiny.

II. DOE 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"). *See also, 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").

Furthermore, in addition to this burden on his religious exercise, Doe is currently being harmed by Defendants' actions because he cannot claim the substantial benefits to which the ACA otherwise entitles him because HSRI would require him to sacrifice his religious convictions against directly paying the abortion premium and enabling others' abortions in order to claim those benefits. Without an injunction from this Court prior to February 15, 2015 Doe 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 DOE.

The balance of equities also tips heavily in favor of Doe. Defendants have nothing preventing them from contracting for either a multi-state plan or another insurance plan excluding elective abortion to be offered on HSRI that would alleviate the substantial burden on

Doe's religious exercise. The problem is ostensibly one of timing. Doe merely seeks through HSRI what the vast majority of states already make possible and what all exchanges must have by 2017, an option that does not require coverage and premiums for elective abortion. Further, should it be necessary in the interim, there is no reason Defendants cannot simply exempt Doe from the abortion premium collected by a current exchange plan.

On the other hand, Doe faces the prospect of going without health insurance, and he and others are presently having their religious exercise burdened, being denied the subsidies to which the ACA entitles them, and face significant fines. The equities tip decidedly in Doe's favor.

IV. AN INJUNCTION IS IN THE PUBLIC INTEREST.

A preliminary injunction will serve the public interest by protecting Doe's First Amendment and RFRA rights. *Westfield High School L.I.F.E. Club v. City of Westfield,* 249 F.Supp.2d 98, 128 (D. Mass. 2003) (Protecting First Amendment rights "is *ipso facto* in the interest of the general public.") The public can have no interest in enforcement of the individual mandate and continued management of the exchange such that Defendants substantially burden the religious exercise of Doe and others. "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, Doe asks that this Court enter a preliminary injunction prohibiting Defendants from enforcing against Doe 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 managing HSRI and enforcing the ACA in such a way as to leave Doe with no choice but to pay the abortion premium in order to enroll in a plan through HSRI.

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