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 STEVEN M. COSTANTINO, in his official capacity as Commissioner of Vermont Health Access, ***Defendants***	Civil Action No. 2:15-cv-6

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Mr. Howe is presently uninsured. He wants and urgently needs to enroll in a health insurance plan in accordance with the mandate of the Affordable Care Act. Due to his limited part-time income he is entitled to substantial federal and state subsidies that make a plan affordable. Unfortunately, as a result of Defendants' enforcement of the ACA and their other actions, Howe cannot obtain such a plan in Vermont without paying a separate abortion payment allocated into a distinct account used solely to pay for others' elective abortions. Mr. Howe, as a sixty-three year old man with no dependents does not need, and for reasons of religious exercise would never use, abortion coverage. Defendants have made no accommodation despite the examples in other states where federal and state officials have worked to provide options to avoid the burdens being imposed on citizens like Mr. Howe. Howe's religious exercise is substantially burdened, resulting in injuries that are imminent and ongoing. However, these burdens could be easily lifted without interfering with any of Defendants' interests or affecting the rights of any other persons. This Court has the power to provide that relief.

Howe seeks to prevent this unnecessary and illegal violation of his rights under the Religious Freedom Restoration Act and the Free Exercise Clause of the First Amendment. Specifically, Howe seeks an injunction preventing Defendants from penalizing and denying him benefits under the Affordable Care Act because of his religious exercise in refusing to pay a separate abortion payment. Defendants may comply with this injunction in several ways, including (1) contracting for a multistate plan (as the ACA requires them to do) or other plan options (as other states have done) that do not require a separate abortion payment; or (2) exempting Howe and Howe's chosen plan issuer from the requirement of the separate abortion payment on an existing exchange plan. As explained below, Defendants are empowered to

provide these accommodations. Even if these were not feasible, however, Defendants should be enjoined from denying Howe a hardship exemption from the individual mandate penalties and from denying him tax credits and subsidies to which he is entitled under the ACA in order to offset his own healthcare costs. This injunction should remain in effect until they can satisfy the obligations of the ACA and provide a plan option that does not require a separate abortion payment through Vermont Health Connect.

Defendants' arguments are akin to the same failed arguments that they recently made in the Supreme Court in *Burwell v. Hobby Lobby Stores,* 134 S. Ct. 2751 (2014). This position is even less persuasive where an *individual* whose religious convictions are unquestioned is being fined for his religious objection to paying a separate payment expressly for elective abortions in violation of his conscience. Anticipating such a conflict the Supreme Court acknowledged then that HHS's argument would provide no RFRA protection even for those objecting to paying for "third-trimester abortions or assisted suicide. .. HHS would effectively exclude these people from full participation in the economic life of the Nation. **RFRA was enacted to prevent such an outcome."** *Hobby Lobby,* 134 S. Ct. at 2783 (emphasis added).

I. THE COURT HAS JURISDICTION TO ENTER INJUNCTIVE RELIEF.

A. Howe Has Been Injured by Defendants' Actions And Enforcement Of The ACA.

Defendants enforce the Affordable Care Act, requiring Howe to obtain "minimum essential coverage" or otherwise face substantial fines under the individual mandate. 26 U.S.C. §5000A. Verified Complaint, ¶ 46. The mandate is subject to a range of exemptions, including a broad "hardship" exemption that Defendants grant for many secular "hardships" experienced in attempting to enroll in a plan. But they do not make this exemption for Mr. Howe's hardship even though Defendants are responsible for failing to provide plan options without the separate

abortion payment. 26 U.S.C. § 5000A (d-e) (describing exemptions from individual mandate). As Federal Defendants note, the State Defendants are responsible for authorizing these exemptions from the individual mandate. Federal Opposition, 6. The ACA requires that all plans offered on the exchange that include coverage of elective abortions charge a "separate payment" to enrollees for this abortion coverage and requires this payment to be placed in a separate allocation account for the purpose of paying for those abortions. 42 U.S.C. § 18023(b)(2)(B)(i)(II). Uniquely in Vermont, state law enforced by Defendants requires all plans offered in the state to be offered via the exchange, Vermont Health Connect ("VHC"). 33 V.S.A. § 1811(b). Further, Federal Defendants – particularly Director Archuleta – is obligated by the ACA to contract for two multi-state plans on every exchange. 42 U.S.C. § 18054(a)(1). These issuers must include a plan that excludes elective abortion coverage and thus requires no elective abortion payment. 42 U.S.C. § 18054(a)(6). Moreover, other state exchanges have worked to also create a non-multi-state plan option that does not include elective abortion and thus requires no separate abortion payment. See Part II(C)(1), *infra* (recent efforts of Rhode Island exchange to add such a plan after the companion case to the instant case was filed on the same date in Rhode Island). Defendants give Howe no choice. Because he holds a sincere religious objection to paying a separate abortion payment solely used for others' elective abortions, Defendants would fine him under the individual mandate and deny him the benefits to which he is entitled under the ACA.

Howe holds a sincere religious objection to paying for others' elective abortions, particularly through a separate abortion payment exclusively used for that purpose. Verified Complaint, ¶ 19, 66. His insurance plan has now been cancelled after he "discovered that it included the previously undisclosed 'separate payment' for abortions." Verified Complaint, ¶ 47.

Federal Defendants do not dispute the sincerity of Howe's religious conviction. Federal Opposition, p. 14. Vermont Defendants also do not directly dispute the sincerity of Howe's religious beliefs. However, they spend much of their brief suggesting that perhaps Howe would refuse to pay the less than $20 per month he would have to pay for a plan even if Defendants did not require him to pay for others' elective abortions. *See e.g*., Vermont Opposition, 29. Vermont Defendants provide the Court an incomplete story of Mr. Howe's experience with Vermont Health Connect.

The fact is that Howe is one example of the many Americans, including Vermonters, who experienced major billing problems in the first year of the Affordable Care Act. See Nancy Remsen, *Billing Problems Plague Vermont Health Connect*, Burlington Free Press (Aug. 9, 2014, 6:59 AM), http://www.burlingtonfreepress.com/story/news/2014/08/08/billing-problems-plague-vermont-health-connect/13814019/. Howe's Declaration provides some of the history of his difficulties in getting an accurate bill from Vermont Health Connect. Despite multiple calls to Vermont Health Connect at the beginning of his coverage he received three insurance cards with the same incorrect start date of May 1, 2015. Howe Declaration, ¶ 3. When his dental plan could not provide basic information about the coverage under that plan he cancelled it effective June 30, 2014. Howe Dec., ¶ 4. Nevertheless, Vermont Health Connect continued to incorrectly bill him for the dental plan in his monthly bill, charging him substantially more than the amount due. Howe Dec., ¶¶ 5, 7. VHC also informed Howe that he could no longer pay online but would need to pay by mail after receiving these erroneous bills. Howe Dec, ¶_6. Howe was only able to finally straighten out his bill on January 28 when a customer service representative named "Steve" told Howe that he had found the error in the VHC billing system and was removing the dental billing from Howe's account. Howe Dec., ¶ 10. Nevertheless, despite the representative

informing Howe that a correct bill would be sent to him, Howe has never received a correct bill from VHC. Howe Dec, ¶ 11.

The billing difficulties aside, it is undisputed that Howe remains willing and able to enroll in a health insurance plan through VHC that would satisfy his obligations under the ACA and would allow him to claim the benefits of the ACA to which he is entitled in order to make that coverage affordable for him. The sole obstacle to this end is Defendants' enforcement of the ACA to require Howe to pay a separate abortion payment for others' elective abortions as a consequence of enrolling in such a plan. 42 U.S.C. § 18023(b)(2)(B)(i)(II)

While Howe has not sought preliminary injunctive relief with respect to Count IV, Vermont Defendants also insist that Vermont Health Connect and issuers were transparent about abortion coverage. But they do not dispute that the documents provided to Howe and attached as Exhibit A to the Verified Complaint did not inform him that abortion was covered in his former plan.[1] Verified Complaint, ¶ 24. Nor do Defendants dispute that the ACA permits disclosure of abortion coverage "only as part of the summary of benefits and coverage explanation, *at the time of enrollment* of such coverage." 42 U.S.C. § 18023(b)(1)(A)(3) (italics supplied); Verified Complaint, ¶ 33. It is cold comfort that if he had followed a series of links to a 56 page document available on another website he might have found there a reference to abortion coverage. Indeed, "[c]onsumers, State regulators, and other stakeholders expressed to OPM the desire to have greater transparency with regard to MSP options that exclude non-excepted abortion services," 79 Fed. Reg. 69808 (Nov. 24, 2014) (acknowledging that abortion coverage currently need only

[1] Howe was not insured under the Catamount MVP plan cited and linked by Vermont Defendants. Vermont Opposition, 18 n.6. He was enrolled in a "Catamount Blue" plan and, despite the assertions of Vermont Defendants, was not aware of any abortion coverage in this plan. In any case, Defendants do not dispute that he was not required to pay a separate abortion payment as part of his coverage in this plan. Declaration of Alan Lyle Howe, Jr., ¶ 13.

be disclosed at the time of enrollment and proposing a new "disclosure of coverage or exclusion of this benefit [elective abortion] *before a consumer enrolls*") (italics supplied). If Vermont Defendants are correct that in the 2014 plan year MVP Health offered a plan that did not include elective abortion coverage, it is noteworthy that the Government Accountability Office, like Howe, was unable to discover this fact. See U.S. Government Accountability Office, *Health Insurance Exchanges: Coverage of Non-excepted Abortion Services by Qualified Health Plans*, 1, 3 (2014), http://www.gao.gov/assets/670/665800.pdf (Vermont was one of 5 states in which every plan offered on the exchange covered elective abortions).

Moreover, Defendants do not claim that they inform plan participants or the public about the separate abortion payment requirement. Even where enrollees are able to discern that their plans include abortion coverage, only an individual with detailed knowledge of the ACA would be aware that the consequence of this coverage is that they must pay a separate abortion payment and that proceeds of this payment must be used solely for the purpose of paying for others' elective abortions. 42 U.S.C. § 18023(b)(2)(B)(i)(II). Defendants enforce regulations requiring that plan issuers and exchanges may provide "information only with respect to the total amount of the combined payments [for both elective abortion and all other insured services]." 45 C.F.R. § 156.280(f). The separate abortion payment contemplated by the ACA is not disclosed to enrollees by force of law and as administered by Defendants.

B. Howe's Injuries Are Redressable

Defendants have done nothing to eliminate the burdens their enforcement of the ACA and additional actions are imposing on Howe – and perhaps others similarly situated. Several options, some anticipated by the ACA itself, and others having no impact on any of the identified government interests are available to ensure that Howe is not penalized or denied the benefits of

the ACA because of his exercise of his religious convictions against paying directly for others' abortions. Defendants can, and under RFRA and the First Amendment must, use less restrictive means of advancing their asserted interests. As discussed in more detail below, Defendants can:

- Contract for and approve a multi-state plan on the exchange as required by the ACA and as most states have already done.
- Contract for and approve a non-multi-state plan on the exchange that would not offer elective abortion require and thus require a separate abortion payment. Other state exchanges have provided this option, including Rhode Island while the instant case has been pending.
- Exempt Howe from the separate abortion payment on an existing plan.
- At a minimum, extend the ACA's hardship exemption available to millions of others for reasons entirely at Defendants' discretion to Howe and provide him with the undisputed amount of the subsidies to which he is entitled so that he can use these benefits to manage his own health expenses until Defendants can provide an option that does not require a separate abortion payment.

These options would redress Howe's injuries in whole or in part and are each within Defendants' capacity and the Court's authority.

C. Director Constantino Is Responsible For Violations Of The First Amendment.

Vermont Defendants argue that Commissioner Constantino is not a proper party under *Ex parte Young*, 209 U.S. 123 (1908), because that case requires that "the state officer against whom a suit is brought must have some connection with the enforcement of the act that is in continued violation of federal law." Vermont Opposition, 9 (citing *Papazoni v. Vermont*, No. 5:12-CV-1, slip op. at 8 (D. Vt. May 9, 2013)). In *Papazoni*, which found no basis for *Ex parte Young* jurisdiction, the government official involved there was not "connected to any alleged violation" of federal law. This is not the case here.

Commissioner Constantino is responsible for the actions of Vermont Health Connect, 33 V.S.A. § 1801 *et seq*., which requires all individual health benefit plans offered in Vermont to be

available on the Vermont Exchange. 33 V.S.A. § 1811(b). Federal Opposition, 11 n.9. Commissioner Constantino's enforcement of this requirement excludes any possibility that Howe might seek an off-exchange plan that would not require a separate payment for abortions. Furthermore, Vermont law requires the Commissioner, prior to contracting with a health insurer to offer a qualified health benefit plan, to "determine that making the plan available through the Vermont health benefit exchange is in the best interest of individuals and qualified employers in the state." 33 V.S.A. § 1806. Commissioner Constantino is thus responsible for contracting for and/or authorizing any plans to be provided through Vermont Health Connect, including any multistate plan offering or contracting for any other plan that excludes elective abortion coverage.

Moreover, federal law assigns to Commissioner Constantino and Vermont Health Connect the responsibility of determining whether Vermont residents should be exempted from the individual mandate. 42 U.S.C. § 18031(d)(4)(H). A hardship exemption or any other exemption from the individual mandate for Howe would be subject to the discretion of Commissioner Constantino. As Vermont Defendants note, Howe is also eligible for Vermont Premium Assistance as administered by Commissioner Constantino's Department of Vermont Health Access, in addition to federal subsidies. See 33 V.S.A. § 1812. However, he cannot receive these benefits without paying the separate abortion payment. *Id.* (making these benefits available only to those receiving federal subsidies). The Commissioner therefore takes direct action "connected" to the violations of the First Amendment. *Papazoni*, at 8. He is a proper party, because his direct action results in unlawful conduct.[2] The Court has jurisdiction to enjoin

[2] Howe does not contest that Vermont Health Connect or the Department of Vermont Health Access are unnecessary parties for preliminary injunctive relief at this time.

Constantino from violating the First Amendment. See *Benjamin v. Malcolm*, 803 F.2d 46, 51-52 (2d Cir. 1986) (federal claims against state officials are not barred by *Pennhurst*).

II. HOWE IS LIKELY TO SUCCEED ON HIS RFRA CLAIM.

The sincerity of Howe's religious beliefs is not seriously in dispute. Howe objects to being compelled to pay a separate abortion payment for others' elective abortions in order to avoid penalties and receive government benefits to which he is otherwise entitled from Defendants. For the reasons in Howe's opening brief and below Defendants are violating RFRA.

A. Defendants Are Substantially Burdening Howe's Religious Beliefs.

Howe's injury stems directly from the Defendants' actions, including their enforcement of the ACA. As explained below it is Defendants' enforcement of the separate abortion payment requirement that obligates him to pay an increased amount solely into an account used for others' elective abortions in violation of his conscience. The Federal Defendants then fine Howe under the individual mandate if he refuses to enroll in a plan through Vermont Health Connect and pay this separate abortion payment because both the Federal and Vermont Defendants deny him an exemption from the individual mandate. The Vermont Defendants enforce a state law requiring all plans to be offered through Vermont Health Connect. Vermont Health Connect. 33 V.S.A. § 1811(b). Neither the Federal nor Vermont Defendants have contracted for the availability of a plan that would eliminate this burden on Howe and others like him, nor have they permitted or required insurers to exempt him from this separate abortion payment. Nor is there any dispute that because of his refusal to pay this separate abortion payment the Defendants will not provide Howe the federal and state benefits to which he is entitled to help pay for his medical costs. It belies reason to assert that Howe's injury is not "fairly attributable" to the government. Federal Opposition, 17. Thus, Federal Defendants' reliance on *Vill. of Bensenville v. F.A.A.*, 457 F.3d 52

(D.C. Cir. 2006) and *Annex Medical v. Burwell*, 769 F.3d 578, 582 (8th Cir. 2014), where relief from Plaintiff's injury was dependent upon a private party, is misplaced. While Howe would desire to not pay for any objectionable items through either his insurance premiums or tax dollars, it is Defendants' separate elective abortion payment that is particularly burdensome.

Defendants do not even attempt to distinguish the most relevant precedent, the Supreme Court's recent decision in *Hobby Lobby*, holding that requiring employers to provide employees with insurance coverage of contraceptives in violation of the employer's religious beliefs is a substantial burden. 134 S. Ct. at 2779. 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." *Id*. Indeed, the Court expressed concern that the principal expounded by HHS was not limited to "contraceptives," but could be much worse.

> "Under HHS's view, RFRA would permit the Government to require all employers to provide coverage for any medical procedure allowed by law in the jurisdiction in question—for instance, **third-trimester abortions** or assisted suicide. The owners of many closely held corporations could not in good conscience provide such coverage, and thus **HHS would effectively exclude these people from full participation in the economic life of the Nation. RFRA was enacted to prevent such an outcome.**

Hobby Lobby, 134 S. Ct. 2783 (emphasis added). Under Defendants' administration of the ACA Howe must pay a separate payment for all legal abortions, including third-trimester abortions, in order to avoid fines and receive the benefits to which he is entitled. Less than one year after this decision the Court's concern about the extent of the government's position is now reality.

As discussed below, both the majority and the dissent in *Hobby Lobby* indicated that a direct payment expressly for specific services that violated one's conscience would be *at least* as burdensome if not more than an "undifferentiated" payment for an insurance plan generally that

included objectionable services. The separate abortion payment Defendants would require of Howe is at least as burdensome as the contraceptive coverage requirement at issue in *Hobby Lobby*.

Contrary to the claims of Federal Defendants, Howe does not refuse "to use such subsidies because all products offered on Vermont Health Connect include coverage that Plaintiff finds objectionable." Federal Opposition, 18. *See Hobby Lobby*, at 2777 (rejecting argument that contraceptive mandate did not burden religious exercise because employers could terminate health insurance and pay the fine for doing so). Howe desires and needs health insurance coverage. Federal Defendants will impose substantial fines on him if he does not comply with the ACA and the meter is currently running on his fines. Howe is not making a choice to forego participating in a plan that includes some objectionable coverage, Howe objects to being compelled to pay a separate (and substantially larger) abortion payment expressly to be used for paying for elective abortions. While insurers might still choose to cover abortions and Howe's tax dollars might still be used to pay for abortions and other things to which he objects, those possibilities do not diminish the fact that the separate abortion payment requirement to which Howe objects is even more directly burdensome.

Because the separate abortion payment requirement is directly attributable to the Defendants, Federal Defendants' attempt to distinguish *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Bd.*, 450 U.S. 707 (1981) also fails. Just as *Sherbert* and *Thomas* were eligible for unemployment compensation benefits, it is undisputed that Howe would be eligible for substantial benefits under the ACA. Verified Complaint, ¶ 25; Federal Opposition, 18 n.12 and 20 (not disputing Howe's eligibility and stating, "If an individual meets the income and other criteria, he or she is eligible for and may receive subsidies.") Without these benefits he is unable

to obtain health insurance coverage. Verified Complaint, ¶ 44. But Defendants will not permit Howe to receive these benefits unless he pays the separate abortion payment they require to be used solely to pay for elective abortions. Like the Plaintiffs in *Sherbert* and *Thomas*, Defendants will not extend these government benefits to Howe unless he commits an act that violates his conscience. The burden on Howe is just as attributable to Defendants as it was in *Sherbert* and *Thomas* where private employers refused to accommodate the plaintiffs. Indeed, the burden here is even more substantial and directly attributable to the Defendants than in *Sherbert* and *Thomas* because Howe would suffer not just the denial of these government benefits, as they did, but also significant fines if he does not pay this separate abortion payment in violation of his conscience.

Despite Federal Defendants' suggestion, this principle is not limited to unemployment compensation cases. Federal Opposition, 20. *Sherbert* affirmed over fifty years ago that "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." 374 U.S. at 405. But this principle has been reaffirmed by the Supreme Court in a number of contexts. *See Clingman v. Beaver*, 544 U.S. 581, 587 (2005) (plurality) (denial of public "benefits and privileges" for exercise of First Amendment rights would be "severe burden" subject to strict scrutiny); *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712, 716-17 (1996) (government could not refuse to provide business to towing service because of owner's exercise of First Amendment rights); *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996) (government contract cannot be terminated due to exercise of First Amendment rights); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (college professor's employment could not be terminated based on exercise of First Amendment rights).

In *Speiser v. Randall*, the Supreme Court applied this principle to denials of a state tax exemption for veterans where the Plaintiff refused to swear an oath of allegiance to the state or federal governments required of everyone claiming the exemption. 357 U.S. 513 (1958). These cases, and dozens more like them, acknowledge that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Perry v. Sindermann*, 408 U.S. 564, 597 (1972).

Here Defendants not only would deny Howe his tax credits and other subsidies because of his refusal to pay the separate abortion payment, they would also impose fines on him of 2-2.5% of his annual income. Federal Opposition, 5 n.3. These are substantial burdens on Howe and would leave him not only subject to tax penalties and without government benefits but without health insurance altogether. Verified Complaint, ¶¶ 43-44.

B. Federal Defendants Cannot Serve A Compelling Interest In Preventing Taxpayers From Paying For Abortions By Compelling Howe To Pay For Them.

Federal Defendants effectively acknowledge the burden on Plaintiff's religious exercise when they cite as a compelling interest preventing federal taxpayer dollars from being used to for abortions. Federal Opposition, 20-21. Federal Defendants rely upon a compelling interest in ensuring that federal taxpayers are not coerced into violating their conscience by paying for elective abortions. "The Hyde Amendment is narrowly drawn to accomplish the purpose of ensuring that unwilling taxpayers are not forced to pay for abortions . . . ." Michael McConnell, The Selective Funding Problem: Abortions and Religious Schools, 104 Harvard L. Rev. 989, 1043 (1991). Indeed, this conscience rationale must be the basis for Defendants' position or otherwise they are asserting a tautological compelling interest in maintaining existing funding

rules. If protecting federal taxpayers, including Howe, from being compelled to pay for elective abortions through their tax payments is a compelling interest of the government, and Howe agrees that it is, compelling Howe to pay for those same abortions personally through a separate payment expressly for that purpose is necessarily a substantial burden on his own religious exercise. *See Hobby Lobby*, at 2777 n.33 (other exemptions from contraceptive mandate were created by government to "'protec[t]' these religious objectors 'from having to contract, arrange, pay, or refer for such coverage.' Those exemptions would be hard to understand if the plaintiffs' objections here were not substantial.")

Moreover, the rationale for this separate abortion payment is undermined by Defendants' actions here. The very basis for the enforcement of the separate abortion payment is that individuals who *voluntarily choose* to pay for abortion coverage would pay for that coverage rather than compelling federal taxpayers to do so against their conscience. Ostensibly, the separate abortion payment permits a "[v]oluntary choice of coverage of abortion services." 42 U.S.C. § 18023(b)(1). Unlike the vast majority of states where Federal Defendants and the state exchanges have complied with the requirements of the ACA and offered a multi-state plan or some other option that does not require a separate abortion payment, Defendants have not done so in Vermont. U.S. Government Accountability Office, http://www.gao.gov/assets/670/665800.pdf (last visited March 27, 2015) (Vermont one of five states without a plan excluding elective abortion. Since this report Connecticut and Rhode Island have added plans that do not include elective abortion coverage and its required separate payment, making Vermont 1 of 3 remaining states without such a voluntary choice). Defendants cannot claim to be advancing an interest in ensuring that voluntary choice, not compulsory violation of taxpayer conscience, is advanced by a mandate that forces Howe to personally pay for the same elective abortions.

C. There Are Less Restrictive Means Of Better Serving The Government's Interest.

Under RFRA the government must show "that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Hobby Lobby*, 134 S. Ct. at 2780 (citing 42 U.S.C. § 2000bb-1(a)-(b)). Defendants have multiple less restrictive means available to them. Indeed, Defendants' own asserted interest is not even advanced by a rule that forces Howe to pay a separate abortion payment in order not to force taxpayers to pay for those same abortions.

1. Defendants can provide a plan option that does not require a separate abortion payment.

Defendants seem to cast themselves as mere spectators in the federal program and state health exchange they run, placing the blame on the private choices of Vermont insurers. Federal Opposition, 22-23. But the ACA places them squarely on the field, not on the sidelines. The Act specifically requires Defendant Archuleta, as Director of the Office of Personnel Management, to contract for a multi-state plan on every state exchange. 42 U.S.C. § 18054(a)(1). These plans must include at least one option that does not include elective abortion coverage and thus does not require a separate abortion payment. 42 U.S.C. § 18054(a)(6). The Vermont Defendants must authorize any plan, including the multistate plan, to be sold on Vermont Health Connect. 33 V.S.A. § 1806. The multistate plan is now available in thirty-six states, according to Federal Defendants, but not Vermont. Federal Opposition, 9. Of the remaining states, many already have other available plans that exclude abortion coverage. See U.S. Government Accountability Office, p. 3 http://www.gao.gov/assets/670/665800.pdf (last visited March 27, 2015) (As of September 2014 Vermont was one of 5 states in which every plan offered on the exchange covered elective abortions, RI and CT have since added such plans).

Defendants also have the power to seek another insurer or contract with an existing insurer to provide an option for Vermonters that does not pay for others' abortions. At the same time this action was filed, a companion lawsuit was filed in Rhode Island. *Doe v. Burwell*, Case No. 1:15-cv-00022 (D. RI). The Governor of Rhode Island requested that an insurer provide a plan option that did not include elective abortion coverage. Within weeks Blue Cross had modified an existing plan to eliminate elective abortion coverage and that plan was made available on the Rhode Island exchange. See Richard Salit, *Health Source RI Now Offers Plan For Abortion Opponents*, Providence Journal (March 11, 2015, 1:00 AM), http://www.providencejournal.com/article/20150311/NEWS/150319864/13816 ("Governor Raimondo, upon taking office [in January 2015], asked HealthSource to pursue offering a plan with minimal abortion coverage after being informed that State House leaders wanted one. … Two weeks [after the companion complaint to the instant case was filed in January], HealthSource began offering 'Modified VantageBlue Direct Plan 5800/11600,' It's called 'modified' because, apart from its minimal abortion coverage, it's identical to a plan with the same name.") After *Bracy v. Burwell*, Case No. 3:14-cv-00593 (D. Ct.) was filed in Connecticut, federal and state officials successfully worked to provide other options on the Connecticut exchange leading to voluntary dismissal of that action.

Defendants relate no specific efforts they made to contract for either a multistate or a non-multistate plan on the Vermont exchange that would exclude elective abortion coverage. Nor do Defendants explain why Vermont insurers would be any more reluctant than those in Rhode Island, Connecticut, or nearly every other state, to offer a plan that does not include elective abortion coverage and thus would not require them to employ the "separate payment" requirement and accounting procedures mandated by the ACA for abortion plans. 42 U.S.C. §

18023(b)(2)(B)(i)(II). Despite their knowledge that every plan on the Vermont exchange included elective abortion coverage and thus required a separate abortion payment, Defendants have failed to contract for such a plan in Vermont, leaving Vermont residents like Howe in a worse position than residents of almost any other state.

2. Defendants can exempt Howe from the separate abortion payment.

In addition to contracting for and approving for sale on the exchange a plan that does not include elective abortion and the separate abortion payment, Federal Defendants can also exempt him from this requirement on an existing Vermont Health Connect plan.[3] Indeed, the Federal Defendants have ordered insurers to provide such an accommodation in a similar context. The ACA requires all health insurance plans (whether offered on or off an exchange) to provide coverage of "preventive care" for women. 42 U.S.C. §300gg–13(a)(4). While the ACA authorizes HHS to define the scope of "preventive care," it is silent as to any exemptions. Yet, when imposing the controversial requirement that all plans include all FDA approved contraceptives, the Federal Defendants have exercised what they view as inherent authority to exempt some religious employers from this mandate, and even to delegate the authority to create such exemptions to others. *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2763 ("HHS [not the ACA] also authorized the HRSA to establish exemptions from the contraceptive mandate for 'religious employers.'") (citing 45 CFR §147.131(a)) (authorizing HRSA to exempt religious organizations); 45 CFR §147.13(b-c) (authorizing further accommodation for other religious

[3] Federal Defendants argue that this separate abortion payment is a mandate on insurers, not Howe, even though the mandate requires the insurers to collect the separate payment from Howe. 42 U.S.C. § 18023(b)(2)(B)(i). However described the mandate requires the collection of the abortion payment from Howe in order to enroll. But under Defendants' interpretation of the separate abortion payment requirement they should be enjoined from imposing that mandate directly on any insurer with whom Howe would contract through the Vermont exchange and, if necessary, to require such insurers to accommodate Howe.

employers); 78 Fed. Reg.39874 (2013) (HHS authorizing "accommodation" for additional religious employers, including requiring insurers and third party administrators to pay for these items where the religious employer objects.). Notably, in exempting and accommodating religious employers the Federal Defendants have not even asserted that these exemptions are required by the Religious Freedom Restoration Act, the First Amendment, or any other law but have nevertheless provided these exemptions and accommodations. Thus, Federal Defendants' own practice belies any argument that they are powerless to similarly require insurers to accommodate Howe or others like him from the abortion payment requirement.

Further, regardless of Defendants inherent authority to require insurers to accommodate Howe, they are obligated to do so under both RFRA and the First Amendment. As explained in Howe's opening brief and below, both RFRA and the First Amendment require Defendants to accommodate Howe. Defendants enforce the separate abortion payment requirement, the individual mandate penalty, and Vermont's elimination of non-exchange plans, and given these realities have failed to contract for a plan on Vermont Health Connect that would permit Vermonters, like citizens of almost every other state, to comply with the individual mandate and receive the benefits of the ACA without paying a separate abortion payment for elective abortions in violation of their conscience. Thus, notwithstanding Defendants' own assertion of an inherent authority to require insurers to accommodate religious objectors from Defendants' own mandates under the ACA in the contraceptive mandate context, Defendants are independently obligated to order such an accommodation for Howe from burdens resulting from Defendants' own administration of the ACA.

Any of these approaches would fully serve the Defendants' asserted interest in complying with the Hyde Amendment and preventing taxpayers from being required to pay for others'

abortions while also fully accommodating Howe. Such an accommodation would also impose no burdens on anyone else. Were Defendants to contract for another plan for the Vermont exchange that did not include abortion coverage, Vermonters would still have all the same choices they had before except that Howe and others like him would have one (or more) additional choice. Moreover, if Defendants suspended the separate abortion payment for Howe the loss of the $1 per month abortion payment would have no impact on anyone else. 42 U.S.C. § 18023(b)(2)(D)(ii)(III). According to Vermont Defendants, 20, the $1 payment is more than is necessary to cover the elective abortions actually paid for on the plans. Gannon Declaration, ¶ 5 ("For plan year 2014, less than 4% of the funds collected in the separate account were used to provide coverage for abortion services.") If this is true then accommodating Howe and not requiring him to pay this separate abortion payment should have no impact on the insurer or any other enrollee under the plan because funds collected from participants in elective abortion coverage would be more than sufficient to cover payouts for those services. Defendants cannot show that forcing Howe to pay a separate abortion payment in order to receive a plan through the ACA is "actually necessary to the solution" of the problem of avoiding coerced taxpayer funding of abortions. *Brown v. Entm't Merchs. Ass'n,* 131 S. Ct. 2729, 2738 (2011). He is a single man with no dependents and thus both without the need of an abortion and opposed on religious grounds.

3. Defendants can exempt Howe from the individual mandate.

In addition to fully accommodating Howe as described above, Defendants could still advance their same interests in insuring that federal taxpayers are not forced to pay for abortions while alleviating at least the burden of the individual mandate on Howe. Despite Federal Defendants' claims that this mandate is "essential," Federal Opposition, 27-28, Congress and

Federal Defendants have authorized the exchanges to approve a wide scope of exemptions from this mandate. In addition to a religious exemption for members of other faiths (not Howe's – see part III below), Defendants also exempt anyone certified by the exchange to have experienced an undefined "hardship." 26 U.S.C. § 5000A(d)(2)(b)(ii). This "hardship" exemption is in addition to a separate exemption for financial hardship. "Hardships" may be approved by the exchange 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." Exemptions from the Fee for Not Having Health Coverage, https://www.healthcare.gov/fees-exemptions/exemptions-from-the-fee/ (last visited March 25, 2015). However, while Defendants make a hardship application available for thirteen specified secular reasons and on individual application for others, Defendants have indicated they will authorize no such exemption for Howe despite his objection on religious grounds. Federal Opposition, 27-28 (deeming it "essential" to the ACA to apply individual mandate to Howe). This remedy would not fully relieve Howe's burden as would providing a multistate plan option as required by the ACA or exempting him from the separate abortion payment would. But in the absence of their willingness to do for Howe what they readily do for millions of others, the Court should, at a minimum, order Howe exempt from the individual mandate.

4. Defendants can provide other short-term accommodations.

In addition to immediately accommodating Howe by providing the ACA-required multi-state plan or another plan that did not include elective abortion coverage or by exempting him from the separate abortion payment, Defendants could provide him with other accommodations until such plans are available or other accommodations are feasible. The subsidies to which Howe would be entitled were he able to enroll in a plan through Vermont Health Connect are

known amounts. Verified Complaint, ¶25; Vermont Opposition, 3. In addition to exempting Howe from the individual mandate, Defendants could provide him this already known amount to offset his own healthcare costs until Defendants make available a plan that did not require a separate abortion payment.

The availability of these less restrictive means of accomplishing the Federal Defendants' asserted interests is fatal to Defendants' position under RFRA and requires entry of preliminary injunctive relief for Howe.

D. These Less Restrictive Means Would Relieve Burdens On Howe.

While Federal Defendants are correct that no order from the Court would entirely resolve every burden on Howe's conscience, Federal Opposition, 1-16, that is not the standard. Howe does not support any use of his taxpayer funds or personal funds to pay for the destruction of innocent human life. Verified Complaint, ¶19. But this fact does not authorize Defendants to impose on him the most onerous burden available or deny him relief from the more onerous burden simply because it would not eliminate all possible injury.[4] To the contrary, Defendants' actions must be enjoined because they are not the *least* restrictive means of advancing any compelling government interest. Howe need not demonstrate that an injunction would eliminate all violations of his conscience in order to be entitled to relief from a more burdensome mandate. *See Hobby Lobby*, at 2781-82 (HHS's own accommodation for some religious nonprofit organizations was a less restrictive means of accomplishing the government's interest even if it also did not completely satisfy objections for religious employers).

[4] Such a challenge to all possible uses of an individual's funds for causes to which he objects is distinguishable from the specific separate abortion payment here. "Because of the enormous variety of government expenditures funded by tax dollars, allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos. Recognizing exemptions from the contraceptive mandate is very different." *Hobby Lobby*, at 2784.

Nor, as Federal Defendants insinuate, would relief from the separate abortion payment mean that Howe would be required to make an "undifferentiated premium payment into one account that covers all of the various services, including [elective] abortion services, covered by the plan." Federal Opposition, 16. Howe is bringing an as-applied, not a facial challenge. Should the Court order Defendants either to make a multi-state or another plan that does not include elective coverage available then his "undifferentiated" payment would not include any amount for these abortions. Further, should the Court order Defendants to require insurers to accommodate Howe by not charging him the separate abortion payment his "undifferentiated" payment for his insurance plan would not cover elective abortions. 42 U.S.C. § 18023(b)(2)(B)(ii) and 42 U.S.C. § 18023(b)(2)(C) (requiring separate allocation accounts for separate abortion payment and segregation of these accounts).

While Howe objects to being required to pay for the destruction of any human life, he deems Defendants' requirement that he pay a separate abortion payment expressly for this purpose to be particularly egregious and seeks relief from this mandate. It is not for Defendants to second guess Howe's religious objection. *Hobby Lobby*, 2779 (petitioners "sincerely believe 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"). In *Hobby Lobby,* the dissent diminished the burden on the religious employers' religious exercise by saying that instead of being required to expressly pay for or provide these drugs they would merely "direct money into *undifferentiated funds* that finance a wide variety of benefits under comprehensive health plans." *Hobby Lobby,* at 2799 (Ginsburg, J, dissenting) (italics added). The majority rejected the dissent's characterization of the ACA as creating an "undifferentiated fund" that merely included payments for contraceptives among other services,

noting an "accommodation" that required segregation of these amounts. *Hobby Lobby*, at 2784. See 45 CFR §147.131(c)(2)(ii) (accommodation requiring segregation of contraceptive payment amounts). This exchange shows that even the dissenters recognized that requiring one to pay a separate payment for services that violated his conscience would be more burdensome than an "undifferentiated" payment that included funds for those objectionable services among others.

Notably, Howe would have to pay substantially more in a separate abortion payment than he would pay for this purpose were the payment "undifferentiated." The ACA requires that the separate abortion payment be the greater of the issuer's calculated actuarial value of those abortions or $1 per enrollee per month. 42 U.S.C. § 18023(b)(2)(D)(ii)(III). Vermont Defendants contend that the actual actuarial value for elective abortion is much less than $1. Vermont Opposition, 20. Thus, Howe would be required to pay substantially more in a separate abortion payment for elective abortions than he would in an undifferentiated payment for all services including elective abortions. While it is true that Howe objects to being required to pay for such abortions at all, requiring him to pay *more* for abortions and *directly* for that purpose is a greater burden on his religious exercise than a smaller undifferentiated payment that may pay for some abortions. See Vermont Opposition, 20 ("If the [separate payment for abortion] did not exist, Mr. Howe's premiums would be collected along with the insurers' other revenues, pooled together, and a very small fraction of the pooled funds would be used to pay for abortion services.").

III. HOWE IS LIKELY TO PREVAIL ON HIS FREE EXERCISE CLAIM.

A. Defendants' Separate Abortion Payment Requirement Is Not Generally Applicable.

As reflected in the ACA's rules for "[v]oluntary choice of coverage of abortion services," 42 U.S.C. § 18023(b)(1), citizens in most states are free to not pay this separate abortion payment by enrolling in a plan that excludes elective abortion coverage. Roughly half of the

states exclude abortion coverage on their exchanges altogether. 42 U.S.C. § 18023(a)(1). Defendant Archuleta is obligated, with the additional need for approval by the state exchange, to contract for multi-state plans on each exchange. 42 U.S.C. § 18054(e). Some state exchanges have also specifically sought to contract for plans that exclude elective abortion to provide their citizens such an option. Thus, far from being a neutral law of general applicability, the separate abortion payment here is only compulsory on citizens in a few states, including Vermont. And its compulsory nature in Vermont is heightened by the fact that Vermont law has eliminated any off-exchange plans, requiring anyone seeking insurance in Vermont – as the ACA requires them to do on penalty of a significant fine – to purchase an exchange plan and pay the separate abortion payment. 42 U.S.C. § 18023(b)(2)(B)(i)(II). This is not a generally applicable mandate but one that is almost unique to Vermont residents and few others.

B. The Individual Mandate Is Not Generally Applicable.

As described above and in the opening brief, the individual mandate exempts millions of Americans on a wide range of bases. These include members of a certain "recognized religious sect or division." 26 U.S.C. § 5000A(d)(2)(a)(i)-(ii). Unfortunately, Howe's religious beliefs do not qualify because he is not a member of a "recognized religious sect or division" that objects to paying for health insurance altogether. Instead, Howe's more modest religious objection is against paying a separate abortion payment to obtain such coverage. Because Howe is not a member of a qualifying denomination he cannot claim this exemption. See Memorandum in Support of Motion for Preliminary Injunction, 16-17. Defendants make no attempt to justify extending an exemption to some religious objectors while not exempting those like Howe with a more narrow objection.

The ACA also creates a broad "hardship" exemption that applies whenever it is "determined by the Secretary of Health and Human Services [that an individual] suffered a hardship with respect to the capability to obtain coverage under a qualified health plan." 26 U.S.C. § 5000A(e)(5). The ACA then assigns the job of determining whether this or any other exemption applies to the exchange, providing no further guidance. 42 U.S.C. § 18031(d)(4)(H). Federal Defendants cite lower court cases decided prior to *Hobby Lobby* denying claims against the individual mandate. Federal Opposition, 27-29. Like the contraceptive mandate at issue in *Hobby Lobby*, the individual mandate here exempts millions of Americans for any number of reasons and thus cannot be considered generally applicable. See *Hobby Lobby*, 134 S. Ct. at 2764 ("All told, the contraceptive mandate 'presently does not apply to tens of millions of people.') (citations omitted). Moreover, the hardship exemption is a classic example of "individualized … assessment of the reasons for the relevant conduct," which the Supreme Court has held renders a law not generally applicable and thus subject to strict scrutiny. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 537 (1993), citing *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 884 (1991).

Neither the separate abortion payment requirement nor the individual mandate which compels its payment are generally applicable and they do not satisfy strict scrutiny in their application to Howe.

IV. HOWE'S INJURY IS IRREPARABLE AND AN INJUNCTION IS IN THE PUBLIC INTEREST.

Because of Defendants' administration of the ACA and other actions Howe is presently without health insurance coverage and the substantial benefits under the ACA and Vermont law to which he is entitled that would allow him to provide for his own coverage. These are imminent ongoing harms that expose Howe to real risk every day that he remains uninsured. As

explained above, the Defendants cannot penalize Howe or deny him benefits to which he is entitled because of his refusal to act in violation of his religious convictions. Defendants may serve their stated interests while still respecting Howe's rights by (1) contracting for a multistate plan or other plan options that do not require a separate abortion payment; or (2) suspend the requirement of the separate abortion payment for Howe just as they have voluntarily done for some religious employers in the contraceptive mandate context. In any event, and without burdening any other public interests Defendants can authorize a hardship exemption from the individual mandate and temporarily provide Howe the amount of the tax credits and subsidies he would receive to offset his own healthcare costs until Defendants can provide a multistate or other plan that does not require a separate abortion payment through Vermont Health Connect.

The Court is fully empowered by RFRA and the First Amendment to enter this relief and Defendants have identified no government interest or any other public interest that would be harmed by such an injunction to protect Mr. Howe. Such an injunction would not "override Congress' judgment through an injunction." Federal Opposition, 29. To the contrary, Congress anticipated that each state exchange would have a plan that did not include abortion and thus offered enrollees a "voluntary choice of abortion coverage." 42 U.S.C. § 18023(b)(1). It was not Congress's intention but Defendants' failure that has left Vermont as one of only a few states where this choice is not afforded. Congress also anticipated hardship and other exemptions from the individual mandate where necessary and empowered Defendants to extend those exemptions. Finally, Congress also passed RFRA and anticipated that Defendants and the Court would afford relief in a circumstance like this one where the ACA operates to substantially burden religious exercise in a given instance. "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 Beneficente*

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.

Although a mere exemption from the individual mandate would not fully relieve the burdens on Howe, limited relief through such an injunction would still be timely. These are not penalties that might *possibly* be assessed in the future. These fines are currently accumulating with each passing month and will continue to do so without relief from this Court. *See Continental Group, Inc. v. Amoco Chemicals Corp,* 614 F.2d 351, 359 (3d Cir. 1980) (internal citations omitted) (injunctive relief against a future payment of accumulating fines is appropriate where there is a "presently existing actual threat"). Here, we have an actual threat that a penalty will be assessed that is concrete—if health insurance is not obtained, the penalty will be incurred. For Mr. Howe, a part-time worker with a modest income, without health insurance and attempting to provide for his own health care needs while also under threat of accumulating fines, waiting until late in the tax year or next year to find that he owes months of back penalties would be very burdensome. He needs to know soon whether he will be afforded a hardship exemption that others are provided for a range of secular reasons so that he can plan his finances and his medical care accordingly.

CONCLUSION

For the foregoing reasons and those in Plaintiff's opening brief, the Court should grant Plaintiff's Motion for Preliminary Injunction.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2015, I electronically filed Plaintiff's Reply in Support of Motion for Preliminary with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to and serve the following NEF parties:

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