IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

HOBBY LOBBY STORES, INC., et al., Plaintiffs, v. SYLVIA BURWELL, in her official capacity as the Secretary of the United States Department of Health and Human Services, et al., Defendants.	Civil Action No. CIV-12-1000-HE

JOINT STATUS REPORT

Pursuant to the Court's October 20th Order (ECF No. 96), the parties hereby submit this joint status report, setting forth their respective proposed injunctions and positions in support thereof, for the Court's consideration.

Plaintiffs' Position

The parties agree that the Plaintiffs won in the Supreme Court and are entitled to convert the preliminary injunction it received from this Court into a permanent injunction. Oct. 17, 2014 Joint Status Report (ECF No. 95). The most straightforward way to do this is to enjoin the statute and regulatory guidelines that the government has used to penalize the Plaintiffs, and to express no advance views on any future regulatory accommodation that the government may devise. That is what the Supreme Court's

decision requires.[1] It is also what two federal courts that have devised their own permanent injunctions—including in the companion case *Conestoga Wood Specialties*—have done.[2] And it is what would result if this Court entered the Plaintiffs' proposed injunction.

The government's proposal is flawed, both because it fails to actually enjoin the statute (thus taking a step back from the protection currently in place under this Court's preliminary injunction), and because it decrees, in advance, that any change the government labels an "accommodation" will immediately void the injunction entirely,

[1] *Burwell v. Hobby Lobby*, 134 S.Ct. 2751, 2785, 2762 (2014) (holding that "[t]he contraceptive mandate, as applied to closely held corporations, violates RFRA," and describing the "contraceptive mandate" as including, among other things, 42 U.S.C. § 300gg-13(a)(4), "HHS regulations promulgated under the Patient Protection and Affordable Care Act of 2010, 124 Stat. 119," and the HHS Health Resources and Services Administration Women's Preventive Services Guidelines).

[2] Ex. A (Order, *Conestoga Wood Specialties Co. v. Burwell*, No 5:12-cv-6744 (E.D. Pa. Oct. 2, 2014) (enjoining the "the statute and regulations" that require the plaintiffs to provide their employees with all FDA-approved contraceptives and noting that "should any future legislation or regulation come into effect providing for-profit entities a religious accommodation . . . the Government reserves its right to enforce such legislation or regulation against Plaintiffs")); Ex. B (Order, *Seneca Hardwood Lumber Co. v. Burwell*, No. 2:12-cv-207 (W.D. Pa. Oct. 10, 2014) (enjoining "42 U.S.C. § 300gg-13(a)(4)" and associated regulations and guidelines "as those statutes, regulations, and guidelines were in effect as of October 10, 2014")).

The government cites three entered orders and five joint proposed orders that limit the scope of the injunction in similar cases. *Infra* at 15. However, five out of the eight orders it cites were agreed to by the same law firm—and two out of the three cited orders that were actually entered by federal judges expressly enjoined the statute, as Plaintiffs request here. Order, *Johnson Welded Prods. v. Burwell*, No. 1:13-cv-609 (D.D.C. Oct. 24, 2014) (enjoining "the statute and regulations in effect on June 30, 2014"); Order, *Midwest Fastener Corp. v. Burwell*, No. 1:13-cv-01337 (D.D.C. Oct. 24, 2014) (same).

regardless of the substance of any new rule and regardless of whether the Plaintiffs even qualify for the "accommodation."

First, the government's proposal would only enjoin a set of regulations that existed on June 30, 2014, not the statute that was litigated all the way to the Supreme Court and is currently enjoined by order of this Court. Preliminary Injunction Order at 3 (ECF No. 76) (enjoining enforcement of "the substantive requirements imposed in 42 U.S.C. § 300gg-13(a)(4) and at issue in this case"). The government claims in the status report below that it does not object to an injunction against the statute—but then argues for an injunction that mentions regulations and fails to identify the statute (which was the source of the coverage obligation that was the subject of this case). By omitting any reference to this statute, the government's proposal ignores two years of litigation history, rewrites the Supreme Court's ruling, and leaves Plaintiffs vulnerable to the re-imposition of multi-million dollar fines at a moment's notice. If the government actually agrees that the statute should be enjoined, then it should agree to an injunction that enjoins the statute.

Second, the government's proposal improperly seeks this court's advance blessing on *any* accommodation it later devises for *any* for-profit organizations. It refuses to even represent to this Court that future accommodations would actually apply to the plaintiffs. This is contrary to *Hobby Lobby*, which refused to evaluate the validity of regulations that were not before it. 134 S.Ct. at 2783 n.40 (refusing to "decide a case that is not

before us here").[3] Once again, two injunctions written by federal judges have refused to follow the government's proposed approach. *See supra* n. 2.

It would be fundamentally unfair for this Court to enter an injunction that gives the government authority to enforce the statutory obligation to "provide coverage for and . . . not impose any cost sharing requirements" for the products at issue. 42 U.S.C. § 300gg-13(4). That statutory requirement—to "provide coverage"—has been litigated and decided. Yet the government asks for an injunction that would allow it to force Plaintiffs to comply with that statutory requirement *immediately* once the government issues any new regulations.[4] To the extent the government in the future wishes to claim that circumstances have changed in a material way and the injunction against the statute should be lifted, the government should of course be free to return to Court and seek a modification of the injunction. Indeed both the Federal Rules of Civil Procedure and

[3] The government seeks this court's approval of the as-yet-unseen new regulations, under the guise that *Hobby Lobby* blessed the original accommodation. But *Hobby Lobby* was clear: the Court did "not decide today whether an [accommodation] of this type complies with RFRA for purposes of all religious claims," and stressed that the accommodation "accommodates the religious beliefs asserted in these cases, and that is the only question we are permitted to address." *Hobby Lobby*, 134 S. Ct. at 2782 & n.40. The Court even reaffirmed its unanimous order in *Little Sisters*, which enjoined the accommodation. *Hobby Lobby*, 134 S. Ct. at 2763 & n.9 (citing *Little Sisters of the Poor v. Sebelius*, 571 U.S. --,134 S. Ct. 1022 (2014)). If any doubt remained, the Court erased it three days later, when it granted extraordinary relief against the accommodation to Wheaton College. *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014). Thus the Supreme Court has not even blessed the old accommodation for non-profits, much less a new and unknown one for (some) for-profits.

[4] To the extent the language the government highlights from the *Conestoga* injunction *infra* would be read to allow for immediate enforcement of the coverage requirement upon the issuance of any new rule, Plaintiffs strongly oppose that approach.

Supreme Court decisions provide a process allowing the government to do precisely that. *See, e.g.*, Fed. R. Civ. P. 60(b)(5) (relief from judgment available where "applying it prospectively is no longer equitable"); *Agostini v. Felton*, 521 U.S. 203, 215 (1997) ("[I]t is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show 'a significant change either in factual conditions or in law.'") (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992)). But the government should not be permitted to obtain that modification *now*, in advance, with neither the Court nor the parties able to see whatever proposed "accommodation" the government may eventually issue, and with no one yet knowing whether a proposed accommodation would even apply to Plaintiffs at all.

The government's proposed approach—that the injunction against the statute immediately dissolves the instant the government issues any "accommodation" for any for-profit organization—would also unfairly expose Plaintiffs to the prospect of yet another round of emergency briefing and eleventh-hour appeals. The government has made prior "accommodations" in the non-profit context effective *immediately* upon publication.[5] If the government takes the same approach again, then Plaintiffs could face the prospect that, any day, the government could issue a slightly different rule and immediately dissolve the injunction and strip Plaintiffs of the protection they won at the Supreme Court. Worse, the government does not promise that any new for-profit rules

[5] *See, e.g.*, Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51092, 51092 (Aug. 22, 2014) (publishing interim final regulations concerning religious non-profits on a Friday and making them effective immediately upon publication the following Wednesday).

will even cover the Plaintiffs in this case. *See* p. 12, *infra* (noting only that plaintiffs "may" qualify for an accommodation).[6] Allowing injunctive relief to be automatically dissolved by the issuance of such rules under the statute—and forcing Plaintiffs to again seek emergency relief against the same underlying statutory requirement they just defeated in this litigation—would be both unfair and inefficient. The better course is to say that, if and when the government believes it has found a regulatory solution that would allow it to enforce the Mandate in a manner that does not violate federal civil rights laws, it can come back and explain why the injunction should not apply. That course will also protect Plaintiffs, in that they will not be subject to immediate application of the (currently-enjoined) statute.

The government attempts to flip this reasonable approach—and to give the plaintiffs *less* protection than they currently have under the preliminary injunction—by accusing the plaintiffs of seeking an injunction against new rules prematurely. Plaintiffs seek no such advance ruling. Instead, Plaintiffs simply seek an injunction that does not automatically dissolve whenever the government issues a new rule that "may" or may not apply to them. If a new regulation creates a permissible way for the government to enforce its mandate against the Plaintiffs, then the government should have every

[6] *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,118 (Aug. 27, 2014) (requesting public comments on an accommodation for "closely held" businesses that object to the HHS Mandate). The government has made no promise that the definition of "closely held" businesses it adopts will apply to Hobby Lobby and Mardel. Indeed, even in this status report the most the government has said is that "[a]t the conclusion of this rulemaking process, plaintiffs *may be* eligible for religious accommodations . . . ." *Infra* at 12. Such vague assurances are cold comfort.

opportunity to come back to court and make that case.[7] But, because the government lost this case and concedes an injunction against the statute is appropriate, the government should have the burden of explaining why some new way of enforcing the enjoined statute is somehow permissible.[8]For all these reasons, this Court should reject the government's proposed order and enter an order that (1) enjoins both the regulations and the underlying statute, and (2) takes no position on the lawfulness of any future regulations that the government may devise.

[PROPOSED] INJUNCTION AND JUDGMENT

In light of the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), it is hereby

ORDERED that defendants, their employees, agents, and successors in office are permanently enjoined

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[7] The government cites *Chamber of Commerce v. E.P.A.*, 642 F.3d 192 (D.C. Cir. 2011) for the proposition that any future regulation it may promulgate will be presumptively valid and immediately enforceable against the Plaintiffs. *Infra* at 12. But all *Chamber of Commerce* actually said was that regulations that are "currently in force" are presumed to be valid notwithstanding the "speculati[ve]" possibility that they might be invalidated in a future court challenge. 642 F.3d at 208. Here, by contrast, the government's existing regulations have been invalidated, and the government asks this court to bless in advance any new regulations it sees fit to write. That is not, and cannot be, the law. *Cf. Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 718 (9th Cir. 2013) ("Under the Park District's implausible reading of the settlement agreement, the day after the district court dismissed the action, the Park District could have repealed the new regulations and once again banned Higher Taste from selling its message-bearing T-shirts anywhere on zoo grounds—in effect putting the parties back to square one. We do not believe the parties spent sixteen months hammering out that illusory 'agreement.'").

[8] Nor should there be any difficulty under Fed. R. Civ. P. 65 in understanding the scope of an injunction against a statute. Plaintiffs' proposed injunction clearly identifies the statute to be enjoined.

(a) from enforcing or applying

(1) the "Contraceptive Coverage Requirement," defined here to include those provisions of federal law that require Plaintiffs to provide their employees with health coverage for contraceptive methods, sterilization procedures, and related patient education and counseling to which Plaintiffs object on religious grounds, including 42 U.S.C. § 300gg-13(a)(4) and related guidelines and regulations, e.g., 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv); 77 Fed. Reg. 8725 (Feb. 15, 2012); and Health Resources and Services Administration, Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines/ (lasted visited [DATE], 2014)); and

(2) any penalties, fines, or assessments for noncompliance with the Contraceptive Coverage Requirement, including those found in 26 U.S.C. §§ 4980D and 4980H and 29 U.S.C. §§ 1132 and 1185d; and

(b) from taking any other actions based on noncompliance with the Contraceptive Coverage Requirement

against Plaintiffs, their employee health plan(s), the group health coverage provided in connection with such plan(s), and/or these Plaintiffs' health insurance issuers and/or third-party administrators with respect to these Plaintiffs' health plan(s); and it is further

ORDERED that judgment is entered in favor of Plaintiffs and against defendants on Plaintiffs' claim under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*; and it is further

ORDERED that all other claims of the complaint are hereby dismissed without prejudice; and it is further

ORDERED that the parties are directed to confer and attempt to reach agreement on attorneys' fees and costs. If the parties are unable to reach agreement on attorneys' fees and costs, Plaintiffs may file a motion for attorneys' fees and costs within 60 days of the entry of this Judgment.

Defendants' Position

In light of *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), defendants agree that plaintiffs are entitled to judgment in their favor on their Religious Freedom Restoration Act ("RFRA") claim, and the entry of a permanent injunction. The parties, however, do not agree on the appropriate scope of the injunction to be entered. Defendants' proposed injunction, which is below, would preclude the government from enforcing against plaintiffs, Hobby Lobby Stores, Inc. and Mardel, Inc., the existing contraceptive coverage requirement—the law that was before the Supreme Court in *Hobby Lobby* and that is before this Court now—but would not be so broad as to enjoin application of any future regulations designed to accommodate for-profit companies with religious objections to providing coverage for contraceptive services, while ensuring that their employees still have access to such services. Indeed, the defendant Departments have already proposed such an accommodation. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,118 (Aug. 27, 2014) (Notice of Proposed Rulemaking). Plaintiffs, on the other hand, ask this Court to enter an injunction

that is overly broad and ambiguous in scope, and could be read—indeed, it appears to be plaintiffs' intent that it be read—to prevent the government from enforcing not only the existing contraceptive coverage regulations, but also any future regulations designed to accommodate plaintiffs' religious beliefs by allowing them to opt out of providing contraceptive coverage. For the reasons explained below, it would be inappropriate for the Court to effectively, preemptively enjoin application of any forthcoming regulations at this time, and the injunction issued in this case should be carefully drawn to avoid such a result.

In *Hobby Lobby*, the Supreme Court held that the Affordable Care Act's contraceptive coverage requirement violated RFRA with respect to certain closely held for-profit entities (including the corporate plaintiffs here) that, under the current regulations, cannot opt out of the requirement. 134 S. Ct. at 2759-60, 2782, 2785. The existence of accommodations in the current regulations permitting certain nonprofit organizations to opt out of the requirement, *see* 78 Fed. Reg. 39,870, 39,874-88 (July 2, 2013), was crucial to the Supreme Court's reasoning in large part because the Court found that the opt-out provisions for nonprofits constituted a less restrictive means of furthering the government's compelling interests. The Court explained that the opt-out regulations "effectively exempt[]" organizations that are eligible for accommodations. *Hobby Lobby*, 134 S. Ct. at 2763. It emphasized that the opt-out regulations "seek[] to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of [such] entities have precisely the same access to all [Food and Drug

Administration (FDA)]-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." *Id.* at 2759.

The Supreme Court described the opt-out regulations for nonprofit organizations as "an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs." *Id.* at 2782. The Court reasoned that the accommodations available to eligible nonprofit organizations "serve[] [the government's] stated interests equally well" as the requirement currently applicable to for-profit entities because "female employees" of eligible nonprofits "continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and . . . face minimal logistical and administrative obstacles" in obtaining the coverage. *Id.* (quotation omitted). Thus, the Court's conclusion that the contraceptive coverage requirement "is unlawful" under RFRA as applied to certain closely-held, for-profit entities rested on its recognition that the accommodations available to religious nonprofits "constitute[] an alternative that achieves all of the Government's aims while providing greater respect for religious liberty." *Id.* at 2759-60. The Court went on to note that "[a]lthough [the government] has made [the accommodations] available to religious nonprofits that have religious objections to the contraceptive [coverage requirement], [the government] has provided no reason why the same [accommodations] cannot be made available when the owners of for-profit corporations have similar religious objections." *Id.* at 2759.

In response, the defendant Departments have proposed regulations that would provide regulatory accommodations to certain closely held for-profit entities that have a religious objection to providing coverage for some or all contraceptive services otherwise

required to be covered. *See* 79 Fed. Reg. 51,118. At the conclusion of this rulemaking process, plaintiffs may be eligible for religious accommodations that would effectively exempt them from providing coverage for contraceptives to their employees while ensuring that their employees will receive coverage without cost sharing for all FDA-approved contraceptives.

Accordingly, defendants agree to the proposed injunction and judgment below. The proposed injunction specifies, consistent with the Supreme Court's decision in *Hobby Lobby*, that it does not prevent defendants from enforcing the contraceptive coverage requirement against plaintiffs "if religious accommodations . . . are made available to for-profit entities" and plaintiffs do not either avail themselves of those accommodations or provide contraceptive coverage. This language is simply intended to make clear that while the injunction precludes enforcement of existing law, it would not preclude enforcement of any future, substantively different regulations, which would be entitled to a "presumption of validity." *See, e.g.*, *Chamber of Commerce v. EPA*, 642 F.3d 192, 208 (D.C. Cir. 2011). Plaintiffs will, of course, be free to challenge any future accommodations should they choose to do so.[9]

[9] The fact that defendants did not propose similar language at the time the Court entered the preliminary injunction does not preclude them from advocating such language now. *See, e.g.*, *Sole v. Wyner*, 551 U.S. 74, 84 (2007) (noting the "tentative character" of a preliminary injunction, which "ha[s] no preclusive effect in the continuing litigation"). The Court should consider intervening authority and events since the preliminary injunction was entered before entering a permanent injunction. Specifically, at the time the Court entered the preliminary injunction, there was no ongoing rulemaking that could change the regulatory scheme as applied to plaintiffs, and thus defendants were not concerned—as they are now—that the scope of the injunction might preclude

If plaintiffs' proposed language were adopted, defendants—out of an abundance of caution—might have to come back to the Court to seek relief from the injunction before enforcing the new rules, which would impose a significant burden on defendants and the Court, and would improperly treat any new regulations as presumptively invalid before they are even promulgated. Such an ambiguous injunction would not satisfy the specificity requirements of Federal Rule of Civil Procedure 65(d)(1), and would run afoul of the Supreme Court's admonition that, "[s]ince an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974); *see also id*. ("Rule [65(d)] was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood."). Furthermore, it is well established that "injunctive relief should be no broader than necessary to provide full relief to the aggrieved party." *Meyer v. CUNA Mut. Ins. Soc'y*, 648 F.3d 154, 170 (3d Cir. 2011); *see also, e.g.*, *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 145 (2d Cir. 2011); *PBM Products, LLC v. Mead Johnson & Co.*, 639 F.3d 111, 128 (4th Cir. 2011) (observing that an injunction may "address only the circumstances of the case").

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enforcement of future regulations—particularly where the possibility of such regulations served as the basis for the Supreme Court's conclusion in *Hobby Lobby* that the current contraceptive coverage requirement is invalid as to certain entities.

Defendants' concern is particularly acute in light of the fact that plaintiffs appear to take the position that the injunction should apply to immunize them from the consequences of any future regulations, and that the government should have to come back to the Court to have the injunction modified if and when new regulations are issued providing an accommodation to for-profit employers that, like plaintiffs, have a religious objection to providing contraceptive coverage. Plaintiffs' proposed injunction is overbroad and otherwise inappropriate, and thus, should be rejected (or, at the very least, modified).

In essence, plaintiffs would have the Court enjoin the enforcement of regulations that do not yet exist, and that, if and when they are promulgated, will be substantively different from the regulations that the Supreme Court held to be invalid in *Hobby Lobby*. Plaintiffs will, of course, be free to challenge any new regulations once they are promulgated if their religious concerns are not resolved, as defendants' proposed injunction makes clear. Plaintiffs have suggested that the government "seeks this [C]ourt's advance blessing on *any* accommodation it later devises for *any* for-profit organizations," but plaintiffs have it backwards. In fact, it is plaintiffs that ask this Court to effectively opine on yet-to-be finalized regulations, which are entitled to a presumption of validity, by issuing an injunction that might prevent the government from enforcing those regulations before they are even promulgated. Defendants, by contrast, want to ensure only that the scope of the injunction is well-defined and limited to current law (which provides no accommodation to for-profit employers).

Although defendants believe that their proposed language is the most precise option, they also would be satisfied with an injunction that includes the following language, which the parties have recently agreed to in numerous similar cases brought by for-profit corporations challenging the contraceptive coverage requirement, and which thus far has been entered by three courts:

> ORDERED that this Injunction and Judgment does not apply with respect to any changes in statute or regulation that are enacted or promulgated after this date, and nothing herein prevents plaintiffs from filing a new civil action to challenge any such future changes.

See Order, *Gilardi v. HHS*, No. 1:13-cv-104 (D.D.C. Oct. 20, 2014), ECF No. 49 (attached as Exhibit C); Order & Judgment, *Johnson Welded Products, Inc. v. Burwell*, No. 1:13-cv-00609-ESH (D.D.C. Oct. 24, 2014), ECF No. 11; Order & Judgment, *Midwest Fastener Corp. v. Burwell*, No. 1:13-cv-01337-ESH (D.D.C. Oct. 24, 2014), ECF No. 21; *see also* Joint Mot. for Entry of Inj. & J., *Lindsay v. Burwell*, No. 1:13-cv-1210 (N.D. Ill. Oct. 15, 2014), ECF No. 42 (attached as Exhibit D); Joint Mot. for Entry of Inj. & J., *Am. Pulverizer Co. v. HHS*, No. 6:12-cv-3459 (W.D. Mo. Oct. 15, 2014), ECF No. 55 (same); Joint Mot. for Entry of Inj. & J., *Zumbiel v. Burwell*, No. 1:13-cv-01611-RBW (D.D.C. Oct. 20, 2014), ECF No. 18 (same); Joint Mot. for Entry of Inj. & J., *Hartenbower v. Burwell*, No. 1:13-cv-02253 (N.D. Ill. Oct. 24, 2014), ECF No. 31 (same); Joint Mot. for Entry of Permanent Inj. & J., *Barron Indus., Inc. v. Burwell*, No. 1:13-cv-01330-KBJ (D.D.C. Oct. 24, 2014), ECF No. 9 (same).[10]

[10] The undersigned counsel for the government proposed this alternative language to plaintiffs' counsel, who stated that plaintiffs oppose this language as well.

Plaintiffs contend that defendants' proposed injunction is insufficient because it purportedly does not enjoin enforcement of 42 U.S.C. § 300gg-13(a)(4) against plaintiffs. But defendants' proposed injunction extends to "those provisions of federal law in existence on June 30, 2014, when the Supreme Court decided *Hobby Lobby*, that require plaintiffs Hobby Lobby Stores, Inc. and Mardel, Inc. to provide their employees with health coverage for contraceptive methods, sterilization procedures, and related patient education and counseling to which plaintiffs object on religious grounds," *see* Defendants' Proposed Injunction and Judgment, *infra*—provisions of federal law that include the statute under which the regulatory scheme at issue in *Hobby Lobby* operate. Indeed, plaintiffs appear to endorse the preliminary injunction entered by the district court in *Conestoga Wood Specialties Corp. v. Burwell*, but that order does not specifically cite the statute either. *See* Order, *Conestoga Wood Specialties Corp. v. Burwell*, No. 5:12-cv-6744 (E.D. Pa. Oct. 2, 2014), ECF No. 82 (attached as Exhibit A). As explained above, defendants' proposed injunction is intended to make clear that, although defendants cannot enforce the statute under the regulatory scheme that existed (and currently exists) and that was at issue in *Hobby Lobby*, the injunction does not extend to any future regulatory scheme under the statute that provides accommodations to for-profit entities—a regulatory scheme that is entitled to a presumption of validity. Plaintiffs suggest that they succeeded before the Supreme Court in proving that the statute cannot be enforced against them without violating RFRA, but that is not accurate; the Supreme Court held only that, absent an accommodation for for-profit entities, like the one the government had devised for non-profit entities, the government had not

shown that it was applying the contraceptive coverage requirement in the least restrictive manner. The injunction entered by this Court, therefore, should not—and should avoid any suggestion that it does—enjoin any future regulations that provide accommodations to for-profit entities. Indeed, the permanent injunction entered in *Conestoga*, the case decided by the Supreme Court along with *Hobby Lobby*, makes clear that it does not. *Id*. (stating that "should any future legislation or regulation come into effect providing for-profit entities a religious accommodation to the contraceptive coverage mandate, the Government reserves its right to enforce such legislation or regulation against Plaintiffs").

There are two additional problems with the language proposed by plaintiffs. First, the permanent injunction should enjoin enforcement of the applicable provisions only as to the corporate plaintiffs, Hobby Lobby Stores, Inc. and Mardel, Inc., and should not extend to the individual plaintiffs. The Supreme Court's decision in *Hobby Lobby* addressed only the claims of the corporate plaintiffs. The Court determined that "[t]he contraceptive mandate, *as applied to closely held corporations*, violates RFRA." *Hobby Lobby*, 134 S. Ct. at 2785 (emphasis added). Having done so, the Court had no occasion to address the RFRA claims of the individual plaintiffs who own the corporations. Moreover, as a practical matter, an injunction against enforcement of the applicable provisions as to the corporate plaintiffs will protect the individual plaintiffs because the government will be enjoined from enforcing the contraceptive coverage requirement against the companies they own and control. The permanent injunction, therefore, should be limited to Hobby Lobby Stores, Inc. and Mardel, Inc.

Second, the permanent injunction should not enjoin application of the penalties found in 26 U.S.C. § 4980H, as plaintiffs' proposed injunction does, because that statutory provision has no relevance to this case. Section 4980H penalties could, starting in 2015, be imposed, for example, if Hobby Lobby Stores, Inc., or Mardel, Inc., were to drop health coverage altogether and at least one of its employees is certified as having been enrolled in a qualified health plan and allowed a premium tax credit under 26 U.S.C. § 36B or paid a cost sharing reduction under section 1412 of the Affordable Care Act. There are no penalties in § 4980H related to the failure to provide contraceptive coverage (or any other preventive service). The penalties that address such a failure are found in 26 U.S.C. § 4980D, a provision that defendants agree should be enjoined with respect to Hobby Lobby Stores, Inc.'s and Mardel, Inc.'s failure to provide contraceptive coverage.

For these reasons, defendants respectfully request that the Court enter the following proposed injunction and judgment.

Defendants' proposed injunction and judgment

In light of the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and upon defendants' consent, it is hereby

ORDERED that defendants, their employees, agents, and successors in office are permanently enjoined

(c) from enforcing

(3) the "June 30, 2014 Contraceptive Coverage Requirement," defined here to include those provisions of federal law in existence on June 30, 2014, when

the Supreme Court decided *Hobby Lobby*, that require plaintiffs Hobby Lobby Stores, Inc. and Mardel, Inc. to provide their employees with health coverage for contraceptive methods, sterilization procedures, and related patient education and counseling to which plaintiffs object on religious grounds, *e.g.*, 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv); and

(4) any penalties, fines, or assessments for noncompliance with the June 30, 2014 Contraceptive Coverage Requirement, including those found in 26 U.S.C. § 4980D and 29 U.S.C. §§ 1132 and 1185d; and

(d) from taking any other actions based on noncompliance with the June 30, 2014 Contraceptive Coverage Requirement

against plaintiffs Hobby Lobby Stores, Inc. and Mardel, Inc., their employee health plan(s), the group health coverage provided in connection with such plan(s), and/or these plaintiffs' health insurance issuers and/or third-party administrators with respect to these plaintiffs' health plan(s); and it is further

ORDERED that judgment is entered in favor of plaintiffs and against defendants on plaintiffs' claim under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*; and it is further

ORDERED that nothing herein prevents defendants, their employees, agents, and successors in office from enforcing the contraceptive coverage requirement against plaintiffs Hobby Lobby Stores, Inc. and Mardel, Inc., their employee health plan(s), the group health coverage provided in connection with such plan(s), and/or these plaintiffs'

health insurance issuers and/or third-party administrators with respect to these plaintiffs' health plan(s), if religious accommodations to the contraceptive coverage requirement are made available to for-profit entities; and it is further

ORDERED that nothing herein prevents plaintiffs from filing a new civil action to challenge any such future religiou accommodations, and it is further

ORDERED that the parties are directed to confer and attempt to reach agreement on attorneys' fees and costs. If the parties are unable to reach agreement on attorneys' fees and costs, Plaintiffs may file a motion for attorneys' fees and costs within 60 days of the entry of this Judgment.

Respectfully submitted this 24th day of October, 2014,

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2014, a copy of the foregoing was filed electronically with the Clerk of the Court to be served upon the following:

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