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

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| (1) SOUTHERN NAZARENE UNIVERSITY; (2) OKLAHOMA WESLEYAN UNIVERSITY; (3) OKLAHOMA BAPTIST UNIVERSITY; and (4) MID-AMERICA CHRISTIAN UNIVERSITY,<br><br>*Plaintiffs,*<br><br>v.<br><br>(1) KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; (2) THOMAS E. PEREZ, in his official capacity as Secretary of the United States Department of Labor; (3) JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury; (4) UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; (5) UNITED STATES DEPARTMENT OF LABOR; and (6) UNITED STATES DEPARTMENT OF THE TREASURY,<br><br>*Defendants.* | ) | Case No. 5:13-cv-01015-F |

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

Plaintiffs Southern Nazarene University ("SNU"), Oklahoma Wesleyan University ("OKWU"), Oklahoma Baptist University ("OBU"), and Mid-America Christian University ("MACU") (hereinafter, "the Universities") seek preliminary injunctive relief against a series of regulations (the "Mandate") that force them to violate their sincerely held religious beliefs. The enforcement of the Mandate will begin on January 1, 2014. *See* Fed. Reg. 39,870 (July 2, 2013). The Mandate requires religious organizations, including the Universities, to provide, pay for, and/or facilitate access to abortifacient drugs and devices, as well as related education and counseling, in a manner that is directly contrary to their religious beliefs.

Defendants promulgated the Mandate pursuant to their authority under the Affordable Care Act ("ACA") to require employer health plans to include coverage for women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4). By defining "preventive care" to include "all Food and Drug Administration approved contraceptive methods,"[1] the Mandate requires employer and student health plans to cover abortifacient drugs, contraception, sterilization, and related counseling. *See* 45 C.F.R. § 147.130.[2] Failure to provide the mandated coverage exposes employers to fines of $100 per day, per affected beneficiary. *See* 26 U.S.C. § 4980D(b). Dropping their employee health plans altogether subjects employers to substantial penalties of approximately $2,000 per employee. *Id*. at §§ 4980H(a), (c)(1). In each of these scenarios, they would also face liability under ERISA. Regarding the student plans they facilitate, the Universities would be forced to choose between (a) compliance; (b) violation and fines; and (c) stopping the facilitation of a student plan. Given that the Universities believe that the facilitation of

[1] http://www.hrsa.gov/womensguidelines (last accessed Nov. 26, 2013).

[2] The category of mandatory FDA-approved contraceptives includes the morning-after pill (Plan B) and Ulipristal (HRP 2000 or ella), which can act as abortifacients. *See* Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines/ (last accessed Nov. 26, 2013)

employee and student health coverage is an exercise of its religious beliefs, options (a) and (c) are both unacceptable. Following their religious convictions (option (b)) would subject them to fines, thereby pressuring them to choose a course of action that contradicts their religious convictions.

The Mandate contains an extremely narrow "religious employer" exemption which is limited to churches, their integrated auxiliaries, and religious orders. 45 C.F.R. § 147.131(a). The Universities are not eligible for this exemption. Defendants state that the exemption "does not undermine the governmental interests furthered by the contraceptive coverage requirements." 78 Fed. Reg. at 39,874. They explain that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." *Id*. The same rationale applies to the Universities, as they employ people of the same faith who share the same objection;[3] yet Defendants deny them the exemption.

The Mandate's co-called "accommodation" for non-exempt religious employers does not alleviate the substantial burden on the Universities' religious exercise. Under the "accommodation," the Universities continue to serve as a conduit through which "free" abortifacients are provided to their employees and students. Eligible religious organizations, such as the Universities, must provide a "self-certification" to their insurance issuer or, for self-insured plans (such as that belonging to MACU), to their third-party administrator, objecting to coverage for some or all FDA-approved contraceptives. That self-certification, however, has the effect of requiring the Universities' own insurance issuer or third-party administrator to provide or arrange "payments for contraceptive services" for their employees and students. 45 C.F.R. §

[3] Complaint ¶¶ 6, 28-29, 51-52, 68-70, 86-88.

147.131(c); 26 C.F.R. § 54.9815-2713A(a)-(c)); 29 C.F. R. § 2590.715-2713A. The mandated "payments" will last only as long as the employees or stude nts remain on the Universities' health plans. [4] As for self-insured entitie s, such as MACU, the self-certification actually "designat[es] . . . th e third party adm inistrator(s) as plan administrator and claims admin istrator for c ontraceptive benefits." 78 Fe d. Reg. at 39,879. In short, under t he original ve rsion of t he Mandate (which lacked the "accommodation") and the Final Rule (which includes the "acco mmodation"), the end result is the same: a religious organization's decision to offer a group health plan results in the provision of "free" abortifacient produc ts and related educa tion and counseling to its employees and students in a manner w hich directly contradicts the religious beliefs of the Universities. The Mandate thus substa ntially burdens the Un iversities' religious exercise, a prima facie violation of the Religious Freedom Restoration Act (RFRA).

Forcing the Universities to facilitate access to morally objectionable abortifacients is not the least restrictive means of adva ncing any c ompelling government interest. Consequently, the Mandate can not survive strict scrutiny under RFRA; the Universities are thus likely to s ucceed on the merits of th eir RFRA claim. Assessment of the other preliminary injunction factors also warrants affording the Universities relief.

## STANDARD OF REVIEW

A plaintiff seeking a prelimin ary injunction must establish (1) that he is likely to succeed on the merits; (2) that he is likely to suffer irrepara ble harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an

[4] *See* 29 C.F.R. § 2590.715-27 13A(d) (for self-insured em ployers, the third-party administrator "will provide or ar range separate payments for contraceptive services . . . for so long as [emp loyees] are enrolled i n [their] group health plan"); 45 C.F.R. § 147.131(c)(2)(i)(B) (for employers offering insu red plans, the issuer must "[p]rovide separate payments for any contraceptive services . . . for plan participants and beneficiaries for so long as they remain enrolled in the plan").

injunction is in the public interest. Fed. R. Civ. P. 65; *see*, *e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013) (en banc); *Comanche Nation, Okla. v. U.S.*, 393 F. Supp. 2d 1196, 1210 (W.D. Okla. 2005). The essential purpose of a preliminary injunction is to preserve the status quo, and thus, "[t]he party seeking the injunction need not show conclusively that it will prevail on the merits. It is only necessary that the movant establish a reasonable probability of success on the merits." *Star Fuel Marts, LLC. v. Murphy Oil USA, Inc.*, No. Civ.–02–202–F, 2003 WL 742191, at *8 (W.D. Okla. 2003) (citing *Atchison, Topeka and Santa Fe Ry. Co. v. Lennen*, 640 F.2d 255, 261 (10th Cir. 1981)).

Additionally, the Tenth Circuit has adopted a relaxed standard for the likelihood of success that applies in certain cases. Where the plaintiff can establish that the latter three requirements tip strongly in his favor, the test is modified, and the plaintiff may meet the first requirement for showing likelihood of success on the merits by "prov[ing] that there are questions going to the merits so serious, substantial, difficult and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Comanche Nation*, 393 F. Supp. 2d at 1210 (quoting *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001) (internal quotation omitted)); *see also Fed. Lands Legal Consortium ex rel. Robart Estate v. U.S.*, 195 F.3d 1190, 1195 (10th Cir. 1999); *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002).

## ARGUMENT

### I. THE UNIVERSITIES ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR RELIGIOUS FREEDOM RESTORATION ACT CLAIM.

Under the Religious Freedom Restoration Act ("RFRA"), the Federal Government is prohibited from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless it "demonstrates that application of the burden to the person is (1) in furtherance of a compelling governmental

interest; and (2) the least restrictive means of furthering that compelling governmental interests. 42 U.S.C. § 2000bb-1; *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 423 (2006). The Mandate cannot survive strict scrutiny under RFRA.[5]

A. The Mandate Substantially Burdens the Universities' Religious Exercise.

The Religious Freedom Restoration Act forbids the federal government from substantially burdening a person's exercise of religion unless the government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb-1; *O Centro Espírita*, 546 U.S. at 423. In assessing whether the Mandate substantially burdens the Universities' religious exercise, thereby triggering strict scrutiny, it is essential to: (1) identify the religious exercise in question; and (2) identify exactly what the government is doing with respect to that exercise. *See, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc).

1. *The religious exercise(s) in question*

Three "exercises of religion" are at the heart of this case. Two are affirmative pursuits of religious objectives; the third is avoidance of conduct contrary to the Universities' beliefs. First, the Universities affirmatively live out their religious beliefs in the dignity of human life by making available to members of their communities health insurance coverage that reflects the University communities' shared pro-life beliefs. Second, they create and foster academic communities that encourage its members (faculty, staff, and students) to grow in spiritual maturity through obedience to God's

[5] The Mandate also violates the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment, the Due Process Clause of the Fifth Amendment, the Administrative Procedure Act, and various statutory prohibitions on compelled support for abortion. Because the RFRA claim is adequate to afford relief at this stage of the proceedings, these other arguments are not set forth in greater detail herein.

commands, including His commands about the value of human life. Third, the Universities seek to avoid facilitating sinful behavior, thereby engaging in immoral conduct themselves.

2. *What the government is doing with respect to those "exercises"*

Through the Mandate, Defendants interfere with each of these three "exercises of religion." First, Defendants have made it untenable, to put it mildly, for the Universities to provide employee and student health insurance that correlates with their pro-life beliefs. Left free to exercise their religion in the health insurance context, their plans would ensure access to everything the Affordable Care Act and the HHS Mandate require (including non-abortifacient contraceptives) other than abortifacients like ella and Plan B. Participation in their plans would not trigger the "free" availability of embryo-destroying drugs and devices to members of their communities. Because of the Mandate, however, insurance issuers will sell the Universities plans that either (a) *expressly* include abortifacients; or (b) *functionally* include abortifacients by guaranteeing separate payments for them upon the school's execution of a self-certification. In the case of a self-insured entity, it may either (a) set up a self-insured plan that includes abortifacients; or (b) set up a self-insured plan that functionally includes abortifacients by guaranteeing separate payments for them upon the entity's execution of a self-certification. If it fails to do either of these, and instead creates a self-insurance plan that does not facilitate the availability of abortifacients, it will face fines of $100 per beneficiary per day.

Defendants have also made it impossible, as a practical matter, to avoid facilitating the use of abortifacients by dropping employee health insurance altogether (something that would transgress their religious convictions in its own right). The financial penalty for such a move is $2,000 per employee per year after the first 30 employees.

Because Defendants have left the Universities without the option of fulfilling their religious convictions by providing health insurance that does not facilitate access to abortifacients (or of dropping employee health insurance altogether), they are forced to

provide health insurance that *does* facilitate that access. This significantly interferes with the Universities' other two "exercises of relig ion." First, it directly and significantly interferes with their ability to make and en force religiously-rooted rules of conduct applicable to their employees and students, all of whom voluntarily joined their respective communities. It directly and significantly interferes with their ability effectively to communicate their pro-life message to their students, faculty, staff, and the broader community. It directly and signif icantly interferes with their purs uit of their mission to grow the spiritual maturity of members of th eir community by fostering obedience to and love for God's laws.

Second, it forces them to engage in behavior that violates their religious convictions. Either complying with the Mandate as originally written or complying with it by executing a self-certification that ensures the same result ( *i.e.,* free access for members of their community to abortifacients as a consequence of their employment with them) is, in the eyes of each University, sinful and immora l. The Universities believe that sin adversely affects their relationshi p with God. Although the shape and magnitude of this a dverse effect cannot be predicted or calculated, the Universities nonet heless believe it is quite real, and to be avoided.

3. *How the Mandate burdens the Universities' religious exercise(s)*

The Mandate burdens the Universities' religious exercise by coercing them to take action they believe to be sinf ul and im moral, and by interfering w ith their freedom to foster voluntary com munities that encourage spiritual maturity th rough compliance with shared ethical commitments rooted in religious conviction.

As to the first of these ways Defendants burden the Univer sities' religious exercise, the Universities will transgress their understandi ng of God's laws by pr oviding health insurance to their employees and students that gives them guaranteed payments for drugs and devices that take hum an life. In short, by complying th ey will sin. And non -

compliance, either through dropping employee and/or student coverage, or by continuing their current coverages (which exclude abortifacients), is not possible, either financially or ethically.

As discussed above, the Universities not only want to avoid committing sin, but also want to foster the spiritual maturity of members of their communities, faculty, staff, and students alike. Christian conviction—including respect for the dignity and worth of human life from the moment of conception—is a qualification for entry into and participation in their communities. (Compl., ¶¶ 28, 29, 51, 52, 68, 69, 70, 88.) And, it bears noting, faculty, staff, and students all voluntarily join these communities. Foisting unwanted access to free abortifacients upon the Universities' employees, their families, and students tangibly interferes with this key component of the Universities' missions. Facilitating free access to abortifacients while simultaneously trying to foster a pro-life ethic lacks integrity; and doing the former undermines the latter. The "fig leaf" of the accommodation is just that; a cosmetic, but ultimately unsuccessful, effort to cover over the underlying ethical problem.

4. *The burden is "substantial" under RFRA*

The government "substantially burdens" an exercise of religion if it compels one "to perform acts undeniably at odds with fundamental tenets of [one's] religious beliefs," *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972), or "put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981). In *Yoder*, the Court found that a substantial burden was imposed by a $5 penalty imposed on an Amish family for refusing to follow a compulsory secondary-education law. 406 U.S. at 218-19. In *Thomas*, the Court similarly held that the denial of unemployment compensation substantially burdened the pacifist convictions of a Jehovah's Witness who refused to work at a factory manufacturing tank turrets. 450 U.S. at 717-18.

Here, the refusal to comply with the Mandate will subject the Universities to potentially fatal fines of $100 per day per affected beneficiary. *See* 26 U.S.C. § 4980D(b). If the Universities choose to cease providing employee health insurance altogether, they will be subject to an annual fine of $2,000 per full time employee after the first thirty employees. *See* 26 U.S.C. §§ 4980H(a), (c)(1). Such costs and penalties clearly impose the type of pressure that qualifies as a substantial burden under RFRA—far outweighing, for example, the $5 fine that was a substantial burden in *Yoder*.

The Tenth Circuit has recently held that a for-profit organization challenging the Mandate was likely to succeed on the merits of its RFRA claim, emphasizing that the Mandate imposed a substantial burden on religious exercise by "demand[ing]," on pain of onerous penalties, "that [Plaintiffs] enable access to contraceptives that [they] deem morally problematic." *Hobby Lobby*, 723 F.3d at 1141; *see also Korte v. Sebelius*, Nos. 12-3841, 13-1077, 2013 WL 5960692, at *23 (7th Cir. Nov. 8, 2013); *Gilardi v. Sebelius* No. 13-6059, 2013 WL 5854246, at *8 (D.C. Cir. Nov. 1, 2013). The same is true here.

It is of no moment that the Universities, unlike the *Hobby Lobby* plaintiffs, may be eligible for the Government's "accommodation," for that accommodation does nothing to resolve the conflict with the Universities' beliefs. *See Zubik v. Sebelius*, 2013 WL 6118696, at *23-25 (W.D. Pa. Nov. 21, 2013). For purpose of this Court's analysis, what matters is whether the Government is coercing entities to take actions that violate their sincere religious beliefs. *Hobby Lobby*, 723 F.3d at 1137 ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."). The accommodation continues to require that the Universities facilitate access to objectionable contraceptives, in violation of their sincerely held religious beliefs. The accommodation compels the Universities, through their health insurance plans, to serve as the conduit through which objectionable products and services are provided to their employees and students. The

Universities' sincerely held religious beliefs are entitled to no less protection than the nearly identical sincere religious beliefs at issue in *Hobby Lobby*.

The *Zubik* court's reasoning and conclusion are equally applicable here:

> [A]lthough the "accommodation" legally enables Plaintiffs to avoid directly paying for the portion of the health plan that provides [abortifacient] products, services, and counseling, the "accommodation" requires them to shift the responsibility of purchasing insurance and providing [abortifacient] products, services, and counseling, on a secular source. The Court concludes that Plaintiffs have a sincerely-held belief that "shifting responsibility" does not absolve or exonerate them from the moral turpitude created by the "accommodation"; to the contrary, it still substantially burdens their sincerely-held religious beliefs.

2013 WL 6118696, at *25. *See also Geneva Coll. v. Sebelius*, 2013 WL 3071481 (W.D. Pa. June 18, 2013) (enjoining application of Mandate to college's student health plan, rejecting government's contention that then-proposed accommodation alleviated burden on college's religious objection to facilitating access to abortifacients).

The Mandate substantially burdens the religious exercise of the Universities, and thus constitutes a prima facie violation of the Religious Freedom Restoration Act.

B. The Mandate Is Not the Least Restrictive Means of Advancing a Compelling Governmental Interest.

Federal laws or regulations that substantially burden religious exercise violate RFRA unless they satisfy strict scrutiny. 42 U.S.C. § 2000bb-1(b). More specifically, government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

The U.S. Court of Appeals for the Tenth Circuit has held that the Mandate fails strict scrutiny. *Hobby Lobby*, 723 F.3d at 1143-44. The court held that the government's stated interests in "public health" and "gender equality" "do not satisfy the Supreme Court's compelling interest standards." *Id.* at 1143. The *Hobby Lobby* court also held that even if the government's stated interests were compelling, the Mandate was not the least restrictive means of advancing those interests. *Id.* at 1144 (government failed to explain how exempting the plaintiffs would undermine its interests).

There is no plausible basis for arguing that the Tenth Circuit's strict scrutiny holding does not apply to this case. Indeed, the government has subsequently conceded in another Western District of Oklahoma case that the district court was "bound by that decision."[6] The U.S. Supreme Court's grant of the government's petition for a writ of certiorari in *Hobby Lobby*[7] does not alter that reality.

## II. A PRELIMINARY INJUNCTION IS NEEDED TO PREVENT IRREPARABLE HARM.

"It has long been established that the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (internal quotation marks and citation omitted). "By extension, the same is true of rights afforded under the RFRA, which covers the same types of rights as those protected under the Free Exercise Clause of the First Amendment." *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, 2012 WL 5817323, at *18 (citing *O Centro Espirita Beneficente União do Vegetal v. Ashcroft*, 389

[6] *Reaching Souls Int'l v. Sebelius,* No. 5:13-cv-1092-D, ECF No. 50, at 21.
[7] *Sebelius v. Hobby Lobby Stores, Inc.*, 2013 WL 5297798, 82 U.S.L.W. 3139 (U.S. Nov 26, 2013) (No. 13-354).

F.3d 973, 995 (10th Cir. 2004), *aff'd*, 546 U.S. 418). Here, coercing the Universities to facilitate access to abortifacients in direct violation of their faith is the epitome of irreparable injury.

The impending enforcement of the Mandate is also causing significant disruption to the Universities' hiring and human-resources planning. Health plans do not take shape overnight, but instead require a number of analyses, negotiations, and decisions before the Universities can offer a health benefits package to their employees. Employers using an outside insurance issuer must work with actuaries to evaluate their funding reserves, and then negotiate with the insurer to determine the cost of the products and services they want to offer their employees. Employers that are self-insured must similarly negotiate with third-party administrators. Under normal circumstances, the Universities must begin the process of determining their health care package for a plan year at least one year before the plan year begins. The multiple levels of uncertainty surrounding the Mandate make this already lengthy process even more complex. In addition, if the Universities choose to follow their religious conscience instead of complying with the Mandate, they will be subject to massive fines and penalties. The Universities require time to budget for such additional expenses. Such jarring uncertainties adversely affect the Universities' ability to hire and retain employees.

The Tenth Circuit has twice concluded that forcing a conscientious objector to comply with the Mandate would impose irreparable harm. *See Hobby Lobby*, 723 F.3d at 1146; *Newland v. Sebelius*, No. 12-1380, 2013 WL 5481997, at *2 (10th Cir. Oct. 3, 2013) (affirming lower court's finding of irreparable harm). There is no plausible basis for departing from that conclusion in this case.

## III. THE BALANCE OF EQUITIES WARRANTS ENTRY OF A PRELIMINARY INJUNCTION.

The balance of equities tips strongly in favor of the Universities. The Universities are subject to crippling fines for non-compliance with the Mandate, and the potential

harm to the Government in exempting a small fraction of employees and students compared to the millions already exempt is *de minimis*.

The next OBU and MACU employee plans are scheduled to begin on January 1, 2014. The Mandate will apply to those plans in the absence of injunctive relief. Accordingly, OBU and MACU are right now facing an unenviable choice: either comply with the Mandate and transgress their duties to God, or drop their employee plans and face enormous penalties. Although the SNU and OKWU employee plans begin later in 2014, there is no compelling reason to hold off on granting them preliminary injunctive relief as well.

The Government cannot possibly establish that it would suffer any substantial harm from a preliminary injunction pending final resolution of this case. The Government has not mandated contraceptive coverage for over two centuries, and there is no urgent need to enforce the Mandate immediately against the Universities before its legality can be adjudicated. Furthermore, Defendants concede that there is no reason to impose the Mandate on employers whose employees share their religious convictions concerning contraceptives.

In addition, given that courts have concluded that the Mandate already contains exemptions available to "tens of millions of people," *Hobby Lobby*, 713 F.3d at 1143, the Government cannot plausibly claim that it will be harmed by a temporary delay in enforcement against the Universities. On remand in *Hobby Lobby*, the district court held that, because a "bulk of the approved [contraceptive] methods are available" to health plan beneficiaries, "unlike a substantial number of other employees whose plans the government has completely exempted from the contraceptive coverage requirement," balanced against the potential crippling fines established that "the threatened injury to the [Plaintiffs]. . .outweighs the potential harm to the government." *Hobby Lobby Stores, Inc. v. Sebelius*, 2013 WL 3869832, at *1 (W.D. Okla. July 19, 2013).

Indeed, any claim of harm to the Government is fatally undermined by the fact that it consented to or did not oppose preliminary injunctive relief in several other cases challenging the Mandate. *See, e.g., Mot. to Stay, Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092, (E.D. Mo. Mar. 11, 2013) (Dkt. # 41); Order, *Sioux Chief Mfg. Co. v.* Sebelius, No. 4:13-cv-00036, (W.D. Mo. Feb. 28, 2013) (Dkt. # 9); Order, *Hall v. Sebelius*, No. 13-cv-00295, (D. Minn. Apr. 2, 2013) (Dkt. # 11). The Government "cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in several similar cases." *Geneva Coll. v Sebelius*, No. 12-00207, 2013 WL 1703871, at *12 (W.D. Pa. Apr. 19, 2013). Indeed, "[i]f the government is willing to grant exemptions for no less than one third of all Americans, and it is willing to consent to injunctive relief in cases that do not fall within those exemptions, then it can suffer no appreciable harm" were an injunction entered here. *Beckwith Elec. Co., Inc. v. Sebelius*, 2013 WL 3297498, at *18 (M.D. Fla. June 25, 2013). In short, especially when balanced against the serious irreparable injury being inflicted on the Universities, any harm the Government might claim from a preliminary injunction is *de minimis*.

## IV. A PRELIMINARY INJUNCTION WOULD SERVE THE PUBLIC INTEREST.

"It is in the public interest for courts to carry out the will of Congress and for an agency to implement *properly* the statute it administers." *Mylan Pharms. Inc. v. Shalala*, 81 F. Supp. 2d 30, 45 (D.D.C. 2000). In addition, "pursuant to RFRA, there is a strong public interest in the free exercise of religion." *O Centro*, 389 F.3d at 1010. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012). On remand in *Hobby Lobby*, the district court held that:

> Given the importance of the interests at stake […], the fact that the ACA's requirements raise new and substantial questions of law and public policy, and that substantial litigation as to the mandate here is ongoing around the

> country, the court concludes that there is an overriding public interest in the resolution of the legal issues raised by the mandate before [Plaintiffs] are exposed to the substantial penalties that are potentially applicable.

*Hobby Lobby*, 2013 WL 3869832, at *1. Thus, the public interest favors protecting the Universities' religious liberty by enjoining enforcement of the Mandate until it is permanently struck down.

**CONCLUSION**

For the foregoing reasons, the Universities respectfully request that this Court grant their motion for preliminary injunction.

Respectfully submitted this 27th day of November, 2013.

*s/ Gregory S. Baylor*

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 27, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

*s/ Gregory S. Baylor*